

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 0092

ST. TAMMANY PARISH SHERIFF

VERSUS

ADMINISTRATOR, LOUISIANA WORKFORCE COMMISSION
AND MARICHEN FACIANE

DATE OF JUDGMENT: SEP 21 2012

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2011-13816, DIVISION "A", PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE RAYMOND S. CHILDRESS, JUDGE

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BEFORE: KUHN, PETTIGREW, AND MCDONALD, JJ.

Disposition: AFFIRMED.

McDonald, J. dissents

KUHN, J.

Appellant, the St. Tammany Parish Sheriff's Office (STPSO), appeals a district court judgment affirming a decision of the Board of Review¹ upholding a determination that claimant, Marichen Faciane, was not disqualified from receiving unemployment insurance benefits. For the following reasons, we affirm.

FACTS

Ms. Faciane worked as a collection clerk/administrative deputy for the STPSO from May 1, 2006, until her termination on July 16, 2010. Her duties included the collection of fines and court costs. On July 14, 2010, Ms. Faciane's cash drawer was \$50.00 short. In accordance with her employer's policy, she repaid the \$50.00 shortage. According to Ms. Faciane, this incident was only the second time in over four years that her cash drawer was short.

On that same date, another incident occurred that involved a bank deposit being returned because of error on the deposit slip prepared by Ms. Faciane. Ms. Faciane explained that she had actually prepared two deposits and had mixed up the deposit slips. After correcting the deposit slip, the deposit was returned to the bank.

The following day, Ms. Faciane was nervous due to the shortage the preceding day so she approached her supervisor and asked her to count some money from Ms. Faciane's cash drawer, in order to ensure her deposit was correct. After her supervisor counted \$150.00, Ms. Faciane indicated she had thought it was \$150.00. At that point, the supervisor asked Ms. Faciane if she had counted the money first. Ms. Faciane initially stated that she had, but then almost immediately said, "oops, I'm lying, no." According to Ms. Faciane, she did not

¹ The Board of Review is within the Office of Unemployment Insurance Administration in the Louisiana Department of Labor. See La. 23:1651 & 1652.

mean by the latter statement that she was actually lying, but that it was merely “an expression” she used to indicate she had spoken too quickly and was correcting herself. The next day, July 16, 2010, Ms. Faciane was terminated by the STPSO for the stated reasons of violating office policies and procedures by engaging in dishonest or immoral conduct that undermined the agency’s effectiveness, job inefficiency and inadequate or unsatisfactory job performance.

Thereafter, Ms. Faciane applied for unemployment insurance benefits with the Louisiana Workforce Commission (LWC), which determined that she was discharged for inability to meet her employer’s requirements and that she was not guilty of misconduct within the meaning of La. R.S. 23:1601(2). The STPSO appealed that decision and, after a telephonic hearing, the administrative law judge (ALJ) upheld the agency’s determination. Thereafter, the STPSO appealed to the Board of Review, which adopted the ALJ’s findings of fact and conclusions of law as its own and upheld the determination of Ms. Faciane’s eligibility for benefits. Finally, the STPSO filed a petition for judicial review in the district court, which affirmed the decision of the Board of Review. The STPSO now appeals to this Court, arguing in four assignments of error that the district court erred in upholding the administrative decision of the LWC.

DISCUSSION

On appeal, the STPSO argues that an incorrect standard was applied in determining that Ms. Faciane was not culpable of “misconduct” within the meaning of La. R.S. 23:1601(2), which provides that an employee discharged for “misconduct connected with his employment” is disqualified from receiving benefits. Additionally, the STPSO contends that the findings of fact made in this case were not supported by sufficient competent evidence and did not, as a matter of law, justify the LWC’s administrative decision, because the findings were based

on Ms. Faciane's self-serving testimony and completely ignored the testimonial and documentary evidence it presented. The STPSO asserts that its evidence clearly established by a preponderance of the evidence that Ms. Faciane was discharged for misconduct consisting of dishonesty (i.e., lying to her supervisor about counting her money), job inefficiency, and inadequate or unsatisfactory job performance.

When an employer seeks to deny unemployment benefits because of employee misconduct, the burden of proof is on the employer to establish such misconduct.² *Fontenet v. Cypress Bayou Casino*, 06-0300 (La. App. 1st Cir. 6/8/07), 964 So.2d 1035, 1037. Further, upon appeal of cases arising under the Louisiana Employment Security Law, the scope of appellate review is limited to determining whether the facts are supported by sufficient and competent evidence and, in the absence of fraud, whether the facts, as a matter of law, justify the action taken. La. R.S. 23:1634(B); *Fontenet*, 964 So.2d at 1038. Judicial review of the findings of the Board of Review does not permit the weighing of evidence, drawing of inferences, reevaluation of evidence, or substituting the views of the court for that of the Board of Review as to the correctness of the facts presented. *Gonzales Home Health Care, L.L.C. v. Felder*, 08-0798 (La. App. 1st Cir. 9/26/08), 994 So.2d 687, 690-91, writ not considered, 08-2568 (La. 1/9/09), 998 So.2d 730.

In concluding that Ms. Faciane was entitled to benefits, the ALJ made the following findings:

Claimant's drawer was short, she made an error on a bank deposit and she inadvertently stated to her supervisor that she had counted the

² Louisiana Revised Statutes 23:1601(2) provides that an individual is disqualified for benefits if he is discharged for "misconduct connected with his employment." Further, this provision defines "misconduct" to mean "mismanagement of a position of employment by action or inaction, neglect that places in jeopardy the lives or property of others, dishonesty, wrongdoing, violation of a law, or violation of a policy or rule adopted to insure orderly work or the safety of others."

money in her drawer. Although each instance caused the employer dissatisfaction, and occurred with [sic] days of each other, there is no evidence of intentional wrong doing by the claimant or a deliberate disregard for the employer's interest. Claimant's errors do not rise to the level of misconduct which would deny benefits.

The STPSO's contention that the ALJ applied an incorrect standard in determining that Ms. Faciane was not culpable of misconduct is based on the ALJ's statement that "there is no evidence of intentional wrong doing by the claimant or a deliberate disregard for the employer's interest." This finding, as well as the ALJ's other factual findings and legal conclusions, was later adopted by the Board of Review.

As the STPSO correctly points out, this Court held in *Fontenet*, 964 So.2d at 1038-41, that the amendment of La. R.S. 23:1601(2) in 1990 to include a statutory definition of "misconduct" supplanted the prior jurisprudential standard of "misconduct" that required a intentional breach of the employer's rules or policies or a wanton disregard of the employer's interest. Nevertheless, we do not find the fact that the ALJ made a factual finding regarding Ms. Faciane's lack of intent or deliberate disregard of her employer's interest to be sufficient to conclude that she applied an incorrect standard in determining whether misconduct existed. The STPSO's argument to the contrary ignores the fact that the ALJ specifically quoted the statutory definition of "misconduct" in her written decision, indicating her awareness thereof.

In any event, the decision before this Court on appeal is that of the district court, not the ALJ. In its written reasons for judgment, the district court also quoted the statutory definition of misconduct provided by La. R.S. 23:1601(2) before concluding that the findings of fact and ruling before it on review were correct as a matter of law. Accordingly, we find the STPSO's argument lacks merit.

Additionally, the STPSO contends that the administrative decision that Ms. Faciane was qualified to receive benefits is erroneous as a matter of law based on this Court's decision in *Fontenet*. We disagree. A determination as to whether an individual is guilty of misconduct disqualifying him from benefits is dependent upon the facts of each particular case. Of course, there is a similarity between *Fontenet* and the present case in the respect that both involved claimants responsible for a cash drawer who had incidents when their cash balances were incorrect. However, whereas the record herein only sufficiently establishes that Ms. Faciane had one prior incident of a shortage before the one occurring on July 14, 2010, the claimant in *Fontenet* had had at least four "variations that occurred in her balances" and ten "shortages in her cash balances totaling over \$200" prior to the incident resulting in her discharge. In addition to a prior suspension for variations in her cash balances, Fontenet also received a final warning regarding her employment and was placed on probation approximately six weeks prior to the final violation of her employer's policies. Thus, this Court concluded the evidence was sufficient to support the Board of Review's factual finding "that Fontenet's performance established a pattern of violations of Cypress Bayou's rules/policies in regard to cash handling and related work issues" that constituted "misconduct" as defined by La. R.S. 23:1061(2). *Fontenet*, 964 So.2d at 1041.

However, the factual findings made in the present case reflect no such pattern of violations by Ms. Faciane. Nor would the record support such a

finding.³ Additionally, unlike the claimant in *Fontenet*, Ms. Faciane was not given the benefit of a final warning and placed on probation prior to the last incident that occurred on July 15, 2010. Instead, she was given a warning and placed on probation for one year regarding the July 14 incident at the same meeting at which she was terminated, which rendered the purported warning and probation meaningless. Therefore, since *Fontenet* is factually distinguishable from the present case, no conflict exists between its holding that Fontenet was disqualified from receiving benefits due to misconduct and the administrative decision in this case that Ms. Faciane was not.

Under La. R.S. 23:1634(B), the factual findings of the Board of Review must be upheld upon judicial review, if supported by sufficient evidence. Contrary to the SPTSO's contention that Ms. Faciane's testimony was insufficient, this Court has held that a claimant's sworn testimony alone may constitute sufficient evidence to meet the requirements of La. R.S. 23:1634(B). See *Gonzales Home Health Care*, 994 So.2d at 693. The factual findings made in this case indicate that Ms. Faciane's testimony was accepted as credible, including her explanation that she merely misspoke and did not mean that she had intentionally lied when she made the "oops, I'm lying" statement to her supervisor.

³ Although the STPSO alleges in brief that Ms. Faciane had been reprimanded and counseled regarding "numerous violations" of its policies in addition to the incidents on July 14 and 15, 2010, it only listed one incident involving insubordination, as well as an incident involving a prior shortage that Ms. Faciane admitted. Furthermore, while those two incidents and one other involving a shortage were referred to by a witness for the STPSO at the ALJ hearing, the witness did not claim any personal involvement in the incidents and no documentation thereof was provided, even though the ALJ gave permission for the record to be supplemented. Additionally, none of the incidents referred to by the STPSO were cited as a basis for Ms. Faciane's termination at the time that she was discharged. Given these circumstances, and in view of the administrative findings made, the record does not support the STPSO's claim of numerous prior violations by Ms. Faciane.

On appellate review, this Court is not permitted to reweigh the evidence or substitute its views for that of the Board of Review as to the correctness of the facts. *Gonzales Home Health Care*, 994 So.2d at 691.

Accordingly, based on our careful review of the record, we find that the factual findings of the ALJ and the Board of Review are supported by sufficient and competent evidence. Moreover, as a matter of law, those findings justify the Board of Review's decision that Ms. Faciane was not discharged for misconduct within the meaning of La. R.S. 23:1601(2). See La. R.S. 23:1634(B). Therefore, the district court properly affirmed the Board of Review's decision.

CONCLUSION

For the reasons assigned, the decision of the district court affirming the decision of the Board of Review is hereby affirmed. The STPSO is assessed with all costs of this appeal in the amount of \$595.97.

AFFIRMED.