IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robin Daniels,	:	
Petitioner	:	
v.	:	No. 2022 C.D. 2010
	:	Submitted: February 11, 2011
Unemployment Compensation Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** June 15, 2011

Robin D. Daniels (Claimant) petitions *pro se* for review of an order of the Unemployment Compensation Board of Review (Board), issued August 6, 2010. The Board reversed a Referee's decision and denied Claimant benefits under Section 402(e) of the Unemployment Compensation Law (Law),[1] relating to willful misconduct. For the reasons that follow, we affirm.

On February 16, 2010, Claimant applied for unemployment compensation benefits after being discharged from her employment as a unit secretary for Chestnut Hill Hospital (Employer). The Philadelphia UC Service Center (Service Center) issued a determination on March 4, 2010, finding that

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(e). Section 402(e) of the Law provides, in pertinent part: "An employe shall be ineligible for compensation for any week . . . [i]n which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work, irrespective of whether or not such work is 'employment' as defined in this act."

Claimant was ineligible for benefits under Section 402(e) of the Law. Claimant appealed the Service Center's determination, and a hearing was held before a Referee on April 8, 2010, at which Claimant, with a non-legal representative, appeared and testified. Employer was not present at the Referee's hearing. By decision issued April 9, 2010, the Referee reversed the Service Center's determination, concluding that Employer failed to satisfy its burden of proving that Claimant committed willful misconduct under Section 402(e) of the Law.

On April 20, 2010, Employer appealed the Referee's determination to the Board. Employer argued that it was not served with proper notice of the April 8, 2010 Referee's hearing and requested a remand hearing to present evidence on the merits. Determining that a further hearing was necessary, the Board remanded the matter to the Referee, who served as the Board's hearing officer. *See* 34 Pa. Code § 101.104. The Board's remand order provided, in pertinent part:

> The purpose of this hearing is to receive testimony and evidence on the employer's reason for its nonappearance at the previous hearing. The parties may also provide new or additional testimony and evidence on the merits. If the Board finds that the employer did not have proper cause for its nonappearance at the previous hearing, the additional testimony and evidence on the merits may not be considered by the Board.

(Original Record (O.R.), Item no. 15.) A remand hearing was conducted on June 30, 2010, at which Claimant, with a non-legal representative, and two Employer witnesses appeared and testified.

Claimant testified that her last day of employment for Employer was February 10, 2010, and that she was discharged for misconduct. (O.R., Item no. 17, at 12.) Claimant admitted that she was aware of Employer's rules and regulations. (*Id*. at 28.) Claimant testified that when her shift ended on February

9, 2010, she went to collect her personal items in the locker room on the third floor of Employer's facility. (*Id.* at 30.) Claimant testified that she then exited the locker room and went to the elevator. (*Id.*) While waiting for the elevator, Claimant testified that she began to feel ill, so she decided to take the stairs, thinking that being in a "cold place like the stairway" would make her feel better. (*Id.*) By the time that Claimant had descended the stairs to the second floor, Claimant testified that her condition had intensified, prompting her to head for the nearest bathroom, which was located in a conference room on the second floor of Employer's facility. (*Id.*) In the hallway outside of the conference room, Claimant testified that she encountered a former employee of Employer, whom she referred to as Mr. Dicks.[2] (*Id.* at 31.) After speaking briefly with Mr. Dicks, Claimant testified that she entered the conference room, which was unlocked, dropped her personal items on a chair, and used the bathroom. (*Id.* at 31, 36.) When she was finished using the bathroom, Claimant testified that she gathered her personal items and exited the conference room, where she again encountered Mr. Dicks in the hallway.[3] (*Id.* at 31-32.) Claimant testified that she then took the elevator back up to the third floor because she forgot a pair of boots in the locker room. (*Id.* at 37-38.)

Testifying on behalf of Employer was Joyce Keating, Director of Materials Management. Ms. Keating testified that on February 9, 2010, she was requested by her supervisor to gather equipment and supplies in preparation for an anticipated snowstorm. (*Id.* at 21.) Ms. Keating explained that she and a

[2] Claimant explained that she had a working relationship with Mr. Dicks when "[h]e was the supervisor with the housekeeping." (O.R., Item no. 17, at 34.)

[3] Claimant conceded that Mr. Dicks may have come into the conference room while she was in the bathroom, but denied that she and Mr. Dicks were ever in the conference room at the same time. (O.R., Item no. 17, at 31-32.)

co-worker, Stephen MacGuinness, went to a conference room on the second floor of Employer's facility where equipment and supplies were stored. (*Id*.) Ms. Keating testified that the conference room should have been locked, but was not, and that she had difficulty opening the door because there was a heavy chair placed behind it. (*Id*.) After opening the door with Mr. MacGuinness's assistance, Ms. Keating testified that she immediately observed Claimant on a couch with a former employee of Employer, whom she referred to as Mr. Dicks, and that Claimant was "leaning over him, you know, on his lap." (*Id*.) Ms. Keating testified that she was absolutely sure that it was Claimant in the conference room with Mr. Dicks. (*Id*. at 39.) Ms. Keating testified that she then heard Mr. Dicks tell Claimant to "[r]un to the bathroom," and that Claimant entered the bathroom.[4] (*Id*. at 21.) Ms. Keating testified that she asked Mr. Dicks why he was in the conference room, to which Mr. Dicks replied, "I'm talking to [Claimant]."[5] (*Id.* at 22.) Ms. Keating then exited the conference room and went to get Claimant's nurse manager. (*Id*.) When she returned, Ms. Keating testified that Claimant had vacated the area and that Mr. Dicks was standing by the elevator. (*Id*.) Ms. Keating explained that Mr. Dicks then became anxious and departed the area before the elevator arrived. (*Id*.)

James Como, Director of Human Resources, also testified on behalf of Employer. Mr. Como testified concerning Employer's failure to appear at the April 8, 2010 Referee's hearing. According to Mr. Como's testimony, he did not receive notice of the April 8, 2010 Referee's hearing until after the hearing had

[4] Ms. Keating explained that there was a pair of boots next to the couch and that Mr. Dicks "did not move from the couch area. He was very relaxed. He was just sitting there like he was in his living room." (O.R., Item no. 17, at 23.)

[5] Ms. Keating testified that Mr. Dicks would have had access to a master key to Employer's facility in his previous capacity as an environmental services employee for Employer. (O.R., Item no. 17, at 23.)

passed. (*Id*. at 6-7.) Mr. Como testified that he was at the Philadelphia Referee's Office on April 8, 2010, for a hearing in an unrelated matter, and that he would have attended the hearing in the present matter had he received notice. (*Id*.) Mr. Como admitted that the Referee's office timely mailed the hearing notice, but explained that Employer has had difficulty receiving mail from the postal service. (*Id*.) Mr. Como further explained that all mail is opened the day that it is received. (*Id.* at 7-8.)

Mr. Como also testified concerning Claimant's termination. According to Mr. Como's testimony, he summoned Claimant to his office on February 10, 2010, to investigate reports from Ms. Keating and Mr. MacGuinness that Claimant was in a conference room with Mr. Dicks on February 9, 2010. (*Id.* at 15.) Mr. Como testified that Claimant told her story about becoming sick and that she denied being in the conference room with Mr. Dicks. (*Id*.) Mr. Como testified that he then called in Ms. Keating, who gave her version of the relevant events, and that Claimant again denied being in the conference room with Mr. Dicks. (*Id*. at 15, 17-18.) Mr. Como testified that Claimant was immediately placed on investigative suspension, and that four days later, Claimant was discharged for violating Employer's rules against deliberate misuse of Employer property, immoral or indecent conduct, and making false statements to Employer. (*Id*. at 12-14, 18.)

The Board issued a decision on August 6, 2010. Determining that Employer had proper cause for its failure to appear at the April 8, 2010 Referee's hearing because Employer did not receive proper notice, the Board made the following findings of fact on the merits:

> 1. For the purpose of this appeal the claimant was last employed as an Unit Secretary by Chestnut Hill Hospital

from October 16, 2000 through February 10, 2010 at the final rate of pay of $13.82 per hour[.]

2. On or about the claimant's last day of work, the Director of Materials Management went with another employee to get some equipment in preparation for an anticipated snowstorm.

3. The area where supplies and equipment are stored is routinely locked.

4. There is a lounge area with a couch and chair within the locked area.

5. The Director of Materials Management found the door to the lounge unlocked with a heavy chair placed behind the door.

6. The Director and the co-worker pushed the door open. A former employee was sitting on the couch and the claimant was in his lap. A pair of boots was beside the couch.

7. The former employee told the claimant to run to a nearby bathroom.

8. The former employee told the Director he was talking to the claimant. He then left the premises.

9. The incident was reported to the claimant's supervisor and to Human Resources, which conducted an investigation.

10. The claimant stated that she had gotten sick and need to use the restroom. She denied being in the room with the former employee.

11. There are bathrooms on the floor on which the claimant worked. The locked area is on a different floor.

12. The claimant was discharged for violation of the employer's policies prohibiting immoral or indecent conduct, misuse of facility property, and making false statements to the Director of Human Resources.

(O.R., Item no. 18.) Based on the above findings of fact, the Board reversed the Referee's decision and denied Claimant benefits under Section 402(e) of the Law. The Board determined that Claimant was untruthful to Employer during

Employer's investigation of the incident in the conference room, and that Claimant did not have good cause for her actions. In so determining, the Board credited Ms. Keating's testimony and found that Claimant's testimony was inconsistent and illogical. This petition for review followed.

On appeal,[6] Claimant argues (1) that the Board erred in determining that Employer had proper cause for its failure to appear at the April 8, 2010 Referee's hearing, and (2) that the Board erred in determining that Claimant's conduct rose to the level of willful misconduct under Section 402(e) of the Law. We address these issues in order.

Claimant argues, first, that the Board erred in determining that Employer had proper cause for failing to appear at the April 8, 2010 Referee's hearing. Specifically, Claimant contends that Employer did not demonstrate proper cause because Mr. Como could not produce the envelope in which the hearing notice was delivered, and because Mr. Como could not provide the docket number of the Referee's hearing he did attend on April 8, 2010. While Claimant does not dispute that Mr. Como was at the Philadelphia Referee's Office on April 8, 2010, Claimant maintains that Mr. Como was not at the Philadelphia Referee's Office for the hearing in an unrelated matter, but that Mr. Como was merely late for the hearing in the present matter. We disagree that the Board erred in determining that Employer had proper cause for its nonappearance.

[6] This Court's standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. § 704.

Under Section 504 of the Law,[7] the Board has the discretion to determine whether a remand hearing is appropriate. Absent an abuse of that discretion, this Court will not reverse the Board's decision to grant or deny a request for a remand hearing.[8] *See Fisher v. Unemployment Comp. Bd. of Review*, 696 A.2d 895, 897 (Pa. Cmwlth. 1997). Pursuant to 34 Pa. Code § 101.24,[9] where

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[7] 43 P.S. § 824. Section 504 of the Law provides, in pertinent part:

> The board shall have the power, on its own motion, or on appeal, to remove, transfer, or review any claim pending before, or decided by, a referee, and in any such case and in cases where a further appeal is allowed by the board from the decision of a referee, may affirm, modify, or reverse the determination or revised determination, as the case may be, of the department or referee on the basis of the evidence previously submitted in the case, or direct the taking of additional evidence.

[8] "An abuse of discretion occurs if the Board's decision demonstrates evidence of bad faith, fraud, capricious action or abuse of power." *Ensle v. Unemployment Comp. Bd. of Review*, 740 A.2d 775, 779 (1999).

[9] 34 Pa. Code § 101.24 provides, in pertinent part:

> (a) If a party who did not attend a scheduled hearing subsequently gives written notice, which is received by the tribunal prior to the release of a decision, and it is determined by the tribunal that his failure to attend the hearing was for reasons which constitute "proper cause," the case shall be reopened. Requests for reopening, whether made to the referee or Board, shall be in writing; shall give the reasons believed to constitute "proper cause" for not appearing; and they shall be delivered or mailed—preferably to the tribunal at the address shown on the notice of hearing or to the Unemployment Compensation Board of Review, Labor and Industry Building, Seventh and Forster Streets, Harrisburg, Pennsylvania 17121, or to the local employment office where the appeal was filed.
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> . . . .
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> (c) A request for reopening the hearing which is not received before the decision was mailed, but is received or postmarked on or before the 15th day after the decision of the referee was mailed to the parties shall constitute a request for further appeal to the Board and a reopening of the hearing, and the Board will rule upon the request. If the request for reopening is allowed, the case will

a party fails to appear at a scheduled hearing, the Board may remand for an additional hearing only where the Board first determines that there was proper cause for the party's nonappearance. *McNeill v. Unemployment Comp. Bd. of Review*, 510 Pa. 574, 578-79, 511 A.2d 167, 168-69 (1986).[10] This Court has held that a party's own negligence in failing to appear at a hearing does not constitute proper cause, *see Savage v. Unemployment Compensation Board of Review*, 491 A.2d 947, 949-50 (Pa. Cmwlth. 1985), while the negligence of a disinterested third party, such as the postal service, may constitute proper cause. *See Verdecchia v. Unemployment Comp. Bd. of Review*, 657 A.2d 1341, 1343-44 (Pa. Cmwlth. 1995).

Here, the Board determined that Employer had proper cause for its nonappearance at the April 8, 2010 Referee's hearing because Employer "did not receive the Notice of Hearing until after the hearing had taken place." (O.R., Item no. 18.) In so determining, the Board accepted the testimony of Mr. Como that Employer has had difficulty receiving mail from the postal service, and that he did not receive notice of the April 8, 2010 Referee's hearing until after the hearing had passed. (O.R., Item no. 17, at 6-7.) Moreover, the record indicates that an Employer representative called the Referee's office on April 8, 2010, to notify the Referee that Employer had just received the hearing notice. (O.R., Item no. 9.) In

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> be remanded and a new hearing scheduled, with written notice thereof to each of the parties. At a reopened hearing, the opposing party shall be given the opportunity to object to the reopening if he so desires. If the request to have the hearing reopened is denied, the Board will append to the record the request, supporting material and the ruling on the request, so that it shall be subject to review in connection with any further appeal to the Commonwealth Court.

[10] In *McNeill*, our Supreme Court discussed the necessity of 34 Pa.Code § 101.24, explaining that there would be no incentive to appear at an initial hearing if a party who failed to appear at an initial hearing was not required to show proper cause for its nonappearance in order to receive a remand for additional hearings. *McNeill*, 510 Pa. at 579, 511 A.2d at 169.

unemployment compensation matters, the Board is the ultimate finder of fact and has the discretion to make determinations as to witness credibility and conflicting evidence, which may not be reversed on appeal if supported by substantial evidence. *Chiccitt v. Unemployment Comp. Bd. of Review*, 842 A.2d 540, 542 (Pa. Cmwlth. 2004). Accordingly, the Board did not abuse its discretion in determining that Employer had proper cause for its failure to appear at the April 8, 2010 Referee's hearing.

Claimant argues, next, that the Board erred in determining that Claimant's conduct rose to the level of willful misconduct under Section 402(e) of the Law, which provides, in pertinent part: "An employe shall be ineligible for compensation for any week . . . [i]n which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work." Whether an employee's conduct rises to the level of willful misconduct is a question of law subject to this Court's review. *Walsh v. Unemployment Comp. Bd. of Review*, 943 A.2d 363, 368 (Pa. Cmwlth. 2008). The burden of establishing willful misconduct is on the employer. *Id*. at 368-69.

While not defined by statute, the term "willful misconduct" has been judicially defined to mean: "(a) wanton or willful disregard for an employer's interests; (b) deliberate violation of an employer's rules; (c) disregard for standards of behavior which an employer can rightfully expect of an employee; or (d) negligence indicating an intentional disregard of the employer's interest or an employee's duties or obligations." *Grieb v. Unemployment Comp. Bd. of Review*, 573 Pa. 594, 600, 827 A.2d 422, 425 (2003). Where an employer seeks to prove willful misconduct by showing that the claimant violated the employer's rules or policies, the employer must demonstrate (1) the existence of the rule or policy and

(2) that the claimant violated it. *Walsh*, 943 A.2d at 369. Notwithstanding, there should be no finding of willful misconduct where the claimant can show good cause for the violation—*i.e.*, "that the actions which resulted in the discharge were justifiable and reasonable under the circumstances." *Id*.

Here, the Board found that Claimant violated Employer's rule against making false statements to Employer.[11] Because Claimant admitted during the June 30, 2010 remand hearing that she was aware of Employer's rules and regulations, (O.R., Item no. 17, at 28), and because Claimant does not dispute on appeal that Employer has a rule against making false statements to Employer, this Court need only consider whether Claimant violated Employer's rule. In finding that Claimant was untruthful to Mr. Como during his investigation of the incident in the conference room, the Board credited Ms. Keating's testimony and found Claimant's testimony to be inconsistent and illogical. As we stated above, the Board is the ultimate finder of fact in unemployment compensation matters and has the discretion to make determinations as to witness credibility and conflicting evidence. *Chiccitt*, 842 A.2d at 542. The Board, therefore, did not err in determining that Claimant's conduct rose to the level of willful misconduct under Section 402(e) of the Law.[12]

Accordingly, we affirm.

P. KEVIN BROBSON, Judge

[11] Mr. Como testified that Employer has a rule against making false statements to Employer. (O.R., Item no. 17, at 13.)

[12] Even without the existence of a specific work rule, Claimant's untruthfulness to Mr. Como during his investigation might also constitute willful misconduct as a "disregard for standards of behavior which an employer can rightfully expect of an employee." *Grieb*, 573 Pa. at 600, 827 A.2d at 425.

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O R D E R

AND NOW, this 15th day of June, 2011, the order of the Unemployment Compensation Board of Review (Board), issued August 6, 2010, is hereby AFFIRMED.

P. KEVIN BROBSON, Judge