

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Patricia J. Geyer, :
Petitioner :
 :
v. : No. 832 C.D. 2010
 : Submitted: October 1, 2010
Unemployment Compensation :
Board of Review, :
Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: January 19, 2011

Patricia Geyer (Claimant) petitions for review of an adjudication of the Unemployment Compensation Board of Review (Board) denying her claim for unemployment compensation benefits for reason of Claimant’s willful misconduct. In doing so, the Board affirmed the decision of the Referee that Claimant was ineligible for benefits under Section 402(e) of the Unemployment Compensation Law (Law).¹ Claimant asserts that the Board erred in denying her benefits because Employer waited thirteen months to dismiss her for her willful misconduct. Concluding that Employer adequately explained its delay in acting, we affirm.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e). It provides, in relevant part, that “[a]n employe shall be ineligible for compensation for any week ... [i]n which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work.” 43 P.S. §802(e).

Claimant was employed as a claims processor for United Healthcare Services (Employer) from June 2006 through November 2009. Employer has an alcohol and drug policy that prohibits employees from “[u]sing, possessing, distributing, manufacturing, transporting, selling or being under the influence of alcohol or an illegal or illicit drug while on duty, on company work sites, or in company vehicles or in personal vehicles used for company business.” Certified Record (C.R.____) Item No. 9, Employer’s Exhibit 4, at 20. Employer’s policy specifically prohibits an employee from “having a detectable amount of an illegal drug in the blood or urine” while at the workplace. C.R. Item No. 9, Employer’s Exhibit 3, at 1.

On October 3, 2008, Claimant was involved in an automobile accident while on her lunch break. Claimant was taken to the hospital in an ambulance. At the scene of the accident, the police found marijuana and drug paraphernalia under the seat of Claimant’s car. At the hospital, Claimant tested positive for the use of marijuana. Claimant was charged with possession of marijuana and drug paraphernalia as well as driving while under the influence of a controlled substance.

After recovering from her injuries, Claimant returned to work on December 24, 2008. On October 9, 2009, a full year after the accident, Claimant was accepted into the Accelerated Rehabilitative Disposition (ARD) program, the terms of which imposed a 60-day suspension of her driver’s license and 15 months of probation. On November 2, 2009, Employer discharged Claimant for violating its policy against drugs in the workplace.

Claimant applied for unemployment compensation benefits. In the Employer Questionnaire submitted to the Indiana UC Service Center, Employer

stated that Claimant denied she was the same person identified in a newspaper report as having been charged with drug possession following the accident. Employer further stated that Claimant “finally admitted the incident” to Employer in October 2009, after she “was convicted.” C.R. Item No. 3, at 1. The Indiana UC Service Center determined that she was ineligible for benefits under Section 402(e) of the Law, 43 P.S. §802(e), and that Employer’s 13-month delay in terminating Claimant was due to Claimant’s untruthfulness. Claimant appealed and a hearing was held before the Referee on January 14, 2010.

At the hearing, Employer presented the testimony of Dawn Pany. She testified that a local newspaper article, dated December 18, 2008, reported that a “Patricia Geyer” had waived her right to a preliminary hearing on charges of drug possession and driving under the influence. When confronted, Claimant denied that she was the subject of the article, claiming that “it was somebody else.” Notes of Testimony, 1/14/10, at 8 (N.T.____). Pany explained that Employer decided to wait until Claimant “was actually convicted of the crime” as the way to confirm that Claimant was the person identified in the newspaper article. N.T. at 9.²

Pany explained that Employer’s drug and alcohol policy is a “no tolerance policy.” N.T. at 12. Claimant knew of the policy because all employees attend courses that review all employment policies. Claimant was discharged on November 2, 2009, after the human resources department received notification of Claimant’s ARD disposition. Employer’s stated reason for termination was

² Pany referred to Claimant’s acceptance into the ARD program as her “conviction.” This is incorrect. An ARD is not a conviction under the Pennsylvania Rules of Criminal Procedure; however, we note that it may be statutorily construed as a conviction for purposes of computing sentences on subsequent convictions. PA. R.CRIM.P. 312, cmt.

Claimant's violation of Employer's drug policy and her untruthfulness regarding the October 3, 2008, incident.

Upon cross-examination, Pany acknowledged that Employer's drug and alcohol policy does not provide, specifically, that an employee will be terminated for violating the rule. According to Pany, even after Claimant notified her of the criminal proceedings, she maintained her innocence, continuing to assert that the person in the newspaper article "was not her." N.T. at 18. For this reason, Employer did not terminate Claimant until it received the proper documentation, *i.e.*, Claimant's ARD disposition.

Claimant testified that she notified Employer of the pending drug charges in early January 2009. Specifically, she provided Employer with a document from the Pennsylvania Department of Transportation (PennDOT) and another from her physician indicating she may have a substance abuse problem. She later provided Employer with a May 2009 letter from her attorney regarding her upcoming ARD hearing. Claimant stated that she was unaware that she was in jeopardy of losing her job, particularly because her monthly evaluations had been positive in nature. Claimant denied telling Employer that she was not the person mentioned in the newspaper article.

On cross-examination, Claimant admitted that the marijuana and paraphernalia were under her car seat while it was parked in Employer's parking lot. She further admitted that she tested positive for marijuana, stating that she had used marijuana approximately two weeks before the accident.³ Claimant explained

³ Claimant further explained that she was told at the hospital that marijuana remains detectable in one's body for up to 30 days after use.

that she used marijuana on occasion for its calming effect and kept the marijuana in her car because she did not want her son to find it in the house.

On rebuttal, Pany refuted Claimant's statement that Claimant had provided her with the notices from PennDOT, from her physician or from her attorney. She further stated that Claimant was aware that disciplinary action was pending with the human resources department, depending on the outcome of the criminal case.

The Referee did not make a specific finding on whether Claimant initially lied to Employer, stating only that Claimant, at some point, "made [Employer] aware of the various legal proceedings related to her charges." Referee's Decision at 2, Finding of Fact No. 12 (FOF____). The Referee found that Employer discharged Claimant upon "receiving notification of the final disposition of the drug related charges." *Id.*, FOF No. 15.⁴ The Referee further found that Claimant was aware that she had violated Employer's policy against drugs in the workplace, stating that Claimant "had marijuana in her possession at work and ... a detectible amount of marijuana was found in her system on October 3, 2008." Referee's Decision at 2. The Referee concluded, therefore, that Claimant had violated Employer's rule without good cause and was ineligible for

⁴ Claimant contends that the Board's finding that ARD was the "final disposition" of Claimant's drug-related charges was not supported by substantial evidence. It is true that acceptance into the ARD program is not a final disposition; however, the inclusion of the word "final" was harmless error on the part of the Board since it does not affect the outcome of Claimant's case. Employer awaited Claimant's ARD disposition in order to verify that Claimant had violated Employer's work rule, rather than whether Claimant had accepted a plea or was adjudicated guilty. When Claimant acknowledged that she stored marijuana under the seat of her vehicle while it was on Employer's property and that she worked while under the influence of marijuana, this was all Employer needed. Thus, Claimant's argument that the Board's finding is not supported by substantial evidence is without merit.

benefits by reason of her willful misconduct. Claimant appealed, and the Board affirmed, adopting the Referee's findings and conclusions. Claimant now petitions for this Court's review of the Board's adjudication.

On appeal,⁵ Claimant contends that her conduct was too remote in time from her discharge to render her ineligible for benefits. The Board counters that the remoteness doctrine does not apply here because it was reasonable for Employer to await the disposition of the criminal charges to determine whether Claimant had violated its work rule.

Whether a claimant's conduct constituted willful misconduct is a question of law subject to this Court's review. *Glatfelter Barber Shop v. Unemployment Compensation Board of Review*, 957 A.2d 786, 792 (Pa. Cmwlth. 2008). Willful misconduct has been judicially defined as, *inter alia*, a deliberate violation of the employer's rules. *Ruiz v. Unemployment Compensation Board of Review*, 887 A.2d 804, 807 (Pa. Cmwlth. 2005). Where a work rule violation is alleged, employer has the burden of establishing the existence of the rule and its violation. *Id.* Once the employer establishes those elements, the burden shifts to the claimant to show that he had good cause to violate the rule or that the rule was unreasonable. *Bishop Carroll High School v. Unemployment Compensation Board of Review*, 557 A.2d 1141, 1143 (Pa. Cmwlth. 1989).

Here, Claimant acknowledged that she was aware of Employer's drug policy. She admitted having marijuana in her car at work; that her blood tested positive for marijuana on October 3, 2008; and that she had used marijuana two

⁵ This Court's scope of review in an unemployment compensation case is limited to determining whether constitutional rights were violated, whether an error of law has been committed, or whether necessary findings of fact are supported by substantial evidence. *Blue v. Unemployment Compensation Board of Review*, 616 A.2d 84, 86 n.4 (Pa. Cmwlth. 1992).

weeks before the accident. These admissions establish a violation of Employer's policy against drugs in the workplace. Accordingly, the burden shifted to Claimant to show that she had good cause to violate the rule or that the rule was unreasonable. Claimant did not claim that she had good cause to violate Employer's rule, nor did she claim that the rule was unreasonable. In short, Employer proved that Claimant engaged in willful misconduct without good cause.

Claimant asserts that the remoteness doctrine bars Employer from opposing her application for benefits. However, that doctrine applies where the employer cannot explain its delay in acting upon a claimant's misconduct. *Raimondi v. Unemployment Compensation Board of Review*, 863 A.2d 1242, 1247 (Pa. Cmwlth. 2004). The Board argues that the remoteness doctrine does not apply here because Employer has explained the delay. We agree with the Board.

In *Raimondi*, 863 A.2d 1242, the claimant, a meter reader, was required to work eight hour shifts, from 8:00 a.m. to 4:00 p.m., and to refrain from conducting personal business on company time. Meter readers who finished a route in fewer than eight hours were required to perform other duties for the duration of the eight-hour shift. An investigator discovered that the claimant had concluded his assigned route at 1:00 p.m. and then engaged in personal business for the rest of the work day. After the investigator completed his two-day surveillance of each of the seventeen meter readers, the employer viewed the surveillance footage and initiated an administrative review process, which resulted in a 74-day delay between the claimant's misconduct and his discharge. This Court found that the employer's need to verify the employee's misconduct and to determine the appropriate disciplinary measure was a valid reason for delay.

On the other hand, in *Tundel v. Unemployment Compensation Board of Review*, 404 A.2d 434 (Pa. Cmwlth. 1979), the employer could not explain its delay. In *Tundel*, the claimant, a counselor at an institution housing juvenile delinquent males, admitted to sleeping on the job and was fired 25 days later. The employer provided no explanation for the delay, and the incident was found too remote in time to support a finding that the claimant was discharged for willful misconduct.

In *Letterkenney Army Depot v. Unemployment Compensation Board of Review*, 648 A.2d 358 (Pa. Cmwlth. 1994), we clarified that the remoteness doctrine does not turn solely on the length of time it takes an employer to act. In *Letterkenney*, a claimant was found with illegal drugs at his workplace and immediately entered a rehabilitation center. After the claimant's release from rehabilitation, 17 days later, the employer allowed the claimant to work in a different position while it awaited laboratory results on the seized drugs and, thereafter, determined appropriate disciplinary action. Despite a delay of 50 days between the employee's misconduct and his discharge, we found that the remoteness doctrine did not apply given all the circumstances.

Finally, we review *Department of Transportation v. Unemployment Compensation Board of Review*, 755 A.2d 744 (Pa. Cmwlth. 2000). There, the claimant's misconduct occurred in 1995. However, the employer did not discover the problem until 1998 and then confirmed the misconduct after completing a seven-month investigation. We found that Employer adequately explained the delay.

In this case, Employer discharged Claimant 13 months after she violated the work rule. Employer gave Claimant the benefit of the doubt while it

awaited the disposition of the drug-related charges. However, upon receiving documentation that Claimant had been accepted into the ARD program, Employer concluded that it had grounds to find, definitively, that Claimant had violated Employer's rule against drugs in the workplace. Confirmation occurred with Claimant's entry into ARD. Claimant knew that disciplinary action was pending with human resources, depending on the outcome of her case. Consistent with *Letterkenney*, Employer was entitled to deliberate on the appropriate disciplinary action once the misconduct had been confirmed.⁶

For the foregoing reasons, we affirm the Board's order denying Claimant benefits.

MARY HANNAH LEAVITT, Judge

⁶ Claimant also complained that Employer waited 20 days after being notified of Claimant's ARD disposition to discharge her. Employer explained that communications between Claimant's supervisors and its human resources personnel occurred during this time, resulting in the decision to terminate Claimant's employment.

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ORDER

AND NOW, this 19th day of January, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter, dated April 6, 2010, is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge