

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas Hyland, :  
Professional Construction Services, :  
Petitioner :  
 :  
v. : No. 54 C.D. 2011  
 :  
Unemployment Compensation : Submitted: July 22, 2011  
Board of Review, Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE KELLEY

FILED: September 19, 2011

Thomas Hyland, Professional Construction Services (Employer) petitions for review of the order of the Unemployment Compensation Board of Review (Board) affirming the decision of a Referee determining that Pamela Holley (Claimant) is eligible for unemployment compensation benefits, and that she is not ineligible for benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law).<sup>1</sup> We affirm.

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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). Section 402(e) of the Law provides, in pertinent part:

An employe shall be ineligible for compensation for any week-

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(e) In which his unemployment is due to his discharge or

*(Continued....)*

Claimant filed a claim for unemployment compensation benefits with the Allentown UC Service Center, upon the termination of her employment as a project administrator with Employer. The Service Center representative concluded that Employer had failed to demonstrate that Claimant had been discharged for reasons that constitute willful misconduct under Section 402(e) of the Law. As a result, unemployment compensation benefits were granted.

Employer appealed this determination and a hearing was conducted before a Referee. See N.T. 10/1/10<sup>2</sup> at 1-29. At the hearing, Claimant testified and Employer presented the testimony of its president. See id.

On October 5, 2010, the Referee issued a decision and order disposing of the appeal in which she made the following relevant findings of fact: (1) Claimant and Employer had ongoing issues, but Claimant was asked to return from a layoff for a six to nine-month assignment in New Jersey; (2) Claimant accused Employer of constantly screaming at her, and Employer accused Claimant of exhibiting a poor attitude; (3) on July 23, 2010, Claimant's vehicle was broken into while parked at a BMW dealership in New Jersey where she was working as the project administrator; (4) Claimant discussed the situation with the dealership's owner, but she was not disrespectful; (5) Claimant suggested to Employer that he ask the BMW dealership if its general liability insurance policy could pay her deductible, and did not yell at Employer; (6) on July 26, 2010, Claimant took off work to make arrangements for her car to be repaired; (7) on July 28, 2010, Claimant responded to e-mails from

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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.

<sup>2</sup> "N.T. 10/1/10" refers to the transcript of the hearing conducted before the Referee on October 1, 2010.

Employer regarding missing payments that were to have been processed to pay subcontractors; (8) e-mails and telephone calls were exchanged, and Employer told Claimant that he did not like her attitude; (9) Employer yelled at Claimant and told her, "Either change your attitude or you're fired."; (10) Claimant was tired of Employer constantly screaming at her and, in response, yelled back, "If you have to fire me, then fire me."; (11) Employer then told Claimant she was fired. Certified Record (CR) Item No. 10a at 1-2.

Based on the foregoing, the Referee concluded:

In this case, employer testified claimant was insubordinate and had violated the policy manual by failing to track the subcontractor disbursements. Employer also stated claimant had been warned on many occasions about her position. Claimant denied the insubordination and policy violation, and testified that she and employer had their differences over the job, particularly as the result of her being assigned to a job location three hours away from her home. Claimant indicated she was tired of employer constantly yelling and screaming at her, and on the day in question when he told her to either change her attitude or be fired, she basically told him he could fire her if that's what he needed to do.

An employee who is discharged is presumed eligible for benefits unless it is shown that she provoked her discharge by committing deliberate and willful acts of misconduct. Misconduct has been defined as conduct of a willful, deliberate and intentional nature and detrimental to the best interests of the employer. While the claimant may have been an unsatisfactory employee in the eyes of employer, and the employer may have been justified in discharging her, the denial of benefits can not be based on such grounds. Therefore, the claimant is not disqualified under the provisions of Section 402(e) of the Law.

CR Item No. 10a at 2. Accordingly, the Referee issued an order affirming the Service Center's determination and approving benefits. Id.

On October 20, 2010, Employer appealed the Referee's decision to the Board. On December 20, 2010, the Board issued an order adopting the Referee's findings and conclusions, and affirming the Referee's decision. Employer then filed the instant petition for review.<sup>3</sup>

The sole claim raised by Employer in this appeal is that the Board erred in determining that Employer had not sustained its burden of proving that Claimant was ineligible for compensation benefits under Section 402(e) of the Law. More specifically, Employer asserts that Claimant's actions rose to the level of willful misconduct because Claimant repeatedly violated the terms of her employment, and jeopardized the viability of Employer's most important project and client, the BMW dealership in New Jersey.<sup>4</sup>

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<sup>3</sup> This Court's scope of review in an unemployment compensation appeal is limited to determining whether an error of law was committed, whether constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704; Hercules, Inc. v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992). In addition, it is well settled that the Board is the ultimate finder of fact in unemployment compensation proceedings. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985); Chamoun v. Unemployment Compensation Board of Review, 542 A.2d 207 (Pa. Cmwlth. 1988). Thus, issues of credibility are for the Board which may either accept or reject a witness' testimony whether or not it is corroborated by other evidence of record. Peak; Chamoun. Findings of fact are conclusive upon review provided that the record, taken as a whole, contains substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977). This Court must examine the evidence in the light most favorable to the party who prevailed before the Board, and to give that party the benefit of all inferences that can be logically and reasonably drawn from the testimony. Id.

<sup>4</sup> In particular, Employer contends that Claimant: (1) was absent without permission and without good cause; (2) exhibited insubordinate, abusive or offensive language; (3) failed to significantly curtail her tax preparation business; (4) failed to work a 40 hour week; and (5) was disrespectful to the owner of the BMW dealership by using abusive language and demanding payment of her deductible.

As noted above, pursuant to Section 402(e) of the Law, an employee is ineligible for unemployment compensation benefits when she had been discharged from work for willful misconduct connected with her work. Guthrie v. Unemployment Compensation Board of Review, 738 A.2d 518 (Pa. Cmwlth. 1999). The burden of proving willful misconduct rests with the employer. Id. Whether an employee's conduct constitutes willful misconduct is a question of law subject to this Court's review. Id.

Although willful misconduct is not defined by statute, it has been described as: (1) the wanton and willful disregard of the employer's interests; (2) the deliberate violation of rules; (3) the disregard of standards of behavior that 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. Id. (citing Kentucky Fried Chicken of Altoona, Inc. v. Unemployment Compensation Board of Review, 309 A.2d 165, 168-169 (Pa. Cmwlth. 1973)).

Once an employer establishes a prima facie case of willful misconduct, the burden shifts to the claimant to prove that her actions did not constitute willful misconduct under the facts or that she had good cause for her behavior. Jordan v. Unemployment Compensation Board of Review, 684 A.2d 1096 (Pa. Cmwlth. 1996). Good cause is established where the claimant's actions are justified or reasonable under the circumstances. Id. Indeed, as the Pennsylvania Supreme Court has noted:

[I]n order to fall within the definition of "willful misconduct" the actions must represent "a disregard of standards of behavior which the employer has a right to expect of an employe(e)." Thus, not only must we look to the employee's reason for noncompliance we must also evaluate the reasonableness of the request in light of all of the circumstances. To accommodate this end the Superior

Court developed a concept of good cause. The rationale upon which this concept of good cause was developed was that where the action of the employee is justifiable or reasonable under the circumstances it cannot be considered willful misconduct since it cannot properly be charged as a willful disregard of the employer's intents or rules or the standard of conduct the employer has a right to expect.

Frumento v. Unemployment Compensation Board of Review, 466 Pa. 81, 86-87, 351 A.2d 631, 634 (1976) (citations omitted).<sup>5</sup> The question of whether or not a claimant has proved the requisite good cause is also a question of law subject to this Court's review. Gwin v. Unemployment Compensation Board of Review, 427 A.2d 295 (Pa. Cmwlth. 1981).

Employer contends that Claimant's repeated violation of the terms of her employment, and her unprofessional conduct when dealing with the owner of the BMW dealership in New Jersey, constitutes willful misconduct. However, when viewed in a light most favorable to Claimant, our review of the certified record in this case reveals that there is substantial evidence demonstrating that Claimant did not violate the enumerated terms of her employment, or that she had good cause for doing so, and that she did not deal with the owner of the BMW dealership in an unprofessional manner, thereby negating any purported willful misconduct. See N.T. 10/1/10 at 13, 14, 15, 17, 19, 23, 25-26, 29.<sup>6</sup>

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<sup>5</sup> See also McLean v. Unemployment Compensation Board of Review, 476 Pa. 617, 619, 383 A.2d 533, 535 (1978) ("[W]e must evaluate both the reasonableness of the employer's request in light of all the circumstances, and the employee's reason for noncompliance. The employee's behavior cannot fall within 'willful misconduct' if it was justifiable or reasonable under the circumstances, since it cannot then be considered to be in willful disregard of conduct the employer 'has a right to expect.' In other words, if there was 'good cause' for the employee's action, it cannot be charged as willful misconduct.") (citations omitted).

<sup>6</sup> More specifically, Claimant testified, in pertinent part, as follows:

R You'll get that. All right. So Ms. Holley, what's your

*(Continued....)*

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testimony?

C All right. My car was vandalized on the 23<sup>rd</sup> which was that Friday. I had come back from lunch and somebody must have been scoping out the car. The dealership we were working on had – has windows all the way across the whole thing. I think it was the painters, actually, but I can't prove who did it. But the car – three windows were broken out of the car and my – the interior was damaged and everything so I was really upset and things were stolen out of the car. I don't know why he's saying that I – that the owner was upset with me because he took me in his office and had me call my insurance company to get this rectified....

\* \* \*

R Okay.

C And then that – well, I sat down there with the car without windows in it and this – I'm working five miles from New York in northern New Jersey. So I had to have a room down there so I have to stay down there. And the leaving on Fridays, I think I did that for two months and I would leave like at 2:00. I worked until 3:00 so I could get some travel time in because it takes me three hours to get home on a Friday night. When I was hired, I was told that I could travel on their time, which did not happen. I generally traveled on a Saturday morning back home and then would leave again Sunday night to get back there....

\* \* \*

R Okay. So anyway, but what does that have to do with the whole thing?

C Well, it just – because the paperwork says that I was tardy and all this but I mean I had to get my car inspected in Pennsylvania so I mean they don't do it on a Saturday. So I had to have off on either a Friday or a Monday. I never made it during the week. I always had to do it on a Friday or a – or Friday or Monday and then I would drive back down there the same day and then, you know, go to work the next day because we worked 7:00 to 3:30. The day – so anyway that Monday I had off because he's bringing up about me having off that day. I had to order the glass for my car because it required three windows. The windshield and the two side windows were broken. So they couldn't – they had to order the glass and they couldn't do it until that Monday and then I drove back down Monday and showed up for

*(Continued....)*

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work on Tuesday.

\* \* \*

R All right.

C So Wednesday morning he started emailing me and I emailed him back about these checks and I said no matter how you cut it – that’s what the email said, no matter how you cut it, there’s only two checks left for the customer. And he called me and started screaming at me and he said either you change your attitude or you’re fired. And my – my response to that was Tom, legally you cannot talk to me like this anymore and then he’s – we had another exchange of words and I said to him, I said well, I said, you know, if you want to fire me, that’s your prerogative to fire me. And he said you’re fired. And that’s when he sent me that email and I packed up my stuff....

\* \* \*

R So the end was you said if you have to fire me, fire me.

C Right.

R And that was the end of it.

C He said you’re fired.

R And then you’re – and then this is when you got the email?

C Yes. He said you’re fired and I said fine and I hung up....

R Okay.

C So the 26<sup>th</sup> I was off because my car was vandalized at work. There was nothing I could do about it. I drove the car home without windows in it.

R Okay. And Tuesday, fine, there was no – there was no – I mean no argument between the two of you and just regular meetings and everything was okay until Wednesday with the issue of the checks. Well what about all the other things? The insubordination and what – Mr. Hyland’s saying that you were disrespectful to the owner of the BMW dealership?

C I was not disrespectful to them. In fact, I called them and I emailed them all and I said I was sorry that I was leaving and that if they needed any help with anything they could always call me. I emailed both Greg and Jim. And Jim emailed me back and he said what’s up? And I said well Tom fired me.

*(Continued....)*



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R And that was the end of it?

C That was the end of my conversations with anybody down there.

\* \* \*

EW There's a stated policy that, as far as you're aware, in the company guidelines state that you work 40 hours a week plus a half hour for lunch?

C Am I allowed to make comments on this thing?

R Well, sure – sure. But you have to answer the question.

C I don't know what it exactly says I have to work 40 hours but there are many – I mean considering I drove on my own time...

R So you don't know exactly what the policy says?

C It might say that but there was [sic] many times I don't get lunch. There was [sic] a lot of times I don't [sic] get lunch and there were times that I would stay late, especially when he was there.

R But you would agree the policy probably says you worked 40 hours?

C And I know I put in more than 40 hours every week.

\* \* \*

EW Okay. And that was at the same time when you said you were upset when you also talked to the client, correct?

C No. I was crying when I went in to the client and he gave [me a] bottle of water and sat me down and told me to use my cell phone and call my insurance company. A I didn't say one bad thing to Greg. I don't even know where that would even be coming from.

EW Would you describe – would you describe your – you've described my attitude in great detail to the [Referee], would you describe your attitude towards me as a professional?

C I sat there and listened to you yell at me all the time.

EW That wasn't my question.

C Yes, I do think I treated you professionally. I don't think you treated me professionally.

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*(Continued....)*

In its order, the Board specifically stated that it “[r]esolves the conflicts in the testimony, in relevant part, in favor of the claimant and finds the claimant’s testimony to be credible...” CR Item No. 12. As noted above, the Board is the ultimate finder of fact in unemployment compensation proceedings. Peak; Chamoun. In addition, issues of credibility are for the Board which may either accept or reject a witness’s testimony whether or not it is corroborated by other evidence of record. Id. The Board was free to credit the foregoing evidence regarding Claimant’s version of the events and to discredit Employer’s evidence to the contrary. Peak; Chamoun. In addition, the Board’s findings are conclusive on appeal as they are supported by the foregoing substantial evidence. Taylor.

In short, the evidence found credible by the Board in this case demonstrates that Claimant did not violate the terms of her employment, or that she had good cause for doing so, and that she did not deal with the owner of the BMW dealership in an unprofessional manner, thereby negating any purported willful misconduct under Section 402(e) of the Law. McLean; Fruemento.<sup>7,8</sup>

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R [D]id you want to make a closing?

C I’m honest about it. I sent a copy of my return. I mean it’s not like I – I stayed down there during the week. So I mean, how many taxes could I have done if I stayed down there during the week? I didn’t have appointments at night or anything. Yes, I brought things to do back in the room with me but I – this seems to be the biggest thing is my income tax which income tax was way over by the time I got fired. So if that was an issue back then, that should have been brought up back then, which I don’t understand. There was no problem with it.

<sup>7</sup> See also Dincher v. Unemployment Compensation Board of Review, 502 A.2d 797, 800 (Pa. Cmwlth. 1986) (“[T]he Board erred in denying claimant benefits given their current posture that claimant did not call his employer a ‘liar’, since absent the element of abusive language, claimant’s behavior was not unreasonable under *Fruemento* and *Luketic* [*v. Unemployment Compensation Board of Review*, 386 A.2d 1045 (Pa. Cmwlth. 1978)]. See, e.g., *Balaschak v. Unemployment Compensation Board of Review*, [395 A.2d 638 (Pa. Cmwlth. 1978)] (mere talking  
(Continued....)

Accordingly, the order of the Board is affirmed.

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JAMES R. KELLEY, Senior Judge

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back to a supervisor absent abusive language is not willful misconduct for purposes of the [Law]). Consequently, the order of the Board is reversed and benefits are awarded.”); Bivins v. Unemployment Compensation Board of Review, 470 A.2d 662, 664 (Pa. Cmwlth. 1984) (“[W]e have held that an act constituting willful misconduct may not be the basis for a denial of unemployment compensation benefits if it is condoned or too remote in time from the discharge....”) (footnote omitted).

<sup>8</sup> However, that is not to say that Employer was not without a proper basis upon which to terminate Claimant’s employment. See, e.g., Pennsylvania State Police v. Unemployment Compensation Board of Review, 578 A.2d 1360, 1361 (Pa. Cmwlth. 1990) (“[T]he issue in a willful misconduct case is not whether the employer had the right to discharge the employee for the conduct in question but whether the Commonwealth is justified in reinforcing that decision by denying benefits under the [Law]. [*Frumento*].”).

