IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carlene Nardi,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 211 C.D. 2011
	:	
Unemployment Compensation Board of Review,	:	Submitted: June 24, 2011
	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: August 5, 2011**

Carlene Nardi (Claimant) petitions for review of an Order of the Unemployment Compensation Board of Review (Board), which reversed the Unemployment Compensation Referee's (Referee) Decision and found Claimant ineligible for benefits due to willful misconduct pursuant to Section 402(e) of the Unemployment Compensation Law (Law).[1] On appeal, Claimant contends that she did not commit willful misconduct by referring one of Danielle Fashions'

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 802(e).

(Employer) bridal customers to a competitor because Employer's price for a veil that the customer wanted to purchase was more than the customer's budget. Upon review, we affirm.

Claimant worked for Employer for approximately two years. Employer discharged Claimant on July 10, 2010, because Claimant referred a customer to a competitor. (Hr'g Tr. at 6-7.) Thereafter, Claimant applied for unemployment compensation (UC) benefits. The UC Service Center (Service Center) issued a Determination finding Claimant eligible for benefits under Section 402(e) of the Law. Employer appealed the Service Center's Determination, and an evidentiary hearing was held before a Referee at which both Claimant and Employer presented evidence. Following the hearing, the Referee issued a Decision, affirming the Service Center's Determination. Thereafter, Employer appealed to the Board, which issued an opinion reversing the Referee's Decision and finding Claimant ineligible for benefits under Section 402(e) of the Law. The Board made the following findings of fact:

> 1. The claimant was last employed as a part-time sales consultant by Danielle Fashions a/k/a Bridals by Danielle from October 5, 2008, at a final rate of $21.40 per hour and her last day of work was July 10, 2010. The claimant worked 28 to 30 hours weekly.
>
> 2. On July 8, 2010, a customer came into the employer's store to pick up a veil and was waited on by the employer.
>
> 3. The employer became aware that the customer had ordered the veil from a third party named Karen who was not associated with the employer.
>
> 4. Karen was a former employee of the employer.

5. The employer asked the customer how she knew to come into the store to pick up the veil if it was not purchased from the employer.

6. The customer reported that Karen had brought the veil to the store based on a special arrangement between Karen, the customer, and the claimant.

7. The employer became aware that the claimant had referred the customer to Karen.

8. The employer had previously warned the claimant not to be referring customers to competitors via telephone conversations wherein customers inquired about the employer's prices based on their bridal budget, and the claimant directed them to competitor's stores, without ever giving the customer a chance to come into the employer's store.

9. The employer advised the claimant to allow customers to come into the store and look at the merchandise and if they did not like what they saw, they could make their own decision not to purchase anything.

10. On July 10, 2010, the employer discharged the claimant for dishonesty and stealing business from the employer, after her previous warning not to direct customers to competitors.

11. The claimant contends that she did not make arrangements for the customer to pick up the veil at the employer's store but admits to giving the customer the referral to Karen.

12. The claimant contends that she made no profit from the referral or the sale of the veil.

13. The claimant asserts that she was attempting to help the customer because the customer wanted a particular veil from the employer that she could not afford due to her budget.

14. The claimant asserts that she asked the employer if she could sell the veil to the customer for less but the employer would not discount the veil.

> 15. The claimant contends that the customer was not going to buy a veil from the employer anyway, and the employer already profited from the sale of a wedding dress to the customer.
>
> 16. The claimant asserts that the employer never warned her about giving customers referrals to competitors.

(Board Decision, Findings of Fact (FOF) ¶¶ 1-16.) The Board found Employer credible that Claimant "had been verbally disciplined for referring customers to competitors based on the customers' bridal budgets." (Board Op. at 3.) Furthermore, the Board found Claimant's assertion "that she was never warned by the employer to stop referring customers to competitors" not credible. (Board Op. at 3.) The Board concluded that Employer's directive was reasonable when Employer advised Claimant to allow customers to come into the store and look at Employer's merchandise instead of referring them to a competitor based on a customer's budget. (Board Op. at 3.) The Board found that, even though Claimant "may have been attempting to help the customer and did not make a profit," Claimant's conduct was contrary to Employer's interests, "especially in light of her previous warning, and fell below the reasonable standards of behavior that the employer had a right to expect of her." (Board Op. at 3.) The Board held that Claimant was ineligible for benefits because Employer had "met its burden of establishing that [C]laimant's discharge was attributable to willful misconduct in connection with her work." (Board Op. at 3.) Claimant now petitions this Court for review.[2]

[2] This "Court's review is limited to determining whether constitutional rights were violated, whether an error of law was committed, whether a practice or procedure of the Board was not followed or whether the findings of fact are supported by substantial evidence in the record." Western & Southern Life Insurance Co. v. Unemployment Compensation Board of Review, 913 A.2d 331, 334 n.2 (Pa. Cmwlth. 2006.)

On appeal, Claimant argues that she did not commit willful misconduct by referring a customer to Employer's competitor because: (1) there is no evidence that simply referring a customer to a competitor is, per se, willful misconduct; (2) Claimant did not obtain a kickback or referral fee; and (3) Claimant did not violate Employer's directive because she was never told by Employer that she could not refer a customer to another merchandiser.

We begin with a review of the legal principles applicable to a finding of ineligibility based on willful misconduct. Section 402(e) of the Law states that an employee will be ineligible for UC benefits for any week "[i]n which h[er] unemployment is due to h[er] discharge . . . from work for willful misconduct connected with h[er] work." 43 P.S. § 802(e). Although the Law does not specifically define "willful misconduct," the courts have defined it as follows:

> 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.

Caterpillar, Inc. v. Unemployment Compensation Board of Review, 550 Pa. 115, 123, 703 A.2d 452, 456 (1997). "Whether an employee's conduct has risen to the level of willful misconduct is an issue of law reviewable by this Court." Graham v. Unemployment Compensation Board of Review, 840 A.2d 1054, 1057 (Pa. Cmwlth. 2004). However, the Board is the ultimate fact finder and "questions of credibility and evidentiary weight to be given [to] conflicting testimony" are determined by the Board, and not by this Court. Freedom Valley Federal Savings and Loan Association v. Unemployment Compensation Board of Review, 436

A.2d 1054, 1055 (Pa. Cmwlth. 1981). In addition, the employer has the burden of proving that the employee was dismissed for willful misconduct. Graham, 840 A.2d at 1056.

We first address Claimant's argument that there is no evidence that Claimant's conduct in referring Employer's customer to a competitor to purchase a veil fell below the "standards of behavior which an employer can rightfully expect of an employee." Caterpillar, 550 Pa. at 123, 703 A.2d at 456. This Court held in Burke v. Unemployment Compensation Board of Review, 512 A.2d 1367 (Pa. Cmwlth. 1986), that "to deliberately refer away an employer's business constitutes a breach of duty which clearly rises to the level of willful misconduct justifying a denial of benefits." Id. at 1369. Here, Claimant testified that she found a veil that the customer wanted to purchase from Employer, but the price of the veil was out of the customer's budget. (Hr'g Tr. at 12.) Claimant then admitted during testimony that she "refer[red] [the customer] to someone that could make a veil comparable. Not exact, but comparable for less." (Hr'g Tr. at 12.) Employer credibly testified that "every sales consultant is expected to sell items from the store, not from the outside." (Hr'g Tr. at 9.) In addition, after Claimant referred the customer to another merchandiser, competitor's veil was picked up at Employer's store. (Hr'g Tr. at 8, 12.) Employer testified that "the veil was sold . . . by [Claimant] to the customer from a third party, and . . . the store had no . . . money involved. There was no profit . . . just [that] the store was used in order to sell something that . . . wasn't beneficial to the store." (Hr'g Tr. at 8.) Employer further testified that the arrangement was

> damaging to the store because the store has veils and all the accessories for the bride . . . and here is . . . an item that comes to the store from outside to be handed to . . . our customer which was helped by [Claimant] and this veil has nothing to do with the store.

(Hr'g Tr. at 8.) The evidence of record establishes that, not only did Claimant refer the customer to a competitor, but the customer purchased the veil from the competitor, picked up the competitor's merchandise from Employer's store, and Employer received no profit from the transaction. We agree with the Board that Claimant's conduct fell below the "standards of behavior which an employer can rightfully expect of an employee," Caterpillar, 550 Pa. at 123, 703 A.2d at 456, because "an employer has a right to expect that its employees will not take business away from the employer by referring customers to its competitors for better prices." (Board Op. at 3.)

Claimant next argues that simply referring a customer to a competitor does not fall "below the standard that an employer can rightfully expect" in this case because Claimant did not obtain a kickback or referral fee. (Claimant's Reply Br. at 1-2.) Regardless of whether or not Claimant obtained a kickback or referral fee, she still referred business away from Employer and to a competitor of Employer's business. An employee need not obtain a pecuniary benefit from the referral in order for his or her conduct to constitute willful misconduct. Simply "refer[ing] away an employer's business . . . rises to the level of willful misconduct." Burke, 512 A.2d at 1369.

Moreover, Claimant violated Employer's directive. Claimant argues that she did not violate a work rule because Employer did not have a written conduct policy

on this issue. (Claimant Br. at 9.) However, this Court has held that "[i]t is not necessary that an employer's reasonable order or directive be written in order for the Court to determine that an employee's violation thereof constitutes willful misconduct: an employer may deal with its employees on a non-written basis and expect its directives to be followed." Graham, 840 A.2d at 1057. "Where an employee is discharged for refusing or failing to follow an employer's directive, both the reasonableness of the demand and the reasonableness of the employee's refusal must be examined." Dougherty v. Unemployment Compensation Board of Review, 686 A.2d 53, 54 (Pa. Cmwlth. 1996). "If an employer's request is reasonable in the context of the particular employment relationship and the employee's refusal is unjustified, such conduct evidences a disregard of the standards of behavior an employer expects of his employees." Blue v. Unemployment Compensation Board of Review, 616 A.2d 84, 87 (Pa. Cmwlth. 1992).

The credible evidence in this case establishes that, about six months prior to the incident, Employer warned Claimant about referring customers to other merchandisers. (Hr'g Tr. at 11.) Employer testified that Claimant was asking customers their budget over the telephone and, if the Employer's prices did not fit the customer's budget, Claimant would direct the customers to another store. (Hr'g Tr. at 11.) Employer credibly testified that she told Claimant "you cannot refer [the customer] to somebody else because . . . first they have to come here, and . . . see if we can sell them. If not, they can go any other place as they [want]." (Hr'g Tr. at 11.) In addition, Employer testified that Claimant was told, "[i]f [the customers] don't like [it], if it's not what they expect, they will not purchase. But

we have to give them a chance to . . . come into the store." (Hr'g Tr. at 11.) Employer's directive was reasonable because Employer was instructing Claimant not to turn away business. Claimant refused to follow Employer's reasonable directive by referring a customer to a competitor, which resulted in the customer purchasing a veil from the competitor and picking up the merchandise at Employer's store. Claimant's refusal to follow the Employer's directive was not reasonable because, notwithstanding the fact that a customer's budget may not correspond with Employer's prices, Claimant has a duty to Employer to follow a reasonable directive to not refer customers to competitors.

Finally, Claimant argues that there was no evidence that her referring a customer to a third party was, or would be, inimical to Employer's interests. (Claimant's Br. at 10.) However, this Court has held that referring customers to a competitor, instead of selling the merchandise of the store, is "manifestly inimical to the employer's interest." Burke, 512 A.2d at 1369. As such, Claimant committed willful misconduct and is ineligible for UC benefits pursuant to Section 402(e) of the Law.

Accordingly, we affirm the Order of the Board.

RENÉE COHN JUBELIRER, Judge

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O R D E R

NOW, August 5, 2011, the Order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge