IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Cheryl L. Cowell, Petitioner	:	
v.	:	
Unemployment Compensation Board of Review, Respondent	:	No. 2229 C.D. 2010
	:	Submitted: June 17, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: July 18, 2011

Cheryl L. Cowell (Claimant) petitions, pro se, for review of the August 23, 2010 order of the Unemployment Compensation Board of Review (UCBR) affirming a Referee's determination denying Claimant unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law),[1] and assessing non-fault and non-fraud overpayments. The issues before this Court are: (1) whether the Referee erred by failing to give Claimant ample time to review her case file prior to the hearings, and/or by not permitting her to enter documents into evidence; and (2) whether the UCBR erred by finding that Claimant was discharged for willful misconduct. For the reasons that follow, we affirm the order of the UCBR.

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

Claimant was employed full-time by St. John Lutheran Care Center d/b/a St. John Specialty Care Center (Employer) as a respiratory care practitioner from December 4, 2007 through February 11, 2010. Effective February 18, 2010, Claimant was terminated by Employer for improper and insubordinate behavior.

On November 5, 2009, Claimant was verbally counseled and given a performance improvement plan by Claimant's Director, Cindy Naughton, relative to several incidents in which Claimant raised her voice, exhibited inappropriate behavior, expressed her discontent with management and a co-worker, and failed to follow the chain of command.

On February 11, 2010, Claimant became upset and complained to her co-workers at the nurses' station, including Unit Clerk, Bethany Hittle, that she had to work alone because another therapist had been given the day off. Ms. Hittle supplied Ms. Naughton with a written statement about the incident, which was placed on Ms. Naughton's desk. After Claimant likewise complained to Ms. Naughton about Ms. Hittle's behavior, Ms. Naughton had her also provide a written statement. At some point that afternoon, Claimant went to Ms. Naughton's office and, in her absence, read Ms. Hittle's statement. Claimant became upset and confronted Ms. Hittle at the nurses' station in front of co-workers and residents. Claimant's behavior was reported to Ms. Naughton, who suspended Claimant pending investigation of the incident. On February 17, 2010, Ms. Naughton contacted Claimant and asked her to come to a meeting the next day to discuss the matter. Claimant called Ms. Naughton and Employer's Director of Human Resources, Lori Bain, throughout the night leaving voicemails asking if she was going to be terminated, and stating if so, she would not attend. Neither woman returned her calls. Claimant did not attend the February 18, 2010 meeting. By letter dated February 18, 2010, Employer notified Claimant that her employment was terminated.

Claimant filed for unemployment compensation (UC) benefits. The UC Service Center denied benefits pursuant to Section 402(e) of the Law. Claimant filed a timely appeal. A hearing was commenced by a Referee on April 13, 2010 and completed on May 13, 2010, following which the Referee affirmed the UC Service Center's determination. Claimant appealed to the UCBR, which affirmed the Referee's decision. Claimant sought reconsideration of the UCBR's decision, which was denied. Claimant appealed to this Court.[2]

Claimant argues on appeal that the Referee erred by failing to give her ample time to review her case file prior to the hearings, and by not permitting her to enter documents into evidence. We disagree. As to the case file review, the notice of hearing issued by the Referee on March 29, 2010 and April 29, 2010 clearly stated that Claimant had the right to review her case file prior to the hearing. The record reflects, and Claimant admitted, that she was given time to review the case file before the start of the April 13, 2010 hearing. *See* Notes of Testimony, April 13, 2010 (N.T. 4/13/10) at 3. Despite her argument of having insufficient time to review her file, there is no record of Claimant having asked at either hearing for more time in which to do so. As to the Referee's refusal to allow Claimant to admit documents, the record reflects that Claimant wished to introduce Family and Medical Leave Act documents, which the Referee refused on Claimant's representation that they would be reflective of her testimony. In addition, she takes issue with the UCBR's refusal to consider written commentary she supplied with her petition for appeal, which the UCBR declined to consider because it was not properly submitted before the Referee.

[2] This Court's review is limited to determining whether the findings of fact were supported by substantial evidence, whether constitutional rights were violated, or whether errors of law were committed. *Brunswick Hotel & Conference Ctr., LLC v. Unemployment Comp. Bd. of Review*, 906 A.2d 657 (Pa. Cmwlth. 2006).

On December 7, 2010, Employer filed a notice of intervention.

"Where a party is not represented by counsel the tribunal before whom the hearing is being held should advise him as to his rights, aid him in examining and cross-examining witnesses, and give him every assistance compatible with the impartial discharge of its official duties." 34 Pa. Code § 101.21(a). This Court has held, however, that "the referee is not required to become and should not assume the role of a claimant's advocate." *McFadden v. Unemployment Comp. Bd. of Review*, 806 A.2d 955, 958 (Pa. Cmwlth. 2002). Moreover, "[t]he liberal rules of evidence relating to administrative agencies afford agencies broad discretion in admitting or excluding evidence, so the exclusion alone may not constitute a procedural defect." *D.Z. v. Bethlehem Area Sch. Dist.*, 2 A.3d 742, 751 (Pa. Cmwlth. 2010). Finally, the UCBR is specifically limited to considering only evidence previously submitted before the Referee, or directing the taking of additional testimony. 34 Pa. Code § 101.106; *see also Lock Haven Univ. of Pa. of State Sys. of Higher Educ. v. Unemployment Comp. Bd. of Review*, 559 A.2d 1015 (Pa. Cmwlth. 1989). Because the Referee has the discretion to exclude redundant or repetitive evidence, and the UCBR cannot review evidence that was not submitted to the Referee, the UCBR did not err in failing to consider the evidence Claimant submitted to the UCBR upon appeal.

Claimant also argues on appeal that the UCBR erred by finding that Claimant was discharged for willful misconduct. We disagree. Under Section 402(e) of the Law, an employee is not eligible for benefits if "his unemployment is due to his discharge . . . for willful misconduct connected with his work . . . ."

> Willful misconduct has been defined as (1) the wanton and willful disregard of the employer's interest; (2) the deliberate violation of rules; (3) the disregard of standards of behavior which an employer can rightfully expect from his employee; or (4) negligence which manifests culpability, wrongful intent, evil design or intentional and

> substantial disregard for the employer's interests or the employee's duties and obligations.

Elser v. Unemployment Comp. Bd. of Review, 967 A.2d 1064, 1069 n.7 (Pa. Cmwlth. 2009). "Whether a claimant's conduct constituted willful misconduct is a question of law subject to this Court's review. Further, the employer bears the burden of establishing that the claimant was discharged for willful misconduct on the job." *Roberts v. Unemployment Comp. Bd. of Review*, 977 A.2d 12, 16 (Pa. Cmwlth. 2009) (citation omitted). "In the case of a work rule violation, the employer must establish the existence of the rule, the reasonableness of the rule and its violation." *Lindsay v. Unemployment Comp. Bd. of Review*, 789 A.2d 385, 389 (Pa. Cmwlth. 2001). "Once the employer establishes a prima facie case of willful misconduct, the burden shifts to the claimant to prove that his actions were justified or reasonable under the circumstances." *Downey v. Unemployment Comp. Bd. of Review*, 913 A.2d 351, 353 (Pa. Cmwlth. 2006). "A finding of willful misconduct does not hinge on an employee's intent to wrong his employer; such a finding may be based on an employee's conscious indifference to the duty owed his employer." *Grigsby v. Unemployment Comp. Bd. of Review*, 447 A.2d 705, 707 (Pa. Cmwlth. 1982).

Here, it is undisputed that Employer has express rules and standards of behavior expected from its employees, and that they are reasonable. According to the record, when Claimant was hired, she acknowledged having received, read and understood Employer's Corporate Code of Conduct, as well as the Lutheran SeniorLife Compliance Policy Handbook. The Corporate Code of Conduct states that "[a]ll employees are expected to conduct themselves with a high degree of personal integrity and treat all residents, visitors and fellow employees with kindness, respect and dignity." N.T. 4/13/10, Employer Ex. 3 at 29. The Lutheran SeniorLife Compliance Policy Handbook provides:

> Employees are expected at all times to conduct themselves in a positive manner in order to promote the best interests of [Employer]. Appropriate employee conduct includes:
>
> (a) Treating all customers, visitors and co-workers in a courteous manner;
>
> (b) Refraining from behavior or conduct that is offensive
>
> . . . .
>
> The following conduct is prohibited and individuals engaged in it will be subject to discipline, up to and including termination:
>
> (a) Engaging in or threatening acts of workplace violence, including but not limited to: . . . (iii) Threatening or intimidating a co-worker, customers, or guest; . . .
>
> (f) . . . misusing [Employer's] property or another employee's . . . property . . . .

N.T. 4/13/10, Employer Ex.4 at 20-21.

It is clear that Claimant violated the Employer's work rules and standards of behavior. Ms. Hittle testified in this case that in the morning of February 11, 2010, Claimant was complaining to co-workers that she had to work alone. Then, after reading Ms. Hittle's statement on Ms. Naughton's desk during the afternoon shift change on February 11, 2010, Claimant approached Ms. Hittle, with other staff and a resident present, yelling that Ms. Hittle was nothing but a unit clerk, and that the unit was in ruins from the day she walked in. Ms. Naughton testified that Claimant called and left voicemails about the February 18, 2010 meeting, but did not state that she would not be attending due to medical reasons. Claimant, on the other hand, denied yelling at Ms. Hittle, and stated that the reason she did not attend the February 18, 2010 meeting was because she was stressed and went to the hospital.

"Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *City of*

Pittsburgh, Dep't of Pub. Safety v. Unemployment Comp. Bd. of Review, 927 A.2d 675, 676 n.1 (Pa. Cmwlth. 2007) (quotation marks omitted). Because evidence about what occurred on February 11, 2010 consisted of the conflicting testimony of Claimant and Employer's witnesses, it is clear that Claimant is asking this Court to reassess the credibility of the witnesses and to resolve those conflicts. "In unemployment compensation proceedings, the [UCBR] is the ultimate fact finder, and it is empowered to resolve all conflicts in the evidence and to determine the credibility of witnesses." *Procito v. Unemployment Comp. Bd. of Review*, 945 A.2d 261, 262 n.1 (Pa. Cmwlth. 2008). The UCBR deemed credible Ms. Hittle's testimony. It did not find Claimant's testimony credible. Instead, the UCBR declared that Claimant had no good cause for her behavior, and that her reading of the statement on Ms. Naughton's desk, her outburst and her refusal to attend the February 18, 2010 meeting violated Employer's policies. Where, as here, substantial evidence supports the UCBR's findings, credibility determinations made by the UCBR are not subject to review by this Court. *Duquesne Light Co. v. Unemployment Comp. Bd. of Review*, 648 A.2d 1318 (Pa. Cmwlth. 1994).

Because there was substantial evidence to support the UCBR's findings, the UCBR did not err by finding that Claimant was discharged for willful misconduct. Accordingly, the UCBR's decision is affirmed.

JOHNNY J. BUTLER, Judge

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O R D E R

AND NOW, this 18th day of July, 2011, the August 23, 2010 order of the Unemployment Compensation Board of Review is affirmed.

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JOHNNY J. BUTLER, Judge