IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michele D. Wright,	:	
Petitioner	:	
v.	:	No. 2412 C.D. 2010
	:	Submitted: May 20, 2011
Unemployment Compensation Board of Review,	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge**
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** September 2, 2011

Petitioner Michele D. Wright (Claimant) petitions for review of a decision and order of the Unemployment Compensation Board of Review (Board). The Board reversed the decision of a Referee and determined Claimant to be ineligible for benefits under Section 402(e) of the Unemployment Compensation Law (Law),[1] relating to willful misconduct. We affirm the Board's order.

Claimant applied for unemployment compensation benefits after being discharged from her employment as an administrative secretary with Woods Services (Employer). The unemployment compensation Service Center (Service Center) issued a determination, finding Claimant ineligible for unemployment compensation benefits under Section 402(e) of the Law. (Reproduced Record

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

(R.R.) at 23a-25a.) Claimant appealed this determination, and a Referee conducted an evidentiary hearing. Following the hearing, the Referee awarded benefits, concluding that Employer did not meet its burden to prove willful misconduct. (R.R. at 87a-90a.) Employer appealed to the Board.

The facts, found by the Board, are as follows:

> 1. The claimant was last employed as an administrative secretary by Woods Services from September 22, 2010 [sic], at a final rate of $11.70 per hour and her last day of work was May 12, 2010.
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> 2. The employer has a policy that states in pertinent part that "every employee of Woods Services is responsible to protect the rights and welfare of Woods' clients." In addition, the employer has a policy that states: "to protect the service of Woods' clients, photographs or videotapes may not be taken without receiving proper approval" from a parent or legal guardian.
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> 3. The employer also has a policy that prohibits the use of personal cell phones for personal business during work time unless it is being used for an emergency.
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> 4. The claimant was aware or should have been aware of the employer's policies.
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> 5. On May 12, 2010, the employer's manager for employer relations and education administrator were informed that a fellow employee viewed a photograph of a client on Facebook and was concerned that it violated the employer's confidentiality policies.
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> 6. The employer determined that the claimant took the photograph.

7. The employer's education administrator met with the claimant. The claimant indicated that she took a picture on her cell phone of a client being restrained.

8. The employer's education administrator informed the claimant that she was not allowed to be posting pictures or photographs of clients on Facebook. The claimant responded that the picture could not depict the client. The claimant also stated that she was sick at the time she posted the picture, and that she thought she deleted the picture on Facebook.

9. The claimant admitted that there was no business need or any other reason that she needed to take the picture. The claimant also admitted that there was no business reason for her having her personal cell phone out during the time she took the picture.

10. The employer terminated other employees for releasing confidential information about clients.

11. The claimant was discharged for violating the employer's cell phone policy and for violating client confidentiality. In addition, the claimant was terminated for photographing a client without proper approval.

(R.R. at 99a-100a.)

The Board reversed the Referee's decision, holding that Claimant was ineligible for benefits under Section 402(e) of the Law. (*Id.*) The Board explained that Claimant was terminated for violating three of Employer's policies and "provided no credible reason for choosing to photograph a client during a restraint and for using her cell phone in the process." (*Id.*) The Board noted that although Claimant "testified that the individuals in the picture suggested that she take the

picture, the Board does not find this to be a reasonable explanation to violate the employer's policies." (*Id.*) For that reason, the Board concluded that Claimant engaged in willful misconduct and failed to establish good cause for violating Employer's rules. (*Id.*)

On appeal,[2] Claimant advances several issues, which may be summarized as whether substantial evidence exists to support the Board's findings of fact and whether the Board erred in concluding that Claimant's conduct rose to the level of willful misconduct.[3] Claimant also argues in her brief that she had good cause because her conduct was protected by her constitutional right of free speech under the First Amendment to the United States Constitution, but Claimant waived this argument.[4]

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[2] 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.

[3] At the outset, we note that Claimant appears to misunderstand the roles of the Referee and the Board when she argues that the Board erred in *reversing* the Referee's findings of fact and legal determinations when there was substantial evidence of record to support the findings and legal determinations. It is important to note that in an unemployment compensation case, the Board (not the Referee) is the ultimate factfinder and is empowered to make credibility determinations. *Peak v. Unemployment Comp. Bd. of Review*, 509 Pa. 267, 501 A.2d 1383 (1985). In making the credibility determinations, the Board may accept or reject the testimony of any witness in whole or in part. *Greif v. Unemployment Comp. Bd. of Review*, 450 A.2d 229 (Pa. Cmwlth. 1982). The appellate court's duty is to examine the testimony in the light most favorable to the party in whose favor *the Board* has found, giving that party the benefit of all inferences that can logically and reasonably be drawn from the testimony. *Taylor v. Unemployment Comp. Bd. of Review,* 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). Therefore, to the extent that Claimant argues that the Court should accept the Referee's findings of fact over those of the Board, we must reject Claimant's position and confine our analysis to whether substantial evidence exists to support the Board's findings of fact and whether the Board erred in concluding that Claimant's conduct rose to the level of willful misconduct.

[4] Claimant failed to raise the issue before the Referee or Board of whether her conduct was protected by her constitutional right of free speech. *See* Pa. R.A.P. 1551(a) ("No question shall be heard or considered by the court which was not raised before the government unit. . . ."); *Fatzinger v. City of Allentown*, 591 A.2d 369 (Pa. Cmwlth. 1991), *appeal denied*, 529 Pa. 653,

First, we will address Claimant's argument that substantial evidence does not exist to support the Board's findings. Claimant contends that substantial evidence did not exist to support the Board's finding that Claimant violated Employer's rules requiring confidentiality and prohibiting photographing of clients when she took a photograph of a client being restrained and posted the photograph on Facebook.

Substantial evidence is relevant evidence upon which a reasonable mind could base a conclusion. *Johnson v. Unemployment Comp. Bd. of Review,* 502 A.2d 738 (Pa. Cmwlth. 1986). A determination as to whether substantial evidence exists to support a finding of fact can only be made upon examination of the record as a whole. *Taylor v. Unemployment Comp. Bd. of Review,* 474 Pa. 351, 378 A.2d 829 (1977). The Board's findings of fact are conclusive on appeal only so long as the record, taken as a whole, contains substantial evidence to support them. *Penflex, Inc. v. Bryson*, 506 Pa. 274, 485 A.2d 359 (1984).

Claimant essentially argues that substantial evidence does not exist to support the Board's findings that Claimant violated three of Employer's work rules relating to use of cell phones, client confidentiality, and photographing a client. Claimant takes the position that there is no evidence that Claimant violated any rule regarding confidentiality, and there is no evidence of a work rule prohibiting the posting of photographs on Facebook. To the contrary, Claimant contends that,

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602 A.2d 862 (1992). Claimant also failed to include the issue in her petition for review filed with this Court. Where a claimant fails to include an issue in her petition for review, but addresses the issue in her brief, this Court has declined to consider the issue because it was neither raised in the stated objections in the petition for review nor fairly comprised therein. *See* Pa. R.A.P. 1513(a); *Tyler v. Unemployment Comp. Bd. of Review*, 591 A.2d 1164 (Pa. Cmwlth. 1991).

at best, there is evidence of one isolated incident of a violation of the cell phone policy, which would not justify her termination.

During the hearing before the Referee, Sue Cunningham, Employer's Manager with Employee Relations, testified and introduced portions of Employer's employee handbook and an "employee handbook receipt," signed by Claimant. (R.R. at 56a-65a; 81a-83a.) Ms. Cunningham testified regarding Employer's rules as they related to Claimant's conduct.

As to Employer's cell phone policy, Ms. Cunningham testified that Employer's handbook includes a rule that prohibits employees from using their cell phones for *personal* use during work hours. (R.R. at 57a.) The rule provides that "[e]mployee personal . . . cellular telephones can create interruption to the clients['] programs and interference with [Employer's] business and are therefore prohibited to be used during work time." (R.R. at 82a). Ms. Cunningham considered Claimant's use of her cell phone to take a photograph to fall within the prohibition of the above-described policy. (R.R. at 57a-59a.)

As to Employer's policy requiring confidentiality, Ms. Cunningham testified to the existence of Employer's rule regarding confidential information. (R.R. at 56a-57a.) Pursuant to the rule, certain information pertaining to Employer, its employees, and its clients "is considered confidential in nature and should be handled in strict confidence and is not to be discussed except for business purpose with those who have the need and right to know such information. Employees are responsible to make every effort to keep such information secure." (R.R. at 81a.) Employer's policy makes clear that "[e]mployees found to be in violation of this policy are subject to disciplinary action up to and including termination of employment." (*Id.*) Ms. Cunningham

testified that Employer's confidentiality rule is essentially a "need to know" policy, where "the only people that should be privy to any kind of client information [such as] behaviors, restraints, names, anything like that are those who need to know." (R.R. at 56a-57a.)

As to Employer's policy against photographing a client, Ms. Cunningham similarly testified that Employer has a policy that prohibits the photographing of Employer's clients without proper approval in order to protect the privacy of the clients. (R.R. at 81a.)

Penny Evans-Kelly, Employer's Education Administrator, also testified on behalf of Employer. She testified that another employer notified her that the employee had observed a photograph on Facebook of several of Employer's staff restraining a client. (R.R. at 65a). The client's face is not visible in the photograph, only his legs and abdomen. (R.R. at 62a.) Ms. Evans-Kelly questioned one of the staff who appeared in the photograph, and Ms. Evans-Kelly learned that Claimant had taken the photograph. (*Id.*) Ms. Evans-Kelly also questioned Claimant, who confirmed that she took the photograph while a client was being restrained. (*Id.*) When questioned, Claimant also confirmed that she was aware of the rules prohibiting the use of cell phones and requiring confidentiality. (R.R. at 65a-66a.) When Ms. Evans-Kelly asked Claimant if she was aware of a rule prohibiting the posting of photos on Facebook, Claimant attempted to justify her actions by stating that you could not tell that the person was a client, that she attempted to delete the photo from Facebook, and that she was very sick at the time she took the photo and attempted to delete the photo. (R.R. at 66a.) Ms. Evans-Kelly further testified that had Claimant merely violated the rule prohibiting the use of cell phones for personal matters, Employer likely

would not have terminated her employment. (R.R. at 69a.) However, given that the matter implicated confidentiality issues and involved photographing a client without permission—issues which she viewed as "really big issues"—Claimant's employment was terminated. (*Id.*) Ms. Evans-Kelly acknowledged that there was no specific rule prohibiting the posting of photographs on Facebook, but she explained that the mere taking of the photograph evidenced a violation of Employer's policies. (R.R. at 69a-71a).

In addition to the above policies, the Board noted that Employer's employee handbook also includes a rule making every employee "responsible to protect the rights and welfare" of its clients. (R.R. at 99a.) The rule, contained in Employer's handbook, explains, in part:

> It is inherent in the nature and dignity of each individual that he/she be accorded certain human [rights]. Employees . . . are duly bound to recognize the rights of all individuals for whom [Employer] provides care and treatment. All employee actions with and for clients must have as their legitimate [unreadable], implementation of safe, healthful, respectful, human and approved methods for programming, [interaction], and treatment.

(R.R. at 81a.)

Claimant testified that she had been "sitting at the desk and there was a restraint outside of the door and the two girls who [she] assumed were friends said you should take our picture." (R.R. at 71a.) One of them said that Claimant "should put it on Facebook." (*Id.*) She testified that she took the picture of the two girls, not the client. (R.R. at 72a.) Later that evening, she purposely posted the photograph on Facebook, but she removed it later that night when she could not sleep. (R.R. at 72a-77a.)

As to the rule prohibiting cell phones, Claimant testified that it was not unusual for staff to have their cell phones at times in case they were needed in another place and to receive texts from managers. (R.R. at 71a.) Claimant, however, acknowledged that Employer allowed cell phones to be used for work use, but Employer severely disapproved of personal use of a cell phone. (*Id.*)

To begin, we must address Claimant's argument that the Board's findings that Claimant violated Employer's rules requiring confidentiality and prohibiting the photographing of a client are not supported by substantial evidence because those findings are based entirely on hearsay. It is well established that hearsay evidence admitted without objection should be given its natural probative effect and may support a finding if it is corroborated by any competent evidence in the record. *Walker v. Unemployment Comp. Bd. of Review*, 367 A.2d 366 (Pa. Cmwlth. 1976). Here, even if we were to agree with Claimant that portions of the testimony of Employer's witnesses were based on hearsay, Claimant did not object to the testimony. Thus, the testimony may be considered if it is corroborated by any competent evidence in record. *Id.* Claimant's own testimony that she took the photograph while staff members were performing a restraint and posted the photograph on Facebook corroborates the testimony provided by Employer's witnesses. The Board, therefore, appropriately considered the testimony of Employer's witnesses and relied upon it in support of its findings.

A review of the testimony above reveals that substantial evidence of record exists to support the existence of the work rule relating to breach of confidentiality. Contrary to Claimant's contention, the inability to identify the client who was being restrained in the photograph does not negate Claimant's breach of confidentiality. Employer's rule requires employees, such as Claimant,

to keep confidential certain information pertaining to *Employer, its employees, and its clients* and not to disclose that information "*except for business purposes with those who have the need and right to know such information*." (R.R. at 81a (emphasis added).) Ms. Cunningham testified that Employer's confidentiality rule pertains, in part, to information regarding restraints. (R.R. at 56a-57a.) Substantial evidence of record exists that Claimant disseminated for a non-business purpose a photograph of a client being restrained by Employer's employees on Employer's premises when she posted the photograph on Facebook. Substantial evidences, therefore, exists to support the Board's finding that Claimant violated Employer's confidentiality rule.

As to Claimant's argument that substantial evidence does not exist to support the Board's finding that she violated a work rule prohibiting the posting of photographs on Facebook, we disagree with Claimant's characterization of the Board's findings. The Board did not find that Employer had any rule regarding the posting of photographs on Facebook, and Employer acknowledged that it did not. Instead, the Board found that Claimant violated Employer's rule prohibiting the photographing of clients without approval when she photographed a client being restrained and placed it on Facebook. The evidence of record constitutes substantial evidence to support that finding, as discussed above.

Next, we will address Claimant's argument that the Board erred in concluding that Claimant engaged in willful misconduct. Section 402(e) of the Law provides, in part, that an employee 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." The term

"willful misconduct" is not defined by statute. The courts, however, have defined "willful misconduct" as:

> (a) wanton or willful disregard of 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). The burden is on an employer to prove that a discharged employee was guilty of willful misconduct.[5] *Gillins v. Unemployment Comp. Bd. of Review*, 534 Pa. 590, 597, 633 A.2d 1150, 1154 (1993). An employer, seeking to prove willful misconduct by showing that the claimant violated the employer's rules or policies, must prove the existence of the rule or policy and that the claimant violated it. *Walsh v. Unemployment Comp. Bd. of Review*, 943 A.2d 363, 369 (Pa. Cmwlth. 2008).

Claimant essentially argues that the Board erred in concluding that her actions constituted willful misconduct because Employer failed to establish that she violated any work rules other than use of her cellular phone during work hours, which alone would not have justified her termination. We disagree. As discussed above, the Board found to be credible the testimony of Employer's witnesses that Employer had rules prohibiting the personal use of cellular phones during work hours, requiring confidentiality, and prohibiting the photographing of clients

[5] Whether or not an employee's actions amount to willful misconduct is a question of law subject to review by this Court. *Nolan v. Unemployment Comp. Bd. of Review*, 425 A.2d 1203 (Pa. Cmwlth. 1981).

without proper approval. The Board also found that Claimant admitted to using her cellular phone to take a picture of a client being restrained and later posted the photograph on Facebook in violation of Employer's rules. Employer, therefore, met its burden to prove a *prima facia* case of willful misconduct by proving the existence of Employer's rules and that Claimant violated those rules.[6]

Because Employer established a *prima facie* case for willful misconduct, the burden shifted to Claimant to establish good cause for her actions in violation Employer's work rules. *See Kelly v. Unemployment Comp. Bd. of Review*, 747 A.2d 436, 439 (Pa. Cmwlth. 2000). While the employer bears the burden of proving that a claimant's behavior constitutes willful misconduct, it is the claimant who bears the burden of proving good cause for his actions. *Id.* To prove "good cause," the claimant must demonstrate that her actions were justifiable and reasonable under the circumstances. *Id.* On appeal, Claimant does not argue that she had good cause for her actions.

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[6] Claimant, citing *Geslao v Unemployment Compensation Board of Review*, 519 A.2d 1096 (Pa. Cmwlth. 1987), also argues that Employer must prove that Claimant's violation of a work rule was deliberate and done knowingly in order to establish willful misconduct. Claimant overstates the holding in *Geslao*. In *Geslao*, the claimant was discharged for overbooking hotel reservations because she failed to check the reservations list. The Court considered whether the claimant's actions constituted willful misconduct or mere incompetence at her job. The Court noted that incompetence, inexperience, or inability which may justify discharge will not constitute willful misconduct so as to render an employee ineligible for benefits, but that poor work quality which is the result of unwillingness to work to the best of one's ability will constitute willful misconduct. *Geslao*, 519 A.2d at 1097-98. Here, Claimant does not argue that she violated a work rule as a result of incompetence at her job. At best, Claimant's argument may be interpreted to suggest that she was not aware of Employer's work rules. *The Board, however, in finding of fact number 4, specifically found that the "[C]laimant was aware or should have been aware of [E]mployer's policies." (R.R. at 99a-100a.)* Moreover, Claimant's actions in taking the photograph and posting the photograph on Facebook, although perhaps evidencing poor judgment, were purposeful and not accidental or inadvertent. For those reasons, we reject Claimant's argument.

Accordingly, we affirm the order of the Board.

P. KEVIN BROBSON, Judge

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v.	:	No. 2412 C.D. 2010
	:	
Unemployment Compensation Board	:	
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O R D E R

AND NOW, this 2nd day of September, 2011, the order of the Unemployment Compensation Board of Review is hereby AFFIRMED.

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P. KEVIN BROBSON, Judge