IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Julie Jahn-Salerno, Petitioner	:	
v.	:	
Unemployment Compensation Board of Review, Respondent	:	No. 1073 C.D. 2009
	:	Submitted: September 25, 2009

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: November 16, 2009

Julie Jahn-Salerno (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 facts as found by the Board are as follows:
>
> 1. The claimant was last employed as a stylist by Head Area, Inc. from October 26, 2006, at a final rate of 50% commission and her last day of work was January 3, 2009.
>
> 2. The claimant had been previously discharged from this employment due to her poor attitude and was rehired on the condition that she would present a better attitude in the salon.

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

> 3. The claimant apparently had a personality conflict with the receptionist who was responsible for client scheduling.
>
> 4. The claimant and the receptionist met with the employer on or about December 20, 2008, in an attempt to resolve their differences. As a result of the meeting, the claimant was placed in charge of her own client scheduling.
>
> 5. The claimant also agreed to speak to the receptionist in a more professional manner.
>
> 6. On January 3, 2009, the claimant asked the receptionist to reschedule a client for her.
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> 7. The receptionist reminded the claimant that she was now in charge of her own scheduling.
>
> 8. The claimant responded by yelling: 'I don't know who the f**k you think you are. You're always f**king telling me how to run my schedule. You are f**king trying to destroy my book!' The claimant then yelled: 'F**k off!' and left, slamming the door behind her.
>
> 9. The claimant's profane rant occurred in the presence of customers.
>
> 10. The claimant was discharged for using profanity in the presence of customers.

Board Decision, May 8, 2009, (Decision), Findings of Fact Nos. 1-10 at 1-2.

The Board determined that Claimant committed willful misconduct:

> The Board credits the receptionist's testimony regarding the language used by the claimant in the presence of customers on January 3, 2009. Even in the absence of a specific written policy, the language used by the claimant in the workplace was clearly not appropriate. The claimant's conduct certainly fell below the standard of behavior that the employer had a right to expect of her.

> Further, the claimant was placed on notice when rehired that she must display a better attitude in the salon. She was also warned on December 20, 2008, about her unprofessional interaction with the receptionist. The claimant has not justified her actions. The employer has met its burden of proving willful misconduct in connection with the claimant's discharge.

Decision at 2-3.

Claimant contends that the Board erred when it determined that she engaged in willful misconduct.[2]

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). This Court has determined that the use of language by a claimant which is

[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).

abusive, vulgar or offensive constitutes willful misconduct unless the claimant was provoked or the language was *de minimis*. Cundiff v. Unemployment Compensation Board of Review, 489 A.2d 948 (Pa. Cmwlth. 1985).

Claimant argues that her language to the receptionist did not constitute willful misconduct because the receptionist provoked her and the language was *de minimis*. Claimant argues that the receptionist provoked her when she told her she would not schedule or confirm appointments for her. However, the Board found that that policy was implemented at a December 20, 2008, meeting between Claimant, the receptionist, and Head Area, Inc. The receptionist did not provoke Claimant but was following established policy.

In making this argument, Claimant argues a version of the facts which was not found by the Board, even though Claimant failed to challenge any of the findings of fact made by the Board. The Board's factual findings which are not challenged by a petitioner are binding upon this Court. Salamak v. Unemployment Compensation Board of Review, 497 A.2d 951 (Pa. Cmwlth. 1985). Further, 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 which the Board rejected.

Claimant argues that her use of profane language was *de minimis* because it did not result in any lost business. In Allen v. Unemployment Compensation Board of Review, 638 A.2d 448 (Pa. Cmwlth. 1994), Sonia Allen (Allen) was a data entry operator for Balboa Life and Casualty. Allen became involved in a dispute with a supervisor concerning whether she was sitting down at her work station. In the course of this dispute, Allen uttered a profanity and was terminated. Allen applied for unemployment compensation benefits. The Board determined Allen was ineligible for benefits because the profanity was unprovoked and constituted willful misconduct. Allen, 638 A.2d at 49. This Court affirmed. This Court concluded that the language was neither provoked nor *de minimis*. Allen, 638 A.2d at 451.

Here, Claimant argues that her outburst was *de minimis* because it did not result in a loss of business. There was no loss of business in Allen either. Claimant does not cite the correct standard. In Arnold v. Unemployment Compensation Board of Review, 703 A.2d 582 (Pa. Cmwlth. 1997), one employee's statement to another of "What an asshole" after a car driven by a customer almost hit her was found to be *de minimis* because the statement was to a co-employee, was not directed to a customer, and was not made in a tone of voice so the customer could hear it. Here, Claimant engaged in an argument with a co-worker in which she repeatedly used profanity in earshot of customers. The Board did not err when it determined Claimant committed willful misconduct.

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

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O R D E R

AND NOW, this 16th day of November, 2009, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge