

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Renee N. Marich,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	No. 461 C.D. 2011
	:	
Respondent	:	Submitted: September 2, 2011

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

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
JUDGE BUTLER

FILED: October 12, 2011

Renee N. Marich (Claimant) petitions for review of the February 17, 2011 order of the Unemployment Compensation Board of Review (Board) reversing the decision of the Referee and denying Claimant unemployment compensation (UC) benefits. The issues before this Court are: 1) whether substantial evidence supports the Board's order, and 2) whether the Board capriciously disregarded the Referee's finding of fact that Employer did not provide first-hand testimony concerning the incident that caused Claimant's separation from employment. For the reasons that follow, we affirm the order of the Board.

Claimant was employed as a server by Domenico's Ristorante (Employer) from 2006 until August 23, 2010. Employer testified that Claimant had received several warnings concerning policy violations throughout her employment. Employer had a policy that employees covering the restaurant floor are responsible

for wrapping silverware and stocking glasses at the end of their shift, and the manager has the discretion to assign the duty of filling silverware racks and stocking glasses. On August 22, 2010, the restaurant manager directed Claimant, who was covering the restaurant floor along with another server, to wrap silverware and stock glasses before the end of her shift. Claimant, however, left the restaurant before the wrapping and stocking was finished because she believed she had done her share of the work and left the remainder for the other server who was working a double shift. Employer discharged Claimant on August 23, 2010 for refusing to complete her job duties, as well as other infractions.

Claimant filed for UC benefits. The UC Service Center denied benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law).<sup>1</sup> Claimant appealed, and a hearing was held before a Referee. Claimant, Employer, and two witnesses for Employer testified. The Referee issued an order reversing the UC Service Center's determination, and granting Claimant benefits, holding that Claimant's actions did not rise to the level of willful misconduct. Employer appealed to the Board. The Board without taking any further evidence, issued an order reversing the Referee's determination. The Board determined that "[w]here a claimant has been discharged for multiple reasons, the employer only must establish that one of those reasons amounts to willful misconduct." Bd. Or. at 2. It also determined that Claimant did not have good cause for refusing to follow Employer's reasonable directive. Claimant appealed to this Court.<sup>2</sup>

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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).

<sup>2</sup> In general, this Court's review in an unemployment compensation case is limited to determining whether the findings of fact were supported by substantial evidence, whether constitutional rights were violated, or whether errors of law were committed. *Brunswick Hotel & Conference Ctr., LLC v. Unemployment Comp. Bd. of Review*, 906 A.2d 657 (Pa. Cmwlth. 2006). However, "[t]he capricious disregard standard of review, previously applicable where only the party with the burden of proof presented evidence and did not prevail before the administrative agency, is

Claimant argues that the Board's decision is not supported by substantial evidence. She further contends that Employer gave a laundry list of reasons for Claimant's termination and not one specific reason. In addition, Claimant argues that the Board erred or capriciously disregarded Employer's testimony that "all glasses have to be done before you both leave" and Employer failed to testify concerning a specific reason for her dismissal. We disagree.

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Coal Gas Recovery, L.P. v. Franklin Twp. Zoning Hearing Bd.*, 944 A.2d 832, 838 n.9 (Pa. Cmwlth. 2008). "A capricious disregard is the deliberate and baseless disregard of apparently reliable evidence. Where substantial evidence supports the agency's findings, which in turn supports the agency's conclusions, it should be a rare instance where an appellate court disturbs an adjudication based on capricious disregard." *Pennsylvania Bankers Ass'n v. Pennsylvania Dep't of Banking*, 981 A.2d 975, 991 (Pa. Cmwlth. 2009) (citation omitted).

Under Section 402(e) of the Law, an employee is not eligible for benefits if "his unemployment is due to his discharge . . . for willful misconduct connected with his work . . . ."

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.

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now an appropriate component of appellate consideration in every case in which such question is properly brought before the court." *Diehl v. Unemployment Comp. Bd. of Review*, 4 A.3d 816, 824 (Pa. Cmwlth. 2010), *appeal granted*, \_\_\_ Pa. \_\_\_, 20 A.3d 1192 (2011) (quotation marks omitted).

*Elser v. Unemployment Comp. Bd. of Review*, 967 A.2d 1064, 1069 n.7 (Pa. Cmwlth. 2009). “Whether a claimant’s conduct constituted willful misconduct is a question of law subject to this Court’s review. Further, the employer bears the burden of establishing that the claimant was discharged for willful misconduct on the job.” *Roberts v. Unemployment Comp. Bd. of Review*, 977 A.2d 12, 16 (Pa. Cmwlth. 2009) (citation omitted).

Employer testified that Claimant violated several policies throughout the time of her employment. The Board, however, found that the restaurant manager, James Raible, credibly testified that one of the final infractions leading to Claimant’s discharge was her failure to complete her job assignment of wrapping silverware and stocking glasses on August 22, 2010.<sup>3</sup> Specifically, he testified that: “The final incident was August 22<sup>nd</sup> and that was with Renee not doing her work, final tipping out, being mean to other employees.” Original Record, Item 12 at 14. It does not matter that Employer indicated several reasons why Claimant was dismissed, only one had to rise to the level of willful misconduct. “[A] claimant who has been discharged for multiple reasons is disqualified from receiving benefits even if only one of those reasons amounts to willful misconduct.” *Glenn v. Unemployment Comp. Bd. of Review*, 928 A.2d 1169, 1172 (Pa. Cmwlth. 2007). In addition, Employer’s concession that the directive was that the work was to be completed before both servers left for the day does not support Claimant’s position. Claimant left before the work was completed regardless of whether it was the responsibility of more than one person. “Where an employee is discharged for refusing or failing to follow an employer’s directive, both the reasonableness of the demand and the reasonableness of the employee’s refusal must be examined.” *Dougherty v. Unemployment Comp.*

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<sup>3</sup> “In unemployment compensation proceedings, the [Board] is the ultimate fact finder, and it is empowered to resolve all conflicts in the evidence and to determine the credibility of witnesses.” *Procito v. Unemployment Comp. Bd. of Review*, 945 A.2d 261, 262 n.1 (Pa. Cmwlth. 2008).

*Bd. of Review*, 686 A.2d 53, 54 (Pa. Cmwlth. 1996). There is no dispute that Employer's directive in this case was reasonable. Furthermore, a reasonable mind could accept that based on the testimony presented by Employer, Claimant engaged in willful misconduct by leaving the restaurant without completing her assignment.

“Once the employer meets its burden, a claimant may then prove he had good cause for his actions. Good cause is established where the action of the employee is justifiable or reasonable under the circumstances.” *Dep't of Corrs. v. Unemployment Comp. Bd. of Review*, 943 A.2d 1011, 1015 (Pa. Cmwlth. 2008) (citation and quotation mark omitted). “An employee may question or disobey a direct order from a superior if it is unreasonable or if the employee has good cause.” *Kalenevitch v. Unemployment Comp. Bd. of Review*, 531 A.2d 590, 591 (Pa. Cmwlth. 1987). Claimant's reason for not completing the directive to wrap silverware and stock glasses was that she believed she was only responsible for half of the task since there was another server working. The Board found not credible Claimant's conflicting testimony concerning her belief that she was only required to complete half of the assigned task because there were two servers working. Therefore, Claimant did not meet her burden of showing good cause for failing to follow a directive, and the Board did not err as a matter of law or capriciously disregard evidence.

Claimant also argues that the Board capriciously disregarded the Referee's finding of fact that Employer did not provide first-hand testimony concerning the incident that caused Claimant's separation from employment. We disagree.

It should be noted that the standard of capricious disregard applies to evidence presented to the fact finder, not to an actual finding of fact. Regardless, however, there is direct testimony by James Raible, the manager who directed

Claimant to wrap and stock the silverware and glasses, concerning his instructions on August 22, 2010. In addition, although Filippo Lombardo, the person who actually fired Claimant, did not testify, there is no dispute that Claimant was actually fired. Thus, there was, in fact, first-hand testimony of the incident that led to Claimant's termination, even though the Board did not make a specific statement as to why it did not adopt the Referee's finding of fact on that issue. Based on its acceptance of James Raible's testimony as credible, it did not capriciously disregard the relevant evidence.

For the reasons stated above, we affirm the order of the Board.

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JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 12<sup>th</sup> day of October, 2011, the February 17, 2011 order of the Unemployment Compensation Board of Review is affirmed.

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JOHNNY J. BUTLER, Judge