IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tiffany Glenn-Daniels,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2410 C.D. 2009
	:	
Unemployment Compensation Board of Review,	:	Submitted: August 6, 2010
	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: October 20, 2010**

Tiffany Glenn-Daniels (Claimant) petitions pro se for review of the Order of the Unemployment Compensation Board of Review (Board) denying her unemployment compensation pursuant to Section 402(e) of the Unemployment Compensation Law (Law).[1] FamilyLinks (Employer) fired Claimant for allegedly sleeping on the job. Claimant maintains that: the Board's finding that she was asleep is not supported by substantial evidence; sleeping on the job was a pretext

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

for the real reason she was fired; and a two-day delay between her alleged sleeping on the job and her subsequent firing was improper. We affirm.

Claimant started working as a counselor for Employer in Pittsburgh in July 2008. (Referee's Decision/Order, Findings of Fact (FOF) ¶ 1.) On April 13, 2009, Employer fired Claimant for allegedly sleeping on the job. On August 7, 2009, the Duquesne Unemployment Compensation Service Center (Service Center) denied Claimant's application for unemployment compensation. (Notice of Determination, August 7, 2009.) Claimant appealed. The following month, an Unemployment Compensation Referee (Referee) from the Unemployment Compensation Referee Office convened a hearing at which Employer's personnel and Claimant testified. The Referee made the following findings of fact:

1. The claimant was employed by FamilyLinks as teacher/counselor. Her period of employment was July 21, 2008, through April 13, 2009.

2. The employer provides care for high risk youth, individuals who have mental health issues, who may be aggressive, and who may have to be restrained.

3. The employer maintains a ratio of three staff persons to each client.

4. The employer maintains a policy, of which the claimant was aware, which provides that an individual who is found to be sleeping while on duty will be subject to immediate discharge.

5. On April 11, 2009, the claimant and two other employees were charged with the care of a client.

6. A program manager/supervisor who had been hired for her position [on] April 6, 2009, visited the site at which the claimant was working.

7. The program manager found the claimant to be reclining on a sofa with a pillow and blanket, the lights in the room to be dim, and the claimant unresponsive and with her eyes closed.

8. The program manager concluded that the claimant was asleep.

9. The program manager did not call the claimant's name.

10. The program manager did not previously know the claimant.

11. The program manager was present for 15 to 20 minutes, during which the claimant remained in the condition in which the program manager found her.

12. The employer maintains a video camera in the room in which the claimant was found.

13. Camera tape was reviewed by the employer, which enabled it to be determined that the claimant was reclining for at least 75 minutes on the day in question.

14. The review of the tape did not enable the employer to conclude from it alone that the claimant was asleep.

15. The employer met with the claimant two days later and discharged her from employment.

(FOF ¶¶ 1-15.) On the basis of these findings, the Referee held that Employer's policy was reasonable, that Claimant had violated Employer's policy, and that Claimant had failed to demonstrate good cause for the violation. (Referee's Decision/Order at 2.) The Referee concluded that Claimant had been fired for willful misconduct and upheld the denial of her benefits. (Referee's Decision/Order at 2.) In November 2009, the Board affirmed the Referee's decision. (Board Order at 1.) The Board found that Employer's witnesses testified credibly that Claimant was sleeping on the job. (Board Order at 1.) The Board concluded that Claimant's actions constituted willful misconduct. (Board Order at

1.) On this basis, the Board adopted and incorporated the Referee's findings of fact and conclusions of law. (Board Order at 1.) Claimant timely appealed to this Court.[2]

Claimant neither disputes that sleeping on the job constitutes willful misconduct,[3] nor does Claimant disclaim knowledge of Employer's policy that forbids employees to sleep on the job. Instead, Claimant argues, first, that the Board's findings lack evidentiary support. Specifically, Claimant maintains that Employer has not proven, beyond a reasonable doubt, that she was asleep on the job.[4] Claimant directs our attention to Employer's failure to introduce into

[2] The scope of this Court's review "is limited to determining whether constitutional rights have been violated, errors of law were committed or whether findings of fact were supported by substantial evidence." Sheets v. Unemployment Compensation Board of Review, 708 A.2d 884, 885 n.3 (Pa. Cmwlth. 1998).

[3] "Willful misconduct" includes "a disregard of standards of behavior which the employer has a right to expect of an employee, or negligence indicating an intentional disregard of the employer's interest or of the employe's duties and obligations to the employer." Frumento v. Unemployment Compensation Board of Review, 466 Pa. 81, 351 A.2d 631, 632 (1976). Willful misconduct also includes the deliberate violation of an employer's rules. Gillins v. Unemployment Compensation Board of Review, 534 Pa. 590, 600, 633 A.2d 1150, 1155 (1993). Sleeping on the job "is prima facie an act of willful misconduct, for it falls within either 'wanton and willful disregard of the employer's interest,' or 'disregard of standards of behavior which an employer can rightfully expect.'" Biggs v. Unemployment Compensation Board of Review, 443 A.2d 1204, 1205 (Pa. Cmwlth. 1982). The employer bears the initial burden of showing that an employee committed willful misconduct. Gillins, 534 Pa. at 600, 633 A.2d at 1155-56. Where an employee is fired for violating the employer's rule, the employer bears the initial burden of establishing that the rule exists, that it is reasonable, and that it was violated by the employee. Burchell v. Unemployment Compensation Board of Review, 848 A.2d 1082, 1084 (Pa. Cmwlth. 2004). If the employer carries its burden, the burden then shifts to the employee to demonstrate good cause for his or her actions. Id.

[4] Contrary to Claimant's assertions, reasonable doubt is not the applicable standard of proof in unemployment compensation cases.

evidence the videotape of her lying on the sofa. Second, Claimant submits that she was not fired because of her failure to perform her duties but, instead, because of "prior disagreements" between her and her supervisor. (Claimant's Br. at 8.) Third, Claimant points to a two-day delay between her alleged sleeping on the job and her subsequent firing as evidence that she was not fired for sleeping on the job. (Claimant's Br. at 6.) For the following reasons, we disagree.

We first address the issue of whether the Board's findings of fact are supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." On Line Inc. v. Unemployment Compensation Board of Review, 941 A.2d 786, 789 n.7 (Pa. Cmwlth. 2008). Whether the record contains evidence that would support findings other than those that the fact finder indeed made is irrelevant; "the critical inquiry is whether there is evidence to support the findings actually made." Carbondale Area School District v. Fell Charter School, 829 A.2d 400, 404 (Pa. Cmwlth. 2003). In determining whether substantial evidence supports the Board's ruling, this Court "must examine the testimony in the light most favorable to the prevailing party, giving that party the benefit of any inferences which can logically and reasonably be drawn from the evidence." Feinberg v. Unemployment Compensation Board of Review, 635 A.2d 682, 684 (Pa. Cmwlth. 1993). Appellate review of the Board's findings focuses on whether there is substantial evidence to support those findings, not on whether the Board has abused its discretion on issues of credibility. Carter v. Unemployment Compensation Board of Review, 629 A.2d 212, 216 (Pa. Cmwlth. 1993).

The record contains substantial evidence that supports the Board's findings of fact. The Board considered the testimony of Claimant, as well as that of Employer's Program Manager, Bonita Todd; Employer's Senior Program Manager, Rebecca Haberstroh; and Employer's Benefits Administrator, Trina Hill. (Board Order at 1.) Ms. Haberstroh testified that sleeping on the job violates Employer's work-conduct policy. (Referee Hr'g Tr. at 4.) She also asserted that Claimant had been made aware of this policy, and that Employer consistently terminated any employee observed sleeping on the job. (Referee Hr'g Tr. at 4.) Ms. Todd stated that, on April 11, 2009, she went to the site where Claimant was on duty. (Referee Hr'g Tr. at 7.) Ms. Todd recalled that Claimant was sleeping on a sofa at the work site and remained in an unresponsive state during the fifteen to twenty minutes that Ms. Todd was there. (Referee Hr'g Tr. at 7-8.) Ms. Todd also testified that her supervisor advised her that employees should never lie down or sleep while on duty. (Referee Hr'g Tr. at 8.) Ms. Todd also noted that she had reviewed footage from a video camera placed in the unit where Claimant was on duty. (Referee Hr'g Tr. at 19.) She said that the footage showed Claimant lying on the sofa for about one and one-half hours. (Referee Hr'g Tr. at 19.) Ms. Haberstroh told the Referee that she too viewed the footage and that it showed Claimant lying on the sofa for about one hour and fifteen minutes. (Referee Hr'g Tr. at 20.) She said that it is against Employer's policy for an on-duty employee to lie down on a sofa for that length of time. (Referee Hr'g Tr. at 20.) Ms. Hill added that employees who sleep on the job are subject to termination. (Referee Hr'g Tr. at 14.)

The testimony of Ms. Todd, Ms. Haberstroh and Ms. Hill supports the Board's findings that Employer's policy is to subject to immediate discharge employees found asleep while on duty (FOF ¶ 4), that Ms. Todd observed Claimant lying unresponsively on a sofa in a dim room (FOF ¶ 13), and that video footage showed Claimant lying on the sofa for seventy-five minutes on the day in question (FOF ¶ 13). The testimony of Ms. Todd, Ms. Haberstroh and Ms. Hill also supports the Board's supplemental finding that Claimant "was, in fact, sleeping on the job." (Board Order at 1.) We conclude that this testimony, along with the reasonable inferences that can be derived from it, constitutes such relevant evidence as a reasonable person might accept as adequate to support the Board's findings. An inference that Claimant was asleep on the job can reasonably and logically be drawn from Ms. Todd's testimony that Claimant had closed her eyes and laid unresponsively on a sofa with a pillow and blanket for at least fifteen to twenty minutes, coupled with Ms. Haberstroh's and Ms. Todd's testimony that video footage showed Claimant lying on the sofa for more than an hour. Accordingly, the Board's findings are supported by substantial evidence.

The prospect that Claimant's testimony might support contrary findings is of no legal significance to this Court. Our review is restricted to whether substantial evidence supports the findings that were actually made. Carbondale Area School District, 829 A.2d at 404. Despite Claimant's dissatisfaction, Employer was not required to offer the videotape into evidence because Claimant did not subpoena it. Employer's failure to introduce the videotape speaks to the weight of the evidence; however, issues of evidentiary weight are properly left to the Board. Eduardo v. Unemployment Compensation Board of Review, 434 A.2d 215, 217 (Pa. Cmwlth.

1981). The Board gave more weight to Employer's evidence than to the evidence of Claimant, even though the videotape was not introduced. The absent videotape neither undermines how the Board weighed the presented evidence nor renders this evidence insubstantial.

Claimant next argues that sleeping on the job was a pretext fabricated to conceal the real reason she was fired, namely, that Ms. Todd simply did not like her. (Claimant's Br. at 8.) This argument fails because the scope of this Court's review is limited to whether the Board committed an error of law, whether the Board's findings of fact are supported by substantial evidence, and whether Claimant's constitutional rights were violated. This Court does not review the Board's credibility determinations. See Carter, 629 A.2d at 216. The Board credited Employer's reasons for firing Claimant, thereby rejecting Claimant's contrary assertions. We cannot revisit questions of credibility.

Finally, Claimant argues that had she been sleeping on the job, she should have been fired immediately and not two days thereafter. This two-day delay, Claimant suggests, is evidence that she was not actually fired for sleeping on the job. We find Claimant's argument unpersuasive.

This Court has held that if there is a substantial, unexplained delay between an employee's alleged misconduct and the employee's subsequent termination for willful misconduct, then the employer may not seek to deny the employee unemployment compensation on the grounds of willful misconduct. Raimondi v. Unemployment Compensation Board of Review, 863 A.2d 1242, 1247 (Pa.

Cmwlth. 2004). However, if the record shows a reason for the delay, and the employer's actions do not indicate that it condoned the employee's conduct, then the denial of unemployment compensation will not be precluded. Id. "[T]he need for administrative review is a valid reason for delay." Id.

The delay between Claimant's alleged misconduct and subsequent termination was neither substantial nor unexplained. The delay occurred because Ms. Todd, who had been on the job for less than one week, was unsure of the proper administrative procedure to initiate in response to Claimant's behavior. Ms. Todd testified that she immediately called her supervisor to ask if it was proper for an employee to be lying down while on duty. (Referee Hr'g Tr. at 8-9.) Ms. Todd asked her supervisor about other protocols that she was to follow. Ms. Todd testified that, "I just wanted to make sure I was following procedure. . . . [W]e followed the procedure from there." (Referee Hr'g Tr. at 9.) As soon as Ms. Todd determined what the proper procedure was, she followed it. Her administrative review was a valid reason for the two-day delay.

Moreover, the two-day delay was not substantial. In Tundel v. Unemployment Compensation Board of Review, 404 A.2d 434, 436 (Pa. Cmwlth. 1979), this Court held that an unexplained twenty-five-day delay between the employee's sleeping on the job and his eventual firing was too remote to preclude unemployment compensation. Yet, in Wideman v. Unemployment Compensation Board of Review, 505 A.2d 364 (Pa. Cmwlth. 1986), we held that a fifty-day delay between the employee's misconduct and subsequent termination did not preclude the denial of benefits because the employer conducted an administrative review

during that span. Id. at 366-67. Tundel and Wideman demonstrate that the critical question is whether there is an explanation, such as administrative review, for the delay. Here, Employer delayed terminating Claimant because Employer was conducting an administrative review of Claimant's conduct. In this respect, the present case is analogous to Wideman and distinguishable from Tundel. The two-day delay for administrative review of Claimant's behavior is negligible when compared to the fifty-day delay in Wideman.

The record does not show that Employer took any action indicating that it condoned Claimant's behavior. Claimant contends that Ms. Todd did not fire her on the day in question but, instead, allowed Claimant to work two more shifts before firing her. (Claimant's Br. at 7.) But this argument fails to distinguish action from inaction and silence from acquiescence. In Unemployment Compensation Board of Review v. Turner, 375 A.2d 829 (Pa. Cmwlth. 1977), the claimant was fired for excessive absenteeism. Id. at 830. The claimant was absent from work for two days before returning to work on the third day. Id. The claimant was fired on the fourth day for being absent two days earlier. Id. The claimant argued that he should have been fired his first day back and that, by allowing him to work the extra day, his employer condoned his absence. Id. We wrote that "the one day delay in discharge without anything else is insufficient to indicate that the employer condoned claimant's . . . absence." Id. Here, as in Turner, Claimant was allowed to return to work after the alleged willful misconduct. And here, as in Turner, Employer did nothing that condoned Claimant's conduct. Thus, that Claimant worked two shifts after her alleged

misconduct does not bar Employer from seeking to deny Claimant unemployment compensation.

Because the Board based its findings of fact on substantial evidence, and because Claimant's arguments before this Court lack merit, we will not disturb the Board Decision/Order denying Claimant unemployment compensation benefits. Accordingly, we affirm the Board's order.

RENÉE COHN JUBELIRER, Judge

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O R D E R

NOW, October 20, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge