

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sylvia Fleck, :  
Petitioner :  
No. 299 C.D. 2010  
v. :  
Submitted: December 3, 2010  
Unemployment Compensation :  
Board of Review, :  
Respondent :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

**OPINION NOT REPORTED**

MEMORANDUM OPINION  
BY JUDGE McCULLOUGH

FILED: April 4, 2011

Sylvia Fleck (Claimant) petitions pro se for review of the December 14, 2009, decision and order of the Unemployment Compensation Board of Review (Board), which held that Claimant is ineligible for benefits under section 402(e) of the Unemployment Compensation Law (Law) as a result of willful misconduct.<sup>1</sup> We affirm.

Claimant was employed as a cashier by H M S Host Family Restaurants (Employer) from October 22, 2008, through May 6, 2009. (Referee's Finding of Fact No. 1.) Claimant drove her own automobile five to ten miles to work each day. (Referee's Findings of Fact, Nos. 16-17.) Employer had a general work rule that

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

employees must report to work on time, which Claimant was aware of. (Referee's Findings of Fact, Nos. 3-4.) Claimant was late to work approximately twenty-six times and, in response, Employer issued Claimant three verbal warnings, a documented counseling, and three written warnings. (Referee's Findings of Fact, Nos. 5-9.) On April 22, 2009, Employer suspended Claimant pending a further investigation. (Referee's Finding of Fact No. 10.) Claimant subsequently assured Employer that she would arrive to work on time, and Employer permitted Claimant to return to work. (Referee's Finding of Fact No. 11.) Claimant was late to work again on May 6, 2009, and Employer terminated her employment on May 7, 2009. (Referee's Findings of Fact, Nos. 12-13.)

The local service center granted Claimant benefits, observing that Employer did not complete a questionnaire and, therefore, did not meet its burden to demonstrate that Claimant was ineligible for benefits under section 402(e) of the Law. Employer appealed and on October 2, 2009, the referee held a hearing at which Claimant and two representatives of Employer testified. Claimant testified that she was late to work as a result of the weather, traffic, purchasing gas for her vehicle and because she sometimes did not feel well. (Notes of Testimony (N.T.) at 17.) Kim Shoemaker, Employer's Road Training Coordinator, testified that Employer has a general policy requiring employees to arrive to work on time and that the general manager is responsible for initiating the disciplinary process when an employee's tardiness becomes excessive. (N.T. at 15.) Employer's General Manager, Thomas Kelly, testified that he met with Claimant after she was suspended to discuss scheduling options that might assist Claimant in arriving to work on time but that Claimant was late to work again May 6, 2009 and, consequently, was discharged on May 7, 2009. (N.T. at 9.)

On October 6, 2009, the referee issued a decision and order reversing the local service center, concluding that Employer met its burden to demonstrate that Claimant is ineligible for benefits under section 402(e) of the Law. The referee found that Claimant's testimony was not credible and that even if Claimant's testimony had been credible it would not satisfy her burden to demonstrate good cause because the reasons Claimant provided for being late to work were within her control. Claimant appealed to the Board, which affirmed the referee, adopting and incorporating the referee's findings and conclusions. On December 21, 2009, Claimant filed a motion for reconsideration, which the Board denied on January 15, 2010. Claimant now appeals to this Court, asserting for the first time that she was late as a result of an eating disorder and panic attacks.<sup>2</sup>

Section 402(e) of the Law provides that an employee is ineligible for benefits if she is terminated or suspended for willful misconduct. 43 P.S. §802(e). It is well-settled that excessive tardiness, particularly after a warning, is sufficient to sustain a finding of willful misconduct. Conibear v. Unemployment Compensation Board of Review, 463 A.2d 1231 (Pa. Cmwlth. 1983) (holding that the employer met its burden to demonstrate willful misconduct by providing substantial evidence that the claimant was tardy to work on sixty-six occasions despite being warned that her

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<sup>2</sup> Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

As the Board observes, Claimant's brief fails to comply with Rule 2116(a) of the Rules of Appellate Procedure, Pa. R.A.P. 2116(a), in that it does not contain a statement of questions involved. However, our court is generally inclined to construe pro se filings liberally, Robinson v. Schellenberg, 729 A.2d 122 (Pa. Cmwlth. 1999), and Claimant's noncompliance does not impair our ability to discern her issues and arguments or otherwise preclude meaningful appellate review.

tardiness was causing morale problems in her department). Once an employer establishes willful misconduct, the burden then shifts to the claimant to demonstrate good cause. Jordan v. Unemployment Compensation Board of Review, 684 A.2d 1096 (Pa. Cmwlth. 1996). Good cause is established where the claimant's tardiness is justified or reasonable under the circumstances. Id.

Here, Employer met its burden to demonstrate willful misconduct by providing testimony and documentation establishing that Claimant was late to work twenty-six times despite three verbal warnings, a documented counseling, and three written warnings. Conibear. Thus, the sole issue for our review is whether Claimant met her burden to demonstrate good cause for her tardiness. In its entirety, Claimant's argument is as follows:

I am not guilty of willful, misconduct or anything, else.  
I have an eating disorder, and sometimes I have panic attacks.  
I have to wait for things to calm down before I can do anything  
or take it slow as I go along.  
Sometimes I don't feel like eating, but I have to eat anyway, by  
forcing myself to eat.  
I force myself to do things with little or no money. Things are  
different.

(Claimant's brief at 6.)

Claimant asserts that she was tardy as a result of an eating disorder and panic attacks. However, Claimant waived this issue because she failed to raise it before the referee or the Board. Leone v. Unemployment Compensation Board of Review, 885 A.2d 76 (Pa. Cmwlth. 2005). With regard to Claimant's previous explanations for being tardy, we note that the Board determined that Claimant's testimony was not credible; as the finder of fact, credibility determinations are within the exclusive province of the Board and, therefore, will not be disturbed on appeal. Melomed v. Unemployment Compensation Board of Review, 972 A.2d 593 (Pa.

Cmwlth. 2009). Because Claimant did not demonstrate that her tardiness was reasonable or justified under the circumstances, Claimant did not meet her burden to demonstrate good cause. Thus, the Board did not err in concluding that Claimant was ineligible for benefits under section 402(e) of the Law.

Accordingly, we affirm.

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PATRICIA A. McCULLOUGH, Judge

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**ORDER**

AND NOW, this 4<sup>th</sup> day of April, 2011, the decision and order of the Unemployment Compensation Board of Review, dated December 14, 2009, is hereby affirmed.

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PATRICIA A. McCULLOUGH, Judge