

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Peggy Lou Colaviti,	:	
Petitioner	:	
	:	
v.	:	No. 1100 C.D. 2009
	:	SUBMITTED: November 20, 2009
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: January 29, 2010

Peggy Lou Colaviti, *pro se*, petitions this court for review of the order of the Unemployment Board of Review (Board) determining that Claimant was ineligible for unemployment compensation benefits due to willful misconduct under Section 402(e) of the Unemployment Compensation Law (Law).¹ After review, we affirm.

Claimant was employed full time as a Personal Care Aide at Alexandria Manor, Inc. (Employer), an assisted living facility in Allentown. On or

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(e). This section provides that an employee shall be ineligible for compensation for any week in which her unemployment is due to her discharge or temporary suspension from work for willful misconduct connected with her work.

about September 29, 2008, Claimant was arrested and charged with three counts of possession/manufacture/intent to deliver a controlled substance under Section 780-113(a)(16) and (30) of The Controlled Substance, Drug, Device and Cosmetic Act.² Claimant initially called Employer on that date and said she was sick and could not report for work. The next day, Claimant called again and informed another employee that she was incarcerated. At some point, Employer was made aware that Claimant had been arrested for and incarcerated on drug charges and would be in jail an indeterminate amount of time. On October 10, 2008, Employer sent Claimant a notice terminating her employment. Claimant remained incarcerated until December 12, 2008, when she pled guilty to one of the charges and was released after being given credit for time served on her sentence of one to six months. Claimant's claim for benefits was denied by the Unemployment Service Center and Claimant's appeal was then heard by the referee on March 6, 2009.

At the hearing, Employer was represented by two witnesses, Deborah Oleniacz, its Administrator, and Joseph Negrao, President and co-owner. Ms. Oleniacz testified that Claimant was terminated for two reasons; first, because she was arrested on drug charges and secondly, due to her incarceration, she would not be able to report to work and they needed the position filled. Ms. Oleniacz stated that Claimant spoke with her the day she was arrested and told her that she was ill. Ms. Oleniacz did not speak with Claimant the next day, but testified that Claimant did not request a leave of absence. Mr. Negrao testified that Claimant's termination was due to the fact that she was arrested and convicted on drug charges and he believed that he was precluded under state law from hiring anyone or

² Act of April 14, 1972, P.L. 233, *as amended*, 35 P.S. § 780-113(a)(16) and (30).

maintaining the employment of a person who had been convicted of certain enumerated offenses, including drug offenses. Mr. Negro also testified that because they did not know how long Claimant would be incarcerated, they could not hold her job for her, even if they were not restricted from employing a convicted felon. In addition, Ms. Oleniacz testified that Claimant's position as an aide gave her access to the medications that she had to dispense and they viewed that as an unacceptable risk after her arrest on drug charges. Claimant testified and admitted that she was incarcerated from September 29, 2008 until December 12, 2008, when she pled guilty to one count of drug possession. Claimant denied receiving written notice from Employer terminating her employment on October 10, 2008, but admitted that she was unable to report to work after September 29, 2008 because she was in jail.

The referee denied benefits, finding that Claimant's inability to show up for work due to her incarceration on drug charges amounted to willful misconduct. Claimant appealed the referee's decision to the Board, which affirmed the referee's denial of benefits under the Law. This appeal followed.

In her *pro se* appeal, Claimant raises the following issues for our review. First, Claimant argues that there is no factual support in the record for the finding that she was terminated for failing to report to work. Second, Claimant asserts that the real reason she was terminated was because of her drug conviction. With respect to her termination, Claimant asserts that it was unlawful because Employer learned of her arrest and incarceration from the local newspaper, which is hearsay. Claimant contends that Employer could not legally terminate her employment for two reasons: first, because she is presumed innocent of the criminal charges until proven guilty; and second, because at the time of her

termination on October 10, 2008, she had not entered her guilty plea to the drug charge and therefore, Employer had no basis to terminate her due to willful misconduct. Apparently, if we understand Claimant's arguments, the "misconduct" which served as the reason for her termination was the actual conviction on the drug charge, which did not happen until December 12, 2008. Therefore, since her alleged misconduct (drug conviction), could not have been established until the actual date of her guilty plea, and Employer terminated her before she was proven guilty, the Board's finding that she was ineligible due to willful misconduct is not supported by the evidence.

The Board counters that it did not rely on hearsay evidence to affirm the referee's denial of benefits. The Board asserts that it relied on Claimant's own admissions at the hearing that she was arrested and incarcerated on drug charges from September 29, 2008 until December 12, 2008 as competent evidence to support a denial of unemployment benefits due to her willful misconduct. Finally, the Board contends that it also relied on Employer's testimony that it could not hold Claimant's job while she was in jail and, therefore, it was Claimant's continued absence from work due to her incarceration that also led to her discharge. Accordingly, the Board asserts that there is ample support in the record for the denial of benefits. We agree.

Willful misconduct is defined as an act of wanton or willful disregard of an employer's interests; a deliberate violation of its rules; a disregard of the standards of behavior that an employer has the right to expect of an employee; or negligence that indicates an intentional disregard of an employer's interests or a disregard of the employee's duties and obligations to the employer. *Dep't. of Transp. v. Unemployment Comp. Bd. of Review*, 755 A.2d 744 (Pa. Cmwlth. 2000).

The law is clear that the employer bears the burden of proving willful misconduct. *Id.* In turn, if the claimant can then prove that she had good cause for her conduct, it will not be considered willful misconduct. *McLean v. Unemployment Comp. Bd. of Review*, 476 Pa. 617, 383 A.2d 533 (1978). Absenteeism may support a finding of willful misconduct if the employer establishes that the employee's absenteeism is both excessive and the claimant cannot prove good cause for her absence. *Medina v. Unemployment Comp. Bd. of Review*, 423 A.2d 469 (Pa. Cmwlth. 1980).

Claimant's arguments are meritless. Employer's only burden was to establish that Claimant's actions rose to the level of willful misconduct under the law, rendering her ineligible for unemployment compensation benefits. At the hearing, Employer established that Claimant was absent from September 29, 2008, until the date of her discharge, October 10, 2008. Ms. Oleniacz testified that Claimant was terminated for two reasons, explaining that:

we needed to fill the position . . . we have four aides around the clock. Those four people share the time . . . Peggy was a big part of that . . . and without knowing how long things were going to be or, you know, how long she would be out, we had to fill the position and for the fact that we can't have somebody that's involved with drugs working for us.

Notes of Testimony (N.T.), Hearing of March 6, 2009, at 9. Claimant admitted that she was absent because she was incarcerated and that she subsequently pled guilty to one of the drug charges on December 12, 2008. Moreover, Claimant has not proven good cause for her absence. It is well-established that incarceration is not a reasonable or justifiable absence and that an employee who engages in criminal activity resulting in their incarceration should be aware that their inability to attend work could jeopardize their employment. *Medina*. Indeed, "[i]ncarceration does not suspend an employee's obligation to be available for work." *Masko v.*

Unemployment Comp. Bd. of Review, 447 A.2d 328, 329 (Pa. Cmwlth. 1982) (citing *Medina*). Nor is incarceration a reasonable or justifiable excuse for Claimant's absence from work. *Medina*, 423 A.2d at 471.

Lastly, there is no merit to Claimant's assertion that she was innocent of willful misconduct until she was proven guilty on December 12, 2008, and therefore, Employer could not have terminated her for willful misconduct on October 10, 2008. It was her inability to report to work which amounted to willful misconduct and resulted in Claimant's termination, as Employer had a right to expect that Claimant would show up for her shifts and perform her duties. The fact that Claimant could not show up for work because she was in jail as a result of her own illicit conduct, regardless of the outcome of the criminal charges against her, was the basis for Employer's decision to terminate Claimant. In other words, it was both the prolonged absence and the reason for the absence that lead to Claimant's termination.³

The Board found that it was Claimant's inability to be present at work, as result of her arrest and conviction, that led to her dismissal by Employer, concluding that "the claimant clearly has admitted criminal actions resulting in her protracted absence without good cause and in no way can the claimant be said to be not at fault in her unemployment." Board's Decision and Order, May 8, 2009, at 3. Had Claimant not been arrested on drug charges, she would still be employed

³ We find no merit to Claimant's contention that Employer relied on hearsay to terminate her employment because it learned of her arrest and incarceration through the local newspaper. As discussed above, Claimant was discharged due to her continued absence from work stemming from her incarceration and subsequent conviction on the drug charge, which Claimant admitted at the hearing. An admission by a party falls within the exception to the hearsay rule and is competent testimony as determined by the Board. *See Wright v. Unemployment Comp. Bd. of Review*, 465 A.2d 1075 (Pa. Cmwlth. 1983).

with Employer. However, we cannot avoid the inescapable conclusion that it was Claimant's actions, both her continued absence from work and her drug conviction, which the Board found amounted to willful misconduct under Section 402(e) of the Law.

Accordingly, we affirm the order of the Board.

BONNIE BRIGANCE LEADBETTER,
President Judge

