

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Wendy K. Shoop,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2434 C.D. 2010
	:	Submitted: May 27, 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: August 25, 2011

Petitioner Wendy K. Shoop (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board). The Board reversed the Unemployment Compensation Referee's (Referee) decision granting Claimant unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law)¹ based on willful misconduct. For the reasons set forth below, we affirm.

Claimant applied for unemployment compensation benefits after being discharged from her employment as a tax examiner at the Pennsylvania Department of Revenue (Employer). The Lancaster Unemployment Compensation Service Center (Service Center) issued a determination, finding Claimant ineligible

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

for benefits under Section 402(e) of the Law. Claimant appealed the Service Center's determination, and a Referee conducted evidentiary hearings at which both parties testified.

Following the hearings, the Referee reversed the Service Center's determination. (Certified Record (C.R.), Item 10). The Referee concluded that although Employer established it had a policy which prohibited Claimant from being inattentive to her duties or sleeping at work and that Claimant violated the policy, Claimant established good cause for her actions due to her inability to control her sleep apnea and narcolepsy. (*Id.*) The Referee determined that Claimant's conduct was not intentional or deliberate, and, therefore, Claimant could not be denied benefits pursuant to Section 402(e) of the Law. Employer appealed the Referee's decision to the Board.

The Board made the following relevant findings:

1. Claimant was last employed as a tax examiner by the Pennsylvania Department of Revenue from December 15, 1994 to May 5, 2010. Her final rate of pay was \$20.66 per hour.
2. Employer's policy prohibits sleeping on the job.
3. Claimant was aware of Employer's policy.
4. Claimant was warned numerous times, as well as disciplined for sleeping on the job.
5. During the last four years of Claimant's employment, she was given intermittent family medical leave, which was renewed every six months, based upon recommendations provided by Claimant's various medical doctors.

6. During the first two years, Claimant's leave was granted as a result of personal issues Claimant was having.

7. The last two years of her leave was granted because of the sleep issues that Claimant was having.

8. Approximately seven months prior to Claimant's last day of work, she was diagnosed as having sleep apnea and narcolepsy. She was taking medication to alleviate the problems related to the two illnesses.

9. Because of the problems Claimant was having with staying alert at work, Employer suggested that Claimant get up and get a drink, take a short walk, or use leave if she was ill or tired.

10. In September 2009, Employer again discovered Claimant sleeping at her desk. As a result, Claimant was given a final warning on October 19, 2009, and a three day suspension.

11. The final warning indicated that any continued infractions or any future incidents of Claimant being found inattentive to her job duties would result in her dismissal.

12. Claimant filed a grievance against the discipline. The grievance was settled by Employer agreeing to remove the suspension letter from Claimant's file three years from the issuance date if there were no further infractions of a similar nature.

13. The settlement was signed by Claimant on March 14, 2010.

14. On April 20 and April 22, 2010, Claimant was again discovered sleeping at her desk with her head down.

15. On May 3, 2010, Claimant was given ADA accommodation paperwork for the third time. However,

unlike the first two times, when the forms were not returned, Claimant returned the form from her physician.

16. Claimant's physician stated that Claimant did not need any accommodations.

17. Employer initiated a condition of continued employment (COCE) with Claimant. Instead of terminating Claimant as a result of her previous final warning, Employer desired to establish a COCE with Claimant setting specific conditions of employment to remedy her situation.

18. As part of the COCE, Claimant was required to seek assistance from the State Employee Assistance Program (SEAP).

19. Claimant felt that any counseling from SEAP was a waste of her time and would not improve her condition.

20. Claimant refused to accept the COCE. As a result, Claimant was terminated.

21. Claimant was discharged for refusing the terms of the COCE and for sleeping on the job.

(C.R., Item 12.)

The Board reversed the Referee, concluding that Claimant was ineligible for benefits under Section 402(e) of the Law. The Board explained that an employer can expect an employee with medical problems, which are interfering with the employee's ability to do her job, to seek various forms of assistance through an employer paid program at its request. (*Id.*) The Board found that Employer credibly established that Claimant could have retained her position by accepting and receiving additional counseling and assistance through SEAP.² (*Id.*)

² SEAP is an Employer sponsored program in which an employee initially receives three free referrals to behavioral health specialists and/or medical doctors, whichever service is

The Board concluded that Employer's directive was reasonable because Employer wanted Claimant to attempt a different type of treatment to see if it could improve her condition. (*Id.*) Further, the Board found that Claimant failed to establish good cause for her actions because her refusal to participate in SEAP was based only on her subjective belief that the program would be futile. (*Id.*) The Board noted that the fact that Claimant had her own physician did not mean that Employer was not within its right to request that Claimant seek additional care at Employer's expense. (*Id.*) Because Employer's directive was not unreasonable and Claimant failed to establish good cause for her refusal, the Board concluded that Claimant must be denied benefits pursuant to Section 402(e) of the Law.³ (*Id.*) Claimant now petitions this Court for review of the Board's order.

On appeal,⁴ Claimant essentially argues that the Board erred in concluding that Claimant's conduct rose to the level of willful misconduct without good cause under Section 402(e) of the law.⁵ Section 402(e) provides, in part, that

deemed appropriate for that individual. If an employee requires continued treatment, the program is then covered under the employee's medical benefits.

³ The Board did not consider Claimant's discharge for sleeping on the job because it determined that Employer already established willful misconduct through Claimant's refusal to accept the COCE directive. Although Claimant appears to raise this issue in her petition for review, Claimant did not address the issue in her brief. Claimant, therefore, waived the issue before this Court. *Tyler v. Unemployment Comp. Bd. of Review*, 591 A.2d 1164 (Pa. Cmwlth. 1991) (holding when claimant appeals issue but fails to address issue in his brief, issue is waived).

⁴ 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. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704. Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. *Hercules, Inc. v. Unemployment Comp. Bd. of Review*, 604 A.2d 1159, 1161 (Pa. Cmwlth. 1992).

⁵ Claimant also appears to argue substantial evidence did not exist to support the Board's decision but she does not appear to object to any findings of fact. Instead, Claimant's argument

an employee shall be ineligible for compensation for any week in which “his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work.” The employer bears the burden of proving that the claimant’s unemployment is due to the claimant’s willful misconduct.⁶ *Walsh v. Unemployment Comp. Bd. of Review*, 943 A.2d 363, 369 (Pa. Cmwlth. 2008). 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 the employer’s rules,
- (c) disregard of 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 and obligations.

Grieb v. Unemployment Comp. Bd. of Review, 573 Pa. 594, 600, 827 A.2d 422, 425 (2003).

An employee’s refusal to comply with a reasonable request of his employer constitutes willful misconduct. *Ritchie v. Unemployment Comp. Bd. of Review*, 380 A.2d 519 (Pa. Cmwlth. 1977). To establish whether an employee’s refusal rises to the level of willful misconduct, the reasonableness of the employer’s demand and the reasonableness of the employee’s refusal must be examined. *Fruemento v. Unemployment Comp. Bd. of Review*, 466 Pa. 81, 351 A.2d 631 (1976); *Semon v. Unemployment Comp. Bd. of Review*, 417 A.2d 1343

focuses on the reasonableness of her actions. As such we will consider her argument in the context of whether the Board erred in concluding that Claimant lacked good cause for her actions. Moreover, we note that because Claimant did not challenge the Board’s findings of fact, the findings are conclusive and binding on this Court upon review. *Campbell v. Unemployment Comp. Bd. of Review*, 694 A.2d 1167 (Pa. Cmwlth. 1997).

⁶ 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, 1205 (Pa. Cmwlth. 1981).

(Pa. Cmwlth. 1980). The burden of proving the reasonableness of the demand rests with the employer. *LaGare v. Unemployment Comp. Bd. of Review*, 498 Pa. 72, 444 A.2d 1151 (1982). Once the employer establishes the reasonableness of its directive, the burden shifts to the claimant to show good cause for failure to follow the directive. *Id.* An employee can establish good cause by demonstrating that her refusal was a reasonable response. *Devine v. Unemployment Comp. Bd. of Review*, 429 A.2d 1243 (Pa. Cmwlth. 1981).

First, we must determine whether Employer's directive that Claimant participate in SEAP was reasonable. Claimant argues that Employer's request that Claimant seek medical attention was unreasonable because circumstances did not exist whereby Employer reasonably believed it was protecting an important interest. We disagree. Certainly, an employer has a legitimate and important interest in ensuring its employees are attentive to their work and not sleeping at work. The important consideration is whether, in light of the surrounding circumstances, Employer's directive that Claimant participate in SEAP was reasonable.

We agree with the Board that Employer's directive that Claimant participate in SEAP was reasonable. The record demonstrates that Claimant received multiple warnings for sleeping while on the job. (C.R., Item 9.) Claimant, over the previous two years, was granted intermittent family medical leave for her sleep issues, and, approximately seven months prior to her last day of work, Claimant was diagnosed with sleep apnea and narcolepsy. (*Id.*) During this time, Employer attempted to work with Claimant to resolve her sleep issues while at work. (*Id.*) In addition, Claimant was attempting to address her sleep issues through the care of a physician. (*Id.*) On three occasions, Employer provided

Claimant with ADA accommodation paperwork; this paperwork was returned to Employer only the third time it was provided to Claimant. (*Id.*) Claimant's physician stated that she did not need any accommodation for work. (*Id.*) Thereafter, rather than terminating Claimant, Employer initiated a COCE which required that Claimant seek additional assistance for her sleep issues from SEAP. (*Id.*) Claimant refused to participate in SEAP, and, ultimately, refused the COCE. (*Id.*) Claimant was terminated for refusing the COCE, and, thereby, refusing to work with Employer to address her continued sleep issues at work. Because Claimant continued to fall asleep at work, despite the fact that she was receiving medical treatment for her sleep issues, Employer acted reasonably when it sought to preserve Claimant's employment by initiating the COCE. It was reasonable for Employer to seek, at its own expense, additional treatment for Claimant in an effort to improve her condition and resolve her sleep issues while at work.⁷ The Board, therefore, properly concluded that Employer's directive was reasonable.

Because Employer established the reasonableness of its directive, the burden shifted to Claimant to establish good cause for her actions of refusing to participate in SEAP. 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 her actions. *Kelly v. Unemployment Comp. Bd.*

⁷ See *Devine*, 429 A.2d at 1243 (holding that employer's request that employee submit to examination by physician and that he complete appropriate disability form after employee caused disruption at employer's place of business was reasonable and employee's refusal to do so constituted willful misconduct); *Semon*, 417 A.2d at 1343 (holding that employer's request that employee obtain psychiatric examination was not unreasonable under the circumstances of the case); *Ralston v. Unemployment Comp. Bd. of Review*, 336 A.2d 654 (Pa. Cmwlth. 1975) (holding that under the circumstances it was not unreasonable for employer to expect his employees to seek proper medical treatment when sick, and claimant's failure to do so was a deliberate violation of employer's rules and constituted willful misconduct).

of Review, 747 A.2d 436, 438-39 (Pa. Cmwlth. 2000). To prove good cause, the claimant must demonstrate that her actions were justifiable and reasonable under the circumstances. *Id.* at 439. Claimant argues that she had good cause for refusing to seek counseling from SEAP because she believed that participation in the program would be a waste of her time and would not improve her condition. Claimant's subjective belief that SEAP would be ineffective, without more, does not establish good cause for Claimant's actions of refusing to participate in SEAP. *See Semon*, 417 A.2d at 1343 (holding that claimant failed to establish good cause for refusing employer's request to see a psychiatrist when her only explanation for refusing was that she felt she was able to work and did not need psychiatric help). The Board properly concluded that Employer's directive was reasonable and that Claimant failed to establish good cause for her refusal to follow the directive. Consequently, Claimant is ineligible for benefits under Section 401(e) of the Law.

Accordingly, the order of the Board is affirmed.

P. KEVIN BROBSON, Judge

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	:	
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ORDER

AND NOW, this 25th day of August, 2011, the order of the Unemployment Compensation Board of Review is AFFIRMED.

P. KEVIN BROBSON, Judge