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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1329

Filed: 18 December 2018

New Hanover County, No. 17 CVS 1737

DARNELL SIMMONS, Petitioner,

v.

NEW HANOVER COUNTY SCHOOL SYSTEM, Employer, and NORTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF EMPLOYMENT SECURITY, Respondent.

Appeal by Petitioner from order entered 5 September 2017 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 7 August 2018.

Darnell Simmons, pro se, petitioner-appellant.

North Carolina Department of Commerce, Division of Employment Security, Legal Services Section, by Regina S. Adams and R. Glen Peterson, for respondent-appellee.

MURPHY, Judge.

Darnell Simmons (“Simmons”), a school bus driver, was discharged by her employer for conduct arising out of an incident where she repeatedly ignored instructions to pull the school bus into a safe area, operated the school bus while

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having a drink in one hand, failed to follow railroad crossing procedure, and left the children at the school with a School Resource Officer. Simmons was disqualified from receiving unemployment benefits as the Employment Security Division determined that she was discharged for misconduct related to the work.

Where an employee deliberately violates or disregards the standards of behavior that an employer has the right to expect of an employee and that employee's actions were not reasonable or taken with good cause, we uphold the Employment Security Division Board of Review's finding of misconduct connected to the work. We similarly uphold the Board of Review's conclusion that a claimant was afforded procedural due process when this conclusion is justified by findings of fact based on competent evidence. Accordingly, we modify and affirm the Superior Court in upholding the Board of Review's decision.

BACKGROUND

On 5 January 2017, Simmons was employed as a bus driver with the New Hanover County School System. While on duty and driving a school bus from New Hanover High School, a passenger-student opened the back emergency exit door of the school bus. Simmons radioed her supervisor, Deena Henan, who instructed Simmons to find a safe place to pull the school bus over and that a police officer would be sent to that location to assist Simmons. Henan stated, "As soon as this child started giving her problems, she should have pulled over and let us get somebody to

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her.” Instead, Simmons stated that “it is not safe for me to drive like this” and determined that it would “be better for he[r] to return to the school.” The passenger-student then opened the back emergency exit door a second time for about 30 seconds. Another student had to prevent the passenger-student from falling out of the school bus. Simmons again continued driving and did not pull the school bus over. The passenger-student returned to the emergency exit door a third time, opened the door, and jumped out while the bus was stopped at a traffic light.

Simmons was instructed three times to pull the school bus over into a safe area to wait on assistance, but she instead drove the school bus back to New Hanover High School. Once Simmons returned to the school, she told the School Resource Officer to “take the kids and do . . . whatever you want to with them because I’m not taking them home.” No administrator was at the school, and another bus driver had to be enlisted to drive the students home. Some students did not return home until approximately 6:30 P.M.

A video recording from the school bus on 5 January further revealed that, while Simmons was driving during the incident, she held the wheel with one hand and a drink in the other hand. Henan testified that it is school policy that drivers are to have both hands on the wheel. Moreover, the video depicted Simmons failing to look both ways when she approached a railroad crossing. Henan also testified to the school’s policy that drivers are to stop, open the bus door, and listen and look both

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ways at a railroad crossing. Accordingly, Simmons was discharged for continuing to drive the school bus back to the school after being instructed three times to pull over into a safe area, failure to keep both hands on the wheel, and failure to follow procedure when stopping at a railroad crossing.

Simmons applied for unemployment benefits from the North Carolina Department of Commerce, Division of Employment Security. An Employment Security Adjudicator determined on 10 February 2017 that Simmons was discharged from employment for misconduct connected with the work, thus disqualifying her from receiving unemployment benefits. The Appeals Referee affirmed the Adjudicator's determination on 10 March 2017 after a hearing. After appealing the Referee's determination to the Board of Review, Simmons called the Employment Security Division on 28 March 2017. An Employment Security Division employee noted Simmons's complaint that "she ask [sic] some people on her job to be witnesses [at the Referee hearing] but the employer told them no so she requested a new hearing." On 13 April 2017, the Board of Review affirmed the Referee's Decision and concluded that Simmons was afforded procedural due process. Simmons then filed a petition for judicial review to New Hanover County Superior Court. The Superior Court, in turn, affirmed the Board of Review's decision holding that Simmons was disqualified to receive unemployment benefits and concluded that Simmons failed to raise her "fraud and inability to call witnesses" claims at the Board of Review,

depriving the Board from an opportunity to rule on the claims. Plaintiff timely appealed the Superior Court decision.

ANALYSIS

A. Termination for Misconduct

Simmons argues on appeal that the Superior Court erred in affirming the Board of Review's conclusion that she was discharged for misconduct connected with the work and was therefore disqualified from receiving unemployment benefits. We disagree.

“The standard of review in appeals from the [Employment Security Division], both to the superior court and to the appellate division, is established by statute.” *Binney v. Banner Therapy Products, Inc.*, 362 N.C. 310, 315, 661 S.E.2d 717, 720 (2008). “In any judicial proceeding under this section, the findings of fact by the Division, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law.” N.C.G.S. § 96-15(i) (2017). “A determination that an employee has engaged in misconduct under [N.C.G.S. § 96-14.6] is a conclusion of law[,]” and we review questions of law de novo. *Bailey v. Div. of Emp't. Sec.*, 232 N.C. App. 10, 11, 753 S.E.2d 219, 221 (2014).

Generally, a claimant is presumed to be entitled to unemployment benefits. *Intercraft Indus. Corp. v. Morrison*, 305 N.C. 373, 376, 289 S.E.2d 357, 359 (1982).

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The burden is on the employer to rebut this presumption with a showing of “circumstances which disqualify the claimant.” *Id.* Under N.C.G.S. § 96-14.6, an individual terminated for “misconduct connected with the work” is disqualified from receiving unemployment benefits. N.C.G.S. § 96-14.6(a) (2017). Misconduct under the statute may be either:

(1) Conduct evincing a willful or wanton disregard of the employer’s interest as is found in deliberate violation or disregard of standards of behavior that the employer has the right to expect of an employee or has explained orally or in writing to an employee.

(2) Conduct evincing carelessness or negligence of such degree or recurrence as to manifest an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to the employer.

N.C.G.S. § 96-14.6(b) (2017). “[V]iolation of a work rule is not wilful misconduct if the evidence shows that the employee’s actions were reasonable and were taken with good cause.” *Intercraft*, 305 N.C. at 375, 289 S.E.2d at 359. Our Supreme Court has defined “good cause” as “a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work.” *Id.* at 376, 289 S.E.2d at 359.

The Board of Review made the following relevant findings of fact:

4. Employer has in place procedures to ensure the safety of students riding the school buses. Employer’s procedures states [sic] that should a problem arise involving students on the bus, the driver is to “find a safe location and pull over to get the situation resolved.”

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5. On or about January 5, 2017, claimant was driving the school bus when a student on the bus opened the back emergency exit door. The claimant was unable to pull off the road at that moment and by the time the claimant reached an area where the bus could be pulled off the road, the student had closed the door again. Rather than pulling off the road once she reached a safe location to do so, claimant continued driving the bus. The student then opened the back emergency exit door again and had to be caught by another student to keep from falling out of the bus. The claimant again did not pull off the road to resolve the situation. The student then approached the front of the bus and began kicking the front door and then returned to the back door, opened the door and jumped out of the bus while the bus was stopped at a traffic light. At some point during the incident, claimant radioed her supervisor and reported that she [sic] a student was opening the back door, but claimant did not at any time pull the bus off the road to handle the situation.

6. When claimant contacted her supervisor, Deena Henan, employer's Coordinator, to report the issue with the student, Henan informed claimant to pull off the road to a safe location, to give claimant's location and she would dispatch a police officer to claimant's location to assist the claimant. The employer's dispatcher also instructed claimant to pull over to a safe place and the employer would send a person to assist the claimant. The claimant did not adhere to the instructions given to her by her supervisor and employer's dispatcher. Claimant stated that she was not pulling over and was returning the bus to the school with the students. The claimant returned to the school and left the students with a police officer who met claimant at the school. The claimant did not wait for a school administrator to assist the children. She stated to the police officer words to the effect that she "did not care how the kids got home, they need to get off her bus." The employer had to get another bus driver to take the children home; they got home at approximately 6:30 p.m. on

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7. Claimant did not pull the bus off the road to resolve the situation with the student opening the door because each time the student closed the door, claimant felt the issue was resolved. Claimant did not pull off the road and wait for the police as instructed because she felt it was safer for her if she returned to the school.

8. During the incident on January 5, 2017, the claimant did not adhere to employer's procedure for crossing the railroad tracks. The procedure required claimant to (1) open the windows and/or door of the bus for visual purposes; (2) make sure that the bus comes to a complete stop; and (3) look both ways and listen before crossing the railroad tracks. The claimant only slowed down the bus in order to go over the railroad tracks. Prior to January 5, 2017, the claimant had a previous incident of making an improper stop at a railroad crossing.

9. The claimant also violated employer's safety procedure which required her to have both hands on the steering wheel while driving the bus. The claimant admitted that she was driving the bus with one hand while holding a beverage in her other hand. The claimant did so because she allegedly did not have a cup holder for the beverage.

...

12. The claimant was discharged effective January 20, 2017 for insubordination for failing to pull over to a safe location as instructed by the employer's Coordinator and Dispatcher which posed a risk issue for the child(ren) on the bus. She was also discharged for violation of safety procedures for driving with the rear emergency exit door open, for failure to follow railroad crossing procedures and for holding a beverage while operating a school bus.

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Simmons does not challenge any specific finding of fact and her brief does not argue that any finding of fact is not supported by competent evidence. Therefore, these “[u]nchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal.” *Church v. Bemis Mfg. Co.*, 228 N.C. App. 23, 26, 743 S.E.2d 680, 682 (2013). To the extent Simmons’s contention that testimony at the Referee hearing showed she “did not do something so obviously wrong that it is obvious that [she does] not care about her obligations to her employer” challenges the competency of findings that she did not abide by policies and instructions, we disagree. Our Supreme Court has stated that our review of the Board of Review’s findings of fact is limited to whether any competent evidence supports the findings. *Binney*, 362 N.C. at 316, 661 S.E.2d at 721. Simmons points to her supervisor’s statement during the Referee hearing that there was not a reason for Simmons to find a safe place to pull into after a student exited the bus through the bus’s emergency door. However, read in context, the supervisor indicated there was no reason to pull over *after* the three door incidents occurred. The supervisor previously stated Simmons was discharged *because* the door was open, a child exited through the door, and another student had to close it. Thus, the supervisor’s statement has no bearing on whether Simmons failed to follow policy and instructions before and amidst the door incident. Our review of the record indicates that this statement does not render the findings of fact unsupported by any competent evidence.

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These findings of fact support the Board of Review's conclusion: "The claimant's disregard of employer's safety procedures and her insubordinate conduct constituted a disregard of the employer's interest and standards of behavior which the employer had the right to expect of the claimant. The Board of Review concludes that claimant's discharge was for misconduct connected with the work." The findings of fact made by the Board of Review indicate that New Hanover County School System has a policy that school bus drivers are to "find a safe location and pull over to get the situation resolved" when a problem arises while driving the school bus. Simmons thrice ignored and refused her employer's instructions to pull the school bus off to the side of the road in a safe area. She continued to drive even though the student had opened the back door and kept it open for 30 seconds, almost fallen out, and eventually jumped out. In addition to refusing to pull into a safe area, Simmons failed to abide by her employer's policy that she keep both hands on the steering wheel when she held a beverage in her hand while driving the school bus during the incident. Simmons further violated school policy by failing to follow procedure and look both ways at a railroad crossing. *See Jackson v. N.C. Dep't of Commerce, Div. of Emp. Sec.*, 242 N.C. App. 328, 334, 775 S.E.2d 687, 692 (2015) (holding that an employer's failure to follow employer policy constituted misconduct).

The findings of fact indicate that Simmons's refusal and insubordination were not reasonable or taken in good cause such that a reasonable person would find it

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valid. We find unpersuasive Simmons's attempt to draw parallels between her situation and cases where we have held that insubordination was reasonable due to immediate threats of employee safety. In *Urback v. East Carolina Univ.*, 105 N.C. App. 605, 414 S.E.2d 100 (1992), we held that insubordination was not willful misconduct where the employee reasonably believed that exposure to asbestos would cause him serious injury. In *Mendenhall v. N.C. Dep't. of Human Res.*, 119 N.C. App. 644, 459 S.E.2d 820 (1995), we similarly held that a blind employee's reasonable perception that "conducting hands-on training with sharp objects and a [similarly] blind AIDS patient" would put her health at risk negated a finding of willful misconduct.

However, the employer's directive here would not have threatened Simmons's health or safety in such a way. Abiding by her employer's directive to pull into a safe area where police and assistance would meet Simmons would not increase the risk to her safety, and continuing to drive certainly did not decrease the risk. Indeed, Simmons actions of returning to the school and stating to the police officer that she "did not care how the kids got home" indicates an unwillingness to work that undermines Simmons's claim that her refusal was reasonable. *See Intercraft*, 305 N.C. at 376, 289 S.E.2d at 359 ("This Court has defined a 'good cause' to be a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work.").

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The Board of Review's findings of fact are supported by competent evidence and these findings of fact support the conclusion that Simmons was disqualified from receiving unemployment benefits due to her discharge for misconduct connected with the work. The Superior Court did not err in affirming the Board of Review decision.

B. Fraud, False Documents, and Testifying Witnesses

In her appeal to the Superior Court, Simmons asserted "issues of fraud, false documents, and an inability to have witnesses testify at the appeals hearing." The Superior Court concluded as a matter of law that "[t]hese assertions were not raised early in the administrative process. The Board had no knowledge of these assertions and Petitioner did not afford the Board an opportunity to rule on these assertions." This conclusion of law made by the Superior Court was not supported by the Record or findings of fact, and we vacate this conclusion. However, we nevertheless affirm and modify the Superior Court's decision upholding the Board of Review's determination that Simmons was disqualified from receiving unemployment benefits due to her discharge for misconduct connected with the work.

Defendant correctly states that after her Referee telephone hearing on 9 March 2017, she placed a phone call to the Employment Security Division on 28 March 2017 requesting a new hearing. An employee with the Employment Security Division noted Simmons's complaint that "she ash [sic] some people on her job to be witnesses [at the Referee hearing on 9 March 2017] but the employer told them no so she

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requested a new hearing.” We need not determine whether this method of raising the issue was improper, as the Board of Review did, in fact, rule on the claim. The Board of Review issued its decision 13 April 2017, 16 days after the phone call, noting, “There is also no indication in the record that the claimant was prevented from presenting all testimony or documentary evidence, or requesting a rescheduling of the hearing pursuant to 04 NCAC 24C .0207. The Board therefore concludes that the claimant was afforded procedural due process.” Thus, the Superior Court’s conclusion of law that the Board of Review did not have an opportunity to rule on the assertion is erroneous and must be vacated.

Our standard of review is the same as the Superior Court’s in cases of appeals from administrative tribunals, “we review questions of law *de novo* and questions of fact under the whole record test.” *Jackson*, 242 N.C. App. at 332, 775 S.E.2d at 690. Accordingly, our review of the Board of Review’s decision indicates that the finding that there is no indication that claimant was prevented from presenting all testimony is supported by competent evidence. The Referee asked Simmons, “do you wish to go forward without [the witnesses who did not answer the telephone] or do you wish for me to postpone the hearing so that you can get them to be available?” Simmons responded, “no, I can proceed without it, without them.” Moreover, Simmons failed to present evidence supporting her claim that she was prevented from having witnesses testify at the Referee hearing. This finding, in turn, justifies the conclusion

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that Simmons was afforded procedural due process at the Referee hearing and was not entitled to a new hearing. Thus, while we vacate the Superior Court's conclusion, we affirm the decision upholding the Board of Review's determination that Simmons was disqualified from receiving benefits and modify the Superior Court decision accordingly.

With respect to Simmons's "fraud and false documents" claim, we determine that the substance of this claim is unrelated to the conduct on 5 January 2017 for which Simmons was discharged. Accordingly, this argument is moot with respect to the Board of Review's determination that Simmons was discharged for misconduct connected with the work on 5 January 2017.

Since the Board of Review's determination that Simmons was disqualified from receiving unemployment benefits was properly upheld for the reasons stated above, we affirm and modify by vacating this conclusion of law.

CONCLUSION

The Board of Review's conclusion that Simmons was disqualified from receiving unemployment benefits was justified by findings of fact supported by competent evidence. Accordingly, we affirm the Superior Court's decision upholding the Board of Review determination, except as modified herein.

MODIFIED AND AFFIRMED.

Judges CALABRIA and ARROWOOD concur.

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Report per Rule 30(e).