IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Erica M. Price,	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	No. 551 C.D. 2010
Respondent	:	Submitted: October 1, 2010

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: December 10, 2010

Erica Price (Claimant) petitions for review from 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 relevant facts, as initially found by the referee and adopted by the Board, are:

> 1. The claimant was employed full-time as a customer service representative for Delta Dental [Employer] of Pennsylvania from December 2003 through December 10, 2009, paid at the rate of $15.28 per hour.
>
> 2. The employer has a reasonable policy which provides that phone as [sic] strictly for business purposes and

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

all calls on business phones are monitored and recorded.

3. The employer's policy also provides that personal calls can only be made during approved break times or with the supervisor's approval.

4. The employer provides a phone in the break room for employees to use for personal calls with permission or employees may use their personal cell phone to make personal calls during their break time or lunch period.

5. The claimant was aware or should have been aware of the employer's policy.

6. On November 12, 2008, the claimant was placed on disciplinary probation for failure to perform her job functions and the disciplinary probation was removed as of February 10, 2009, however, under the employer's policy the disciplinary probation could be used for further discipline for twelve months since the last disciplinary probation.

7. On August 20, 2009, the claimant was placed on disciplinary probation for failing to perform her job functions which included making numerous personal phone calls during work hours on the employer's business phone.

8. The written warning informed the claimant that any further instances of failure to perform your [sic] job functions may result in discharge under Section 12(B)(3) of the collective bargaining agreement.

9. The employer continued to monitor the claimant's use of the employer's phone and discovered on September 1, 2, 3, and 4th, 2009, the claimant had made personal phone calls on the employer's business phone during her work hours in violations [sic] of the employer's policies.

10. The claimant was discharged for violating the conditions of her August 20, 2009, probationary

> written warning and failing to perform her job functions due to making numerous personal phone calls during her work hours.

Referee's Decision (Decision), November 20, 2009, Findings of Fact Nos. 1-10 at 1-2.

The referee determined:

> In this case, the employer has offered competent evidence that policies exist which prohibit employee [sic] from using the employer's phone for personal calls. The evidence of record further establishes that on August 20, 2009, the claimant was given a second written warning and placed on disciplinary probation for not performing her job functions due to making numerous personal phone calls on the employer's business phone. The warning also informed the claimant that any further violations of the employer's policies or her failure to perform her job functions would result in her discharge from employment. The evidence of record further establishes that the claimant violated her disciplinary probation by making personal phone calls on September 10, 2009, for violating the employer's policies regarding making personal phone calls on the employer's business phone and failing to perform her job functions. The burden now shifts to the claimant.
>
> In this case, the claimant has failed to justify her violations of the employer's policies regarding performing her job function and the prohibition against using the employer's business phones for personal calls on September 1, 2, 3, and 4, 2009. In addition, the claimant has provided no competent evidence to establish that the employer's work rules and policies were unreasonable. By using the employer's business phones for personal calls on September 1, 2, 3, and 4, 2009, the claimant was in direct violation of the employer's reasonable policies which prohibited the use of the employer's business phones for personal calls and as a result of making these calls during business hours, the

> claimant was failing to perform her job functions in violation of the employer's policies.

Decision at 2.

The Board concluded that "the determination made by the Referee is proper under the Unemployment Compensation Law and in accordance with precedent rulings established in the interpretation thereof and hereby adopts and incorporates, by reference, the Referee's findings and conclusions." Board's Order, March 15, 2010, at 1.

Claimant contends that the Board erred when it admitted testimony of Employer's witness over objection that the testimony violated the "best evidence" rule.[2] Claimant also contends that the Board erred in finding that Claimant engaged in willful misconduct where the employer failed to follow it's progressive disciplinary plan.

Jennifer Raup (Ms. Raup), the human resources business partner for Employer, testified credibly regarding Claimant's discharge:

> **[Referee (R)]:** Can you explain why the Claimant was discharged, why the Employer considers the reason for that discharge to be willful misconduct in connection with the Claimant's work?
>
> **[Ms. Raup (EW)]:** Sure. This actually dates back to July 2 of 2008, where we did begin talking to Ms. Price

[2] This Court's review in an unemployment compensation 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).

> regarding failure to perform job functions. And the end result, on September 10, summarized that she did indeed have personal phone calls, as well as having a client on the phone on hold for over four minutes, while she had personal conversations. The fact that we know this is because she does work in a call center environment where we do have policies regarding personal phone calls, use of company phones during work time…
>
> **[R]:** And what are those policies?
>
> **[EW]:** Well, that the phones are strictly for business purposes, that all of the calls coming in to or out of those phones are recorded, for quality purposes and monitoring. There are schedules that need to be adhered to while in the call center environment. There are break times that are given, and those breaks need to be adhered to so that the coverage is on the phones for the clients the entire time that they're scheduled to be there. So, those would be the surrounding policies that were violated here.

Notes of Testimony (N.T.), November 12, 2009, at 7.

Rule 1002 of the Pennsylvania Rules of Evidence, commonly referred to as the "Best Evidence Rule," (BER) provides that, "[t]o prove the *content* of a writing, *recording*, or photograph, the original writing, recording, or photograph is required, except as otherwise required in these rules…." Pa. R.E. 1002 (emphasis added).[3] Claimant argues that Ms. Raup's testimony summarizing the content of the recorded conversations violated the BER. However, "application of the rule is limited to those situations where the *content* of the document are at issue and must be proved to make a case or provide a defense." Hammill-Quinlan, Inc. v. Fisher,

[3] Under Administrative Agency Law, Commonwealth agencies shall not be bound by the technical rules of evidence at agency hearings. See Pinnacle Health System v. Department of Public Welfare, 942 A.2d 189 (Pa. Cmwlth. 2008).

591 A.2d 309 (Pa. Super. 1991). Ms. Raup's testimony was offered to prove Claimant violated Employer's policy prohibiting the use of business phones for personal calls- *not* to prove the contents of the recording. Furthermore, Claimant did not offer testimony to dispute the personal nature of these calls or counter Ms. Raup's characterization of these calls as personal.

Claimant also contends that Employer failed to follow its progressive disciplinary plan because taking excessive breaks and making personal phone calls in violation of Employer's policy did not constitute a "failure to perform job functions." Claimant's Brief at 11-13. Claimant contends that her violations constituted separate behaviors and that, as such, she should have been provided a written warning prior to being placed back on disciplinary probation.

Whether a claimant's conduct rises to the level of willful misconduct is a question of law subject to this Court's review. Lee Hospital v. Unemployment Compensation Board of Review, 589 A.2d 297 (Pa. Cmwlth. 1991). Willful misconduct is defined as conduct that represents a wanton and willful disregard of an employer's interest, deliberate violation of rules, disregard of standards of behavior which an employer can rightfully expect from the employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer's interest or employee's duties and obligations. Frick v. Unemployment Compensation Board of Review, 375 A.2d 879 (Pa. Cmwlth. 1977). The employer bears the burden of proving that it discharged an employee for willful misconduct. City of Beaver Falls v. Unemployment Compensation Board of Review, 441 A.2d 510 (Pa. Cmwlth.

1982). The employer bears the burden of proving the existence of the work rule and its violation. Once the employer establishes that, the burden then shifts to the claimant to prove that the violation was for good cause. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985).

Employer's progressive disciplinary procedure for employees such as Claimant is found in its Collective Bargaining Agreement. Claimant's Exhibit No. 1. This procedure provides for written warnings and probation, followed by discharge. Claimant's Exhibit No. 1, Section 12(B)(1) of the Collective Bargaining Agreement, Certified Record (C.R.), Item No. 9 at 20. In applying the steps of progressive discipline "warnings and periods of disciplinary probation shall not be considered after twelve (12) months from the date of a notice of warning or the date disciplinary probation is ended, *if there are no warnings or probations concerning the same type of misconduct in the intervening period."* Section 12(B)(4)(emphasis added) of the Collective Bargaining Agreement, C.R., Item No. 9 at 20.

Ms. Raup's testimony credibly established that Claimant was aware of Employer's policies when she began her employment and that a copy of additional policies concerning call center employees was provided by the supervisory staff and reviewed with the employees. Ms. Raup also credibly described Employer's progressive disciplinary plan:

> **[EW]:** I'd just like to support the fact that we did follow our proper procedures for handling disciplinary situations. I have read Ms. Price's explanation of how she felt that we did not follow those procedures. And I do want to point out that I mentioned back on July 2,

2008, we started the process by issuing a written caution to Ms. Price for her failure to perform job functions. This was not considered disciplinary action, but it is a first step in talking to an employee, to point out the deficiency and what they need to improve upon. Otherwise, it does state that we would begin the disciplinary process…

….

July 2, 2008, caution notice. That shows it was regarding a failure to perform job functions and content described within.

….

The second one is an August 15, 2008 warning letter, which is headed "Section 12 - - Warning Section 12", is the collective bargaining agreement section that the disciplinary steps are described under, so this would be the warning for the failure to perform her job functions that she received. The third one is November 12, 2008 date, which is a section 12 disciplinary probation to Ms. Price for, again, her failure to perform job functions and that content within…

….

February 10, 2009 was a removal from that section 12 disciplinary probation to Ms. Price, stating that she was successfully removed from her probation. However, if the problem noted in that probation was violated again, she could be put immediately back on probation for that issue without prior warning to that. So thereafter, then it was the August 20, 2009 section 12 disciplinary probation letter that she had received, and she did sign that letter on that date.

….

If I may further explain that the removal from the disciplinary probation on February 10 - - it did remind - - it reminds the employee that, according to section 12b, for the collective bargaining agreement, the problem noted remains in your file for 12 months, during which it may be considered in the imposition of disciplinary procedures under section 12b. So that is our standard policy. Within one year - - which in August - - August 20, when she received her second disciplinary probation - - she was, indeed, within the one year of being removed from her last probation for failure to perform job

> functions; thus, the reason it did not require a new warning be issued prior to that probation.

N.T. at 8- 12.

Essentially, Claimant is challenging the credibility of Employer's witness and quality of Employer's evidence, in other words, Claimant is attacking the factfinding and the weight accorded to the evidence by the Board. As noted by the Referee, as adopted by the Board, Claimant:

> [H]as failed to justify her violations of the employer's policies regarding performing her job function and the prohibition against using the employer's business phones for personal calls… Such violations by the claimant demonstrate a disregard of the standards of behavior that an employer has the right to expect of an employee and are considered willful misconduct within the meaning of the provisions of Section 402(e) of the Law.

Decision at 2.

In unemployment compensation proceedings, the Board is the ultimate factfinding 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). This Court will neither reweigh the evidence nor accept a version of the facts the Board rejected.

Accordingly, the decision of the Board is affirmed.

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BERNARD L. McGINLEY, Judge

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O R D E R

AND NOW, this 10th day of December, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge