

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Heather M. Kimmey, :
Petitioner :
 :
v. :
 :
Unemployment Compensation :
Board of Review, : No. 276 C.D. 2011
Respondent : Submitted: June 24, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: August 12, 2011

Heather M. Kimmey (Claimant), *pro se*, challenges the order of the Unemployment Compensation Board of Review (Board) which affirmed the referee's denial of benefits under Section 402(e) of the Unemployment Compensation Law (Law).¹

The facts, as initially found by the referee and confirmed by the Board, are as follows:

1. The claimant was last employed for more than six years with ACCESS Incorporated and the claimant last worked for the employer as a full time controller earning \$39,748.80 per year on May 18, 2010.

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

2. The claimant was provided with a copy of the employer's policies and procedures manual on January 12, 2004, August 27, 2007 and August 3, 2009.

3. The employer's policy provides for termination of employment for reasons including the receipt of three written warnings for any violation during a twelve-month period.

4. Beginning in or about September 2009, the employer issued verbal counseling and verbal reprimands to the claimant for reasons including her work attendance.

5. On January 5, 2010, the claimant was issued a performance appraisal for which the claimant was rated "partially meets" under the attendance category. The employer specifically directed the claimant, "She needs to begin reporting to work immediately at her scheduled times of 8:30 a.m. – 5:00 p.m." The employer commented in several categories the burden presented to other staff and the poor productivity resulting from the claimant's repeated tardiness and personal poor performance during the morning work hours. The employer advised the claimant of its support in helping the claimant to overcome her personal problems and also indicated that failure to improve could result in disciplinary action. The claimant was specifically directed to call and speak directly with the executive director or assistant director if she is absent from work due to sickness or if she is tardy reporting to work.

6. On March 5, 2010, the claimant was issued a written warning for attendance issues including absenteeism without direct notice to the executive director or assistant director. The warning stated the claimant must immediately begin reporting to work at her assigned time of 8:30 a.m. or risk further disciplinary action. The employer also began requiring the claimant to physically present herself to the executive director, the assistant director or the operations coordinator at the beginning of each workday.

7. On April 30, and May 4, 2010, the claimant was issued a second written warning for excessive absence from her scheduled work hours and for failing to properly report her absence. The claimant was advised that another written warning within a twelve-month period would result in termination.
8. On April 30, 2010, the claimant exhausted her available sick leave.
9. On May 12, May 13, May 14, and May 17, 2010, the claimant did not physically present herself to the assistant director or the operations coordinator at the beginning of the workday, in the absence of the executive director.
10. On May 13, 2010, the claimant fell asleep during her work hours.
11. The claimant has situational depression and polycystic ovarian syndrome and the claimant takes prescription medications including Prozac and Lexapro.
12. The executive director and assistant director were not aware of claimant's specific medical conditions and were not aware of the claimant's prescription medications.
13. The executive director was the claimant's direct supervisor.
14. On May 18, 2010, the claimant was issued a third written warning for failing to physically report herself to the assistant director or operations coordinator to acknowledge her on time arrival.
15. On May 18, 2010, the claimant was suspended from employment.
16. On May 20, 2010, the claimant was discharged from employment for failing to follow the employer's directive to physically present herself to acknowledge her on time arrival and for sleeping on the job.

Referee's Decision, October 1, 2010, (Decision), Findings of Fact Nos. 1-16 at 1-2.

The referee stated in his decision:

The referee recognizes a conflict in testimony between the claimant and the employer. In light of the evidence on the record, the conflict is resolved in favor of the employer.

In this case, the claimant was discharged from employment for failing to follow an employer directive and for sleeping on the job. The claimant was issued three warnings within a twelve-month period and the employer's termination of the claimant's employment was consistent with its disciplinary policy.

....

The employer's policies and directives were reasonable considering the claimant's attendance history. Even if the claimant had good cause for absences from work, the claimant has not demonstrated good cause for failing to properly report her absences. Even if the claimant reported to work on time, the claimant has not demonstrated good cause for failing to physically present herself to acknowledge her on time arrival. The claimant's repeated violations of employer policy and directives, without good cause, constitute willful misconduct in connection with her work. Also, the claimant's conduct of sleeping on the job is a disregard of the standards of behavior which an employer has a right to expect of an employee and also constitutes willful misconduct in connection with her work. Under these circumstances, unemployment compensation benefits must be denied to the claimant under Section 402(e) of the Law. (emphasis added).

Decision at 2-3.

The Board affirmed the referee's decision and resolved conflicts in testimony in favor of Access, Inc. (Employer). Decision at 2.

On appeal, Claimant contends that Employer knew of her illnesses, that she had good cause for her actions, that she was not informed that she was required to adhere to the 8:30 a.m. to 5:30 p.m. work schedule until March 5, 2010, that Employer did not shoulder its burden of proof that Claimant's discharge was the result of willful misconduct, and that the Board failed to consider Employer's failure to follow its own corrective action plan.²

I. Did Employer Shoulder Its Burden and Prove That Claimant's Discharge Was the Result of Willful Misconduct?³

Claimant contends that Employer did not shoulder its burden to prove that Claimant's discharge was the result of willful misconduct. Claimant alleges that the written warning she received on April 30, 2010, was in error, that she physically presented herself to a supervisor on May 12, 13, 14, and 17, and that she was not asleep at her desk on May 13, 2010.

Employer bears the initial burden of proving a claimant engaged in willful misconduct disqualifying him from receiving unemployment compensation, and once the employer meets its burden, a claimant may then prove he had good cause for his actions. Pearson v. Unemployment Compensation Board of Review, 954 A.2d 1260 (Pa. Cmwlth. 2008).

Willful misconduct by an employee has been defined as:

² This Court's review in an unemployment case is limited to a determination of whether constitutional rights were violated, errors of law were committed or essential findings of fact were not supported by substantial evidence. Lee Hospital v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994).

³ For organizational purposes, we have forgone Claimant's order of the issues.

(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 or obligations.

Elser v. Unemployment Compensation Board of Review, 967 A.2d 1064 (Pa. Cmwlth. 2009).

A claimant has good cause for the violation of an employer's rules or policies so as to preclude a finding that the claimant's termination was due to willful misconduct related to work...if his or her actions are justifiable and reasonable under the circumstances. Docherty v. Unemployment Compensation Board of Review, 898 A.2d 1205 (Pa. Cmwlth. 2006).

Although Claimant followed general company protocol when she called in sick on April 30, 2010, she did not follow the guidelines established in her January 5, 2010, performance review and her March 5, 2010, corrective action plan. In fact, Claimant knew that failure to contact the Executive Director, Nancy Hawthorne (Hawthorne), the Assistant Director, Sharon Slaybaugh (Slaybaugh), or Transportation Director, Doug Whitesell (Whitesell), when she would be late to work or out sick was a violation of Employer's policy, specific to Claimant's employment. Claimant's first written warning on March 5, 2010, stated:

[Claimant's] performance evaluation of 1/15/10 specifically addressed her attendance issues and what she needed to do in order to improve. That evaluation was specific in that [Claimant's] regular work hours are 8:30 AM to 5 PM and that she needed to contact the Executive

Director when she would be late and subsequent arrival time or out sick; and in her absence, she needed to contact the Assistant Director ... [Claimant] did not contact the Assistant Director directly at all on February 22-24, 2010 when the ED was away. Instead, on 2/22/10, [Claimant] called the front desk receptionist to report that she was sick and would not be in that day. On 2/23, [Claimant] called the Administrative Assistant and reported that she would be in at 10 AM ... On 2/24/10, [Claimant] left a message with the front desk receptionist that she would be in around 9:30 AM ... The Assistant Director was never contacted by [Claimant] for any of the above arrangements.

Claimant's March 5, 2010, Written Warning.

Claimant read and signed the above cited document that indicated she understood that the Employer's policy, as it pertained to her, was to call and speak with a supervisor in the event that she would be late to or absent from work. Claimant further understood from experience that failure to do so would result in the receipt of a written warning. Employer sufficiently proved that Claimant's deliberate violation of its rules constituted willful misconduct for which Claimant established no good cause.

Employer also established Claimant's willful misconduct in her failure to physically present herself to document her on time arrival at work on May 12, 13, 14 and 17, 2010. Claimant testified that she arrived at work on time and reported in to a supervisor on those days. See Notes of Testimony (N.T.), September 9, 2010, at 44. Claimant also testified regarding her routine of reporting her on time arrival at work to a supervisor:

Thomas E. Miller (Miller), Claimant's attorney: What was your understanding as to who you were supposed to check in and the nature of checking in?

Claimant: [Hawthorne], if she wasn't available [Slaybaugh], if she wasn't available [Whitesell]...the first thing I did in the morning was find one of them and say hi.

....

Miller: ... tell us how you reported in on May 12th, 13th, 14th, 17th to the extent you recall?

Claimant: I would find either [Slaybaugh] or [Whitesell], the first person I came upon and say hi to. I just said hi to them.

N.T. at 37, 44.

Hawthorne offered a different account of Claimant's arrival routine:

Jason D. Dalton (Dalton), Employer's attorney: When – following the performance of the corrective action plan requiring Claimant to check in, had Claimant checked in with you – when Claimant checked in with you, how did she do so?

[Hawthorne]: She would come in and announce, I am here as per my corrective action plan and I know she did the same to [Slaybaugh]. And it became almost a joke to her but she made a point of saying, I am here and she knew it was important from the performance evaluation, so it was never a hi, you know, just hi passing by. I mean I – because I made it very clear at the performance or at the corrective action that you need to present yourself physically. I was very specific about how I wrote that and she did make a production out of it and I appreciated that. And it got to be the point where it was really kind of a running joke that she would come in and be in my office or to [Slaybaugh] or whoever and say, I am here. She made it very clear when she was here, which is what I asked.

N.T. at 52.

Employer's witness credibly testified that Claimant conducted her routine of reporting to a supervisor in a manner that could not be easily missed.

Slaybaugh testified as to Claimant's failure to physically present herself on May 12, 13, 14, and 17, 2010:

Dalton: Were there any instances where the Claimant failed to contact you?

[Slaybaugh] : I have documented ... four days that she did not report to anyone when she came into work, not myself or to [Whitesell].

Dalton: And what were those dates?

[Slaybaugh]: The 12th, the 13th, the 14th and the 17th of May 2010.

Dalton: ...but if you could just describe, for example on the 12th what occurred?

[Slaybaugh]: ...[Claimant] did not report to me at 8:30...I just happened to see her later on in the morning and realized she had not reported to me.

N.T. at 25.

Slaybaugh also testified that Claimant did not physically present herself on the 13th or 14th either, and did not leave Slaybaugh any voicemail that indicated her absence on those days. N.T. at 25, 26.⁴

In unemployment compensation proceedings, the Board is the ultimate fact-finding body empowered to resolve conflicts in evidence, to determine the credibility of witnesses, and to determine the weight to be accorded evidence. Unemployment Compensation Board of Review v. Wright, 347 A.2d 328 (Pa. Cmwlth. 1975). Findings of fact are conclusive upon review provided that the record, taken as a whole, provides substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977).

⁴ Slaybaugh did not testify as to Claimant's failure to report on May 17, 2010.

Finally, Claimant alleges that the medication she was taking caused her to pass out at her desk on May 13, 2010. See Claimant's Brief at 16. However the Board credited Employer's witness testimony that Claimant fell asleep at her desk on that morning. Slaybaugh testified regarding the events on May 13, 2010:

Dalton: Did you at any point witness the Claimant asleep?

[Slaybaugh]: Yes.

....

...it was the 13th.

....

[Johnnie Shindledecker (Shindledecker), Health and Nutrition Coordinator] and I together and we went around to the side of the conference center and looked in [Claimant's] door...she was sitting at her desk slumped over and appeared that she was sleeping.

....

Dalton: Okay. And you said she had her eyes closed?

[Slaybaugh]: Yes.

....

[Shannon Rennhack (Rennhack), administrative assistant] came in from the other door because [Claimant] has two...and I think it startled [Claimant] and she kind of startled herself and got up like this and kind of yawned.

N.T. at 26-28.

Claimant, however, maintains that she was not asleep at her desk but had passed out:

Claimant: I came into work on the 13th, I wasn't feeling well...And so it was getting late into 10:00 or so, I just -- I don't even really remember a whole lot at that point but I know I was feeling kind of lightheaded...and suddenly I just blacked out and at that point I remember that my door was kind of opened a bit and when I came to the

door was shut...I remember the clock saying about 11:01
or so...

N.T. at 43.

Sleeping on the job, if proven or admitted absent proof the employer condones such behavior, can constitute willful misconduct that disqualifies an employee for unemployment benefits. Mine Safety Appliances Co. v. Unemployment Compensation Board of Review, 423 A.2d 798 (Pa. Cmwlth. 1980). The Board credited Employer's testimony that Claimant was asleep at her desk on May 13, 2010, and Claimant did not establish that Employer condoned such behavior.

II. Did the Referee and Board Err In Determining Claimant Did Not Have Good Cause For Her Actions?

Claimant next contends that the Board erred in determining that she did not have good cause for her actions. Specifically, Claimant alleges that she had good cause to violate Employer's policies because Employer had actual knowledge of Claimant's specific illnesses⁵, and because Employer's failure to administer warnings to Claimant for tardiness following her January 5, 2010, performance review and prior to her first warning on March 5, 2010, established a pattern of leniency by Employer regarding Claimant's individualized policies.

There was conflicting testimony concerning Employer's knowledge of Claimant's specific medical conditions. Claimant's supervisor testified that she

⁵ Claimant suffers from situational depression and polycystic ovarian syndrome and has been prescribed Prozac and Lexapro. Referee's F.F. No. 11 at 2.

had no knowledge Claimant's specific health conditions or prescription medications:

Miller: You're certainly aware of some of the health and medical conditions that [Claimant] suffered from during this period of time, are you not?

[Hawthorne]: It depends on what you're calling health conditions. When [Claimant] called in she was – either had a headache, a stomached [sic] or fighting with her husband and was up all night.

....

Miller: ...and you were aware that she had started new... prescribed medication the later part of April, 2010, you were aware of that?

[Hawthorne]: Not really.

Miller: ...the company wasn't provided with any documentation from Dr. Shah...concerning her condition with the new medication?

[Hawthorne]: I don't believe so, other than just an excuse for being out and could return to work. I had no details on anything.

N.T. at 23-24.

Claimant, however, testified that Employer had specific knowledge of her health conditions:

Miller: ...did you discuss with [Hawthorne] or provide any documentation to [Hawthorne] as to these medical conditions?

Claimant: Yes, we talked about it...

....

Miller: ...was that a topic of discussion at the January 5th review meeting that the Employer had with you?

Claimant: My depression.

....

Miller: Did you sign a medical release allowing the Employer to get access to your medical records?

Claimant: Yes.

N.T. at 40-41.

The Board credited the testimony of Employer's witnesses and determined that Claimant's supervisors were not aware of Claimant's specific medical conditions or prescription medications. Referee's F.F. No. 12 at 2.

Claimant's performance appraisal, issued January 5, 2010, established Claimant's work hours as 8:30 a.m. – 5:00 p.m. and required Claimant to call and speak directly to the Executive Director or Assistant Director if she would be absent from work or was running late. Referee's F.F. No. 5 at 1. Claimant received her first written warning on March 5, 2010, for failing to properly report her tardiness and absences on February 22-24, 2010, as per the guidelines established in her performance review. This warning also addressed many other dates during January and February of 2010, when Claimant was late for work.

The Board determined that Employer's policies towards Claimant were reasonable, and although Claimant may have had good cause to be absent from work, she did not establish good cause for failing to follow the procedures set in place by Employer. See Decision at 3. Employer's leniency does not give Claimant good cause to repeatedly violate its policies and procedures.

III. Did the Board Fail To Consider Employer's Failure To Follow Its Own Corrective Action Plan?

Claimant lastly contends that the Board erred in failing to consider Employer's failure to follow its own corrective action plan, and that such consideration would have exonerated Claimant from any wrongdoing. Specifically, Claimant maintains that the Board should have considered

Employer's failure to suspend Claimant for one day following her first written warning.

It is unclear how Employer's suspension of Claimant for one day following the receipt of her first written warning would have exonerated Claimant from any wrongdoing. This oversight is not fatal to Employer's argument that Claimant's behavior constituted willful misconduct.

Accordingly, this Court affirms.

BERNARD L. McGINLEY, Judge

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	:	
Petitioner	:	
	:	
v.	:	
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Unemployment Compensation	:	
Board of Review,	:	No. 276 C.D. 2011
	:	
Respondent	:	

ORDER

AND NOW, this 12th day of August, 2011, the order of the Unemployment Compensation Board of Review in the above captioned matter is affirmed.

BERNARD L. McGINLEY, Judge