

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Chasity L. Thornton, :
Petitioner :
 :
v. : No. 460 C.D. 2011
 : Submitted: July 29, 2011
Unemployment Compensation :
Board of Review, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: August 12, 2011

Chasity L. Thornton (Claimant) has filed a *pro se* petition for review from an order of the Unemployment Compensation Board of Review (Board) affirming the decision of the Referee denying her unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law)¹ for willful misconduct because she swore at her supervisor. For the reasons that follow, we affirm the Board’s decision.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937), 2897, *as amended*, 43 P.S. §802. That section provides, in relevant part:

An employe shall be ineligible for compensation for any work –

(e) in which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work, irrespective of whether or not such work is “employment” as defined in this act.

(Footnote continued on next page...)

Claimant was employed by ABC Janitorial (Employer) as a Crew Leader. On August 16, 2010, Claimant was terminated for cursing, and Claimant filed for unemployment compensation benefits with the Duquesne UC Service Center (UC Center). The UC Center found that Claimant was ineligible for benefits because she was insubordinate when she cursed and swore, hung up on her supervisor and refused to cooperate with her supervisor, all acts amounting to willful misconduct. Claimant appealed that decision arguing that she never swore at her supervisor, Rich Roberts (Roberts) and that if the UC Center was alleging that she swore at George Jackson (Jackson), she was never told that he was going to act as her supervisor, only that he was there to help her.²

(continued...)

Willful misconduct has been defined as (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 and obligations. *Sheetz, Inc. v. Unemployment Compensation Board of Review*, 578 A.2d 621 (Pa. Cmwlth. 1990).

² Employer's questionnaire/statement stated that Claimant had also been terminated because she had been absent for four days without an excuse. However, the UC Center did not address her absences in denying the benefits but only the insubordination for swearing. Testimony was provided by Jackson at the hearing before the Referee regarding Claimant's absences, and the Referee made findings of fact that Claimant did not appear for work for four days, ultimately not finding Claimant's reasons for her absences credible. The Board affirmed. Because the UC Center never informed Claimant that she was terminated due to her absences, the Referee improperly allowed testimony and made findings on that issue, and we would normally remand the matter for a new hearing. However, because there was sufficient evidence of insubordination relative to the cursing and swearing, we need not remand the matter for another hearing.

At the hearing before the Referee, Jackson, Employer's Project Manager, testified that his job duties changed around August 12, 2010. Roberts was the Area Manager and one of his jobs had been running the crew but he was going to be off indefinitely due to an illness. He had discussed with Roberts and Jim Walls (Walls), a President for another company that had merged with Employer, the new plan that Jackson would be in charge of running the crews and specifically that he would be in charge of the floor crew on which Claimant worked. On August 12, 2010, other members of the crew appeared at Roberts' house at 5:00 p.m. but Claimant showed up at 5:45 p.m., and as soon as she pulled up, she came out of the car and "started mother f*cking. F*ck ABM. F*ck Jim Walls. Nobody knows what the f*ck they're doing. This mother f*cking...work. And the cursing just went on and on and on just constant swearing and I was like holy cow. What the heck? And Rich was there, he was outside out of his house and they kind of got into a little bit of an argument and he was telling her to quit yelling and stuff." (November 17, 2010 hearing notes at 7.) Jackson stated that even though he tried to speak up, Claimant kept swearing and only addressed issues to Roberts. Claimant eventually got into her car and left without him getting a word in edgewise.

Jackson testified that he called Claimant on August 13, 2010, and that he tried to tell her he was taking over for Roberts, but she interrupted and said she had to pick up her son and hung up. Jackson stated that he tried to call her a few times after that and eventually reached her, and she told him that she knew what she had to do. He did not know if she ever ended up working or not, but she did not tell him any reason that she would not be working. He didn't get a chance to

tell her what her assignment was for that day because when she called back, she stated that she forgot to tell him that she was going camping and that she would not be available that day or the rest of the weekend, meaning August 13, 14 or 15, 2010, even though she had not requested those days off. Jackson stated that he assumed that she would be at work on August 16, 2010, and the crew waited for her in front of Roberts' house but she did not show up, so he called her and left her a message that her services were no longer needed.

Claimant, who appeared without counsel, testified that she worked as a Crew Leader for Employer. She explained that on August 12, 2010, she met with Walls who informed her that Roberts was not going to be coming back to work and that she would take his place. Claimant stated that even though Roberts was on medical leave, she still reported to him and was never told to meet with Jackson or that he would be her supervisor. She was also told that Jackson would be coming in to do the "call offs, to take care of all the call offs because I was going crazy; I would stay trying to do all the AIUs and take care of call offs. I explained to Jim Walls that I wouldn't be meeting at 5:00 in front of Rich Roberts' because it was my daughter's Sweet 16 that day, her birthday, and we was going to [sic] out to dinner and I'd be around by 5:30 at the latest." (November 17, 2010 hearing notes at 13.) Claimant continued to state that she worked on August 14 and 15, 2010, but she did not have keys to get into the building. Claimant admitted that she didn't tell her supervisor about going camping because it was chaos; she did not realize what date it was, she was picking her son up from getting his hair cut, and it was her daughter's birthday. She denied swearing at Roberts.

The Referee found Jackson's testimony credible that Jackson was to take Roberts' place while Roberts was on medical leave. She also found that Claimant appeared at Roberts' home, a meeting site, and started to yell, curse and argue with Roberts and "the claimant was resisting the authority of the Project Manager, who had been assigned to run the crew on which the claimant worked." (Referee's November 29, 2010 decision at 2.) Claimant appealed to the Board requesting reconsideration on the basis that she had statements from third parties regarding her alleged cursing, but the Board denied her request because the statements were not part of the record below, and Claimant had failed to show good cause for a rehearing. The Board affirmed the Referee's decision, and this appeal by Claimant followed.³

Claimant contends that the Board erred in denying her benefits because:

- she was not given sufficient time to review the file at the hearing, and she asked for and was denied a continuance by the Referee; and
- she had evidence that she was not insubordinate and never cursed at Richie Robert or Chris Casson. Specifically, she had a written letter from both of those

³ Our scope of review of the Board's decision is limited to determining whether an error of law was committed, constitutional rights were violated or findings of fact were supported by substantial evidence. *Frazier v. Unemployment Compensation Board of Review*, 833 A.2d 1181 (Pa. Cmwlth. 2003).

individuals stating that she never swore at them and they were willing to testify to the same.⁴

As for Claimant's first argument, she never raised this issue before the Board, and issues raised for the first time on appeal are waived. Pa. R.A.P. 1551(a). However, even if it had not been waived, Claimant was given time at the hearing to review the file. *See* (November 17, 2010 hearing notes at 2.) All that was in the file for Claimant to review was Claimant's application for benefits, Claimant's and Employer's version of events leading to her dismissal, the UC Center's decision denying benefits, and Claimant's appeal from that decision. The only item that Claimant did not view before the hearing was Employer's version of the events that led to her termination, which she reviewed prior to the hearing. Claimant cannot now argue that she was denied adequate time to review the unemployment file that was before the Referee. Claimant also never requested a continuance so she was never denied one by the Referee.

Regarding Claimant's second contention, Claimant was aware of the reason that she was fired based on the decision of the UC Center. When she filed her appeal, she denied that she swore at Roberts or Jackson. Claimant knew that

⁴ Claimant does not argue on appeal that reconsideration was improperly denied by the Board. We further note that in her "State of Questions Involved," Claimant addresses "Whether the Respondent was Insubordinate in her Job?" In her Answer, she responds: "no they said that I did not show up for work on a Saturday and Sunday August 14 & 15, 2010. However, I was at work (not scheduled but was there) I have proof from an employee. I was also accused of cursing at my Manager Rich Roberts. I have him to back me up that I never cursed at him." (Claimant's brief at 6.) However, nowhere in Claimant's argument does she raise the issue of her failure to attend work so we will only address those arguments briefed. *See County of Venango v. Housing Authority of the County of Venango*, 868 A.2d 646 n.5 (Pa. Cmwlth. 2005) (issues not briefed are waived on appeal).

she had the burden at the hearing to prove that she did not swear at either supervisor, and it was at that time that she should have provided the testimony of Roberts and Chris Casson, not subsequent to the hearing via letters to the Board. Because the Referee did not find her credible, Claimant failed to meet her burden of proving that she did not swear or curse at Roberts or Jackson and was not insubordinate.⁵ Because this Court has held that even a single instance of a claimant using vulgar and offensive language directed at a supervisor, especially unprovoked, amounts to insubordination and is willful misconduct and sufficient cause for termination, *Allen v. Unemployment Compensation Board of Review*, 638 A.2d 448 (Pa. Cmwlth. 1994), Claimant's argument is without merit, and the Board did not err in denying her benefits.

Accordingly, the order of the Board is affirmed.

DAN PELLEGRINI, JUDGE

⁵ The Board is the ultimate fact finder and determiner of credibility in unemployment cases. *McCarthy v. Unemployment Board of Review*, 829 A.2d 1266 (Pa. Cmwlth. 2003). Claimant also argues that she never hung up the phone on Jackson. However, the Referee found Jackson most credible, and because the Board is the ultimate fact finder, we will not disturb that credibility determination.

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ORDER

AND NOW, this 12th day of August, 2011, the order of the Unemployment Compensation Board of Review, dated February 7, 2011, at No. B-512865, is affirmed.

DAN PELLEGRINI, JUDGE