IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lydia M. Rodriguez, Petitioner	:	
v.	:	No. 1232 C.D. 2007
	:	Submitted: November 16, 2007
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE FLAHERTY FILED: March 10, 2008

Lydia M. Rodriguez (Claimant) petitions for review from an order of the Unemployment Compensation Board of Review (Board) which affirmed the decision of a referee that denied Claimant's application for unemployment benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law), Act of December 5, 1936, Second Ex. Sess., P.L. (1937), as amended, 43 P.S. § 802(e) due to her willful misconduct.[1] We affirm.

[1] Section 402(e) of the Law provides that:

> An employee shall be ineligible for compensation for any week-
>
> . . . .
>
> (e) In which his unemployment is due to discharge or temporary suspension from work for willful misconduct connected with his work . . . .

Claimant worked for Access, Inc. (Employer) as a full-time community living arrangement supervisor from July 14, 1995 until February 5, 2007. Claimant thereafter applied for benefits. Her application was denied by the job center. A hearing was then conducted before a referee. The referee concluded that Claimant's conduct in preparing clients for a trip on February 5, 2007, constituted abuse and that such conduct warranted her dismissal and the denial of benefits due to willful misconduct. Claimant appealed to the Board, which made its own findings of fact.

The Board found that Employer provides services to individuals with mental health and retardation issues in community homes that house three to five residents. Claimant was a supervisor in one of Employer's homes and her duties included overseeing all the operations of the home in accordance with state mandated regulations.

Employer has a progressive discipline policy which provided for a verbal warning, written warning, probation and finally termination. The policy also provided that certain offenses, including abuse of clients, would justify immediate termination. Claimant was, or should have been, aware of Employer's policies, as she had previously been given warnings concerning policy violations.

On February 5, 2007, at the home where Claimant worked, the overnight supervisor was informed by the associate director that he did not need to get the clients ready for their day program and, as such, he did not do so. The associate director thought the day program had been cancelled due to the weather.

On that same date, Claimant reported to work an hour and a half later than her usual time and was also informed by the overnight supervisor that the day program had been cancelled. Claimant then made a phone call and learned that the

day program had not been cancelled. In a hurried state, Claimant then got the individuals ready for transport to the day program.

Claimant told one of the clients that he needed to put on his shoes. The client put his slippers on instead. Claimant packed pureed raw carrots and peanut butter for another client's lunch. That client has a condition known as dysphasia, wherein the flap of his throat fails to function properly, resulting in food traveling to his lungs. Because of the condition and the danger of choking, the client has a list of restricted foods. Claimant was aware of the list. The list forbade raw vegetables and peanut butter products. The list provided that Claimant could have pureed cooked vegetables.

After the clients had been transported to the day program, the director of human resources received a call from the director of the day program complaining that one of the clients had been brought to the program wearing slippers. The director of the day program was concerned because it was only fifteen degrees outside and the client was being transported to a bowling outing later in the day. Employer's director of human resources reported the incident to the State for investigation.

The director of human resources then received a second phone call from the day program stating that Claimant had packed pureed raw vegetables and peanut butter for the restricted client's lunch. Employer's director of human resources reported this incident to the State for investigation also. Due to the reports, Claimant was suspended indefinitely pending the outcome of the investigations.

The investigations revealed that as to the slipper incident, Claimant was under the impression that the client put on his tennis shoes for the outing as

she had instructed him to do. Concerning the pureed raw vegetables and peanut butter packed for the client, Claimant admitted she prepared the lunch. She stated that the client's food list was confusing in regards to the vegetables. Claimant did not offer an explanation as to why she packed peanut butter for the client. Employer thereafter discharged Claimant for client neglect and abuse.

Based on the above, the Board determined that Employer properly discharged Claimant for client neglect and abuse, per its policies. The Board accepted Claimant's explanation that she thought the client had put on his tennis shoes rather than his slippers as instructed. As to the client with restricted foods, the Board found that the list with respect to vegetables was confusing, as stated by Claimant. However, the Board found that Claimant offered no justification for packing the client peanut butter, a food which was clearly restricted according to the list. The Board concluded that Claimant's actions in packing a prohibited food item for the client constituted willful misconduct. As such, the Board denied Claimant benefits and this appeal followed.[2]

Initially, we observe that willful misconduct has been defined as a wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, disregard of standards of behavior which an employer can rightfully expect or negligence indicating an intentional disregard of the employee's duties or obligations. Frumento v. Unemployment Compensation Board of Review, 446 Pa. 81, 351 A.2d 631 (1976). It is the employer which has

[2] Our review is limited to determining whether constitutional rights were violated, an error of law was committed, or whether essential facts are supported by substantial evidence. Lee Hospital v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994).

the burden of proving willful misconduct. Orend v. Unemployment Compensation Board of Review, 821 A.2d 659 (Pa. Cmwlth. 2003).

Where, as here, an employee has been discharged based upon willful misconduct in violating the employer's work rule:

> [T]he burden is on the employer to establish both the existence of a reasonable work rule and its violation . . . . Once the employer proves the existence of a rule, its reasonableness, and the fact of its violation, the burden of proof shifts to the claimant to prove that he had good cause for his action . . . .

United Refining Company v. Unemployment Compensation Board of Review, 661 A.2d 520, 522 (Pa. Cmwlth.), petition for allowance of appeal denied, 543 Pa. 721, 672 A.2d 312 (1995).

Here, the Board found that Claimant was not entitled to benefits because she violated Employer's policy that prohibited abuse of clients, by packing a prohibited food in a client's lunch. In arguing that her conduct was not willful, Claimant relies on Navickas v. Unemployment Compensation Board of Review, 567 Pa. 298, 787 A.2d 284 (2001) and Grieb v. Unemployment Compensation Board of Review, 573 Pa. 594, 827 A.2d 422 (2003). In Navickas, a nurse was suspended for making a mistake in the pediatric care unit of the hospital. A few months later, the nurse administered an antibiotic to a child without properly diluting it. The hospital had a policy of requiring employees to look in a medical reference book when in doubt as to the dilution ratio. The nurse glanced at the reference book but did not read it carefully. The nurse was fired for her mistakes.

The Supreme Court determined that the nurse's actions did not amount to disqualifying willful misconduct. In making a determination as to what constitutes willful misconduct, the Court stated that consideration must be made of

all of the circumstances, including the reasons for the employee's noncompliance with the employer's directives. Although the nurse was negligent, the Supreme Court determined that such negligence standing alone did not amount to willful misconduct.

Here, Claimant similarly argues that her act of packing the prohibited peanut butter was negligent. The circumstances in this case, however, show that Claimant's actions were not mere inadvertence. Claimant knew of Employer's policy which prohibited the abuse of clients and also knew that peanut butter was a prohibited food for one of the clients. Nonetheless, Claimant ignored the food restrictions and packed the client peanut butter. Although Claimant was rushed, such does not negate her actions.

In Grieb, the claimant worked as a school teacher. The school had a written policy prohibiting guns on school grounds. The teacher, who was in the process of moving, loaded her car with personal items and three unloaded shotguns. She did not unload her possessions into her new residence because it was raining. The following morning, the claimant, at the employer's request, reported to work early, forgetting that the guns were still in the car. The claimant was thereafter discharged for having weapons on the school premises in violation of the school's policy.

The Court, in concluding that the claimant was entitled to benefits determined that the claimant's one time inadvertent act did not amount to willful misconduct. The claimant simply forgot that the guns were in her car and inadvertently violated the school's weapon policy.

Here, contrary to Grieb, there is no determination that Claimant forgot to comply with Employer's directives or that Claimant's actions were inadvertent.

Specifically, Claimant knew of Employer's policy which prohibited the abuse of clients and Claimant also knew that one of the client's had a list of restricted foods. Claimant, nonetheless, packed the client a restricted food.

The facts in this case are more akin to those in Heitczman v. Unemployment Compensation Board of Review, 638 A.2d 461 (Pa. Cmwlth.), petition for allowance of appeal denied, 538 Pa. 660, 648 A.2d 791 (1994). In Heitczman, the claimant was employed as a truck driver. The employer had a policy requiring employees to keep the backing up of the trucks at a minimum. If an employee had to back up, the employee was required to get out of the vehicle and walk around the truck to ensure that the path to travel was clear. The claimant, in an attempt to get a better radio signal, backed up his truck without first getting out of the truck to ensure a clear path and, ultimately, hit a light standard. This court in affirming the Board's denial of benefits, concluded that the claimant did not mistakenly disregard the employer's work rule. Rather, the claimant knew of the existence of the rule and specifically failed to follow it by not doing a walk around the truck.

This court stated:

> [I]n this case, there is no question of mistake. Claimant knew of the existence of the work rule, specifically failed to follow it backing up his truck without making a 'walk around' and, as a result, hit the light standard that crashed onto the roof of his Employer's truck. Such conduct is not the type of inadvertence, i.e., negligence that Meyers [v. Unemployment Compensation Board of Review, 533 Pa. 373, 625 A.2d 622)] or Morysville [Body Works Inc. v. Unemployment Compensation Board of Review, 419 A.2d 238 (Pa. Cmwlth. 1980)] addressed, but is more akin to disobedience of a direct instruction.

Heitczman, 638 A.2d at 464.

Here, Claimant was aware of Employer's policy which prohibited the abuse of clients. Claimant admitted that in a hurried state she packed a client peanut butter, which was on the client's prohibited food list. Although Claimant was rushed, such does not excuse her action in failing to abide by Employer's directives. Like the claimant in Heitczman, Claimant in this case knew of Employer's rule, yet ignored it. Such action amounts to disobedience of a direct instruction.

Claimant also argues that the Board improperly denied her benefits based on the investigation conducted by the Office of Mental Retardation which was done in connection with the February 5, 2007 incidents. Claimant maintains that the Board cannot use the Office of Mental Retardation or Employer's definition of neglect and abuse in determining whether her conduct constituted willful misconduct. In this case, however, the Board did not rely on the disposition of another agency. The Board conducted its own hearing wherein Claimant and Employer both testified and, thereafter, the Board made its own findings and conclusion as to whether Claimant engaged in willful misconduct.

In accordance with the above, the decision of the Board is affirmed.

JIM FLAHERTY, Senior Judge

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O R D E R

Now, March 10, 2008, the Order of the Unemployment Compensation Board of Review, in the above-captioned matter, is affirmed.

JIM FLAHERTY, Senior Judge

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HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE FRIEDMAN FILED: March 10, 2008

Because the majority affirms a determination of the UCBR that is neither supported by substantial evidence nor in accordance with the law, I respectfully dissent.

Lydia M. Rodriguez (Claimant) began working for Access, Inc. (Employer) in 1995, and she was promoted to the position of community living arrangement supervisor in 1998. On the morning of February 5, 2007, Claimant reported to work an hour and a half late because she was having difficulties with her truant daughter. The overnight supervisor had been told, erroneously, that a program scheduled for two of the residents that morning had been cancelled due to weather. Accordingly, when Claimant arrived, she found that the overnight supervisor had not performed his customary tasks of dressing, shaving and

otherwise preparing these clients for the morning's activity, which, Claimant confirmed, was taking place as scheduled.

Without any help available, Claimant had to clean, dress, prepare lunch for and transport these two clients to their program within an hour. One of the two clients repeatedly removed his shoes and socks and ended up leaving Employer's facility wearing slippers instead of shoes. The other client suffers from dysphasia and has a list of restricted foods, including raw vegetables and peanut butter, that is posted on the residence's refrigerator. The lunch Claimant packed for this client included pureed raw carrots and peanut butter. Upon learning of these incidents and following an investigation, Employer terminated Claimant's employment.

The local job center denied Claimant's application for benefits pursuant to section 402(e) of the Unemployment Compensation Law (Law).[1] A referee affirmed that determination, and the UCBR affirmed the decision of the referee. The UCBR concluded that a reasonable person in a hurried state may have thought that the one client was wearing shoes instead of brown corduroy slippers. The UCBR also determined that the other client's list of prohibited foods may have been confusing with respect to raw vegetables. However, the UCBR found that Claimant *offered no explanation* or justification for sending peanut butter in that client's lunch. (UCBR's Findings of Fact, No. 35; UCBR's op. (discussion) at 4.) Because the posted list includes peanut butter among the "Foods Not To Choose,"

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

(Record Item 3, #4), the UCBR determined that Claimant's action *in this regard* was in clear and substantial disregard of Employer's interest and rendered Claimant ineligible for benefits pursuant to section 402(e) of the Law.

However, contrary to the UCBR's Findings of Fact, No. 35, ("Claimant offered no explanation for the peanut butter"), Claimant *did* testify regarding the reasons for this mistake.[2] Indeed, the UCBR concedes on appeal that *this finding is not supported by the record*. I cannot agree with the UCBR that its capricious disregard of Claimant's explanation is of no moment; instead, because this *critical* finding of fact is without support, I believe the UCBR's decision must be reversed.

Willful misconduct is defined as a wanton or willful disregard of the employer's interests, a *deliberate* violation of the employer's rules, the disregard of standards of behavior that an employer can rightfully expect of an employee or negligence indicating an *intentional* disregard of the employee's duties and obligations. *Frumento v. Unemployment Compensation Board of Review*, 466 Pa. 81, 351 A.2d 631 (1976). Significantly, Employer bears the burden of proving willful misconduct. *Orend v. Unemployment Compensation Board of Review*, 821 A.2d 659 (Pa. Cmwlth. 2003). Where, as here, an employee is discharged for

[2] Claimant testified that she was confused about items on the client's food list. Claimant stated that she had questioned the nurse months earlier and that staff members continued to question what food items were permitted. Thus, according to Claimant, it was not at all clear what foods this client was allowed. More important, Claimant testified that she did not think that she was giving the client the wrong food that morning and did not do so on purpose. (N.T. at 44.)

violating a work rule, the employer bears the burden of establishing the existence of the work rule and its violation.[3] *Id.* I submit that there is *no* evidence of record to support a finding of willful misconduct in this case and that Employer failed to establish that Claimant's conduct was anything more than mere negligence.

Unlike the majority, I believe that this case is controlled by *Navickas v. Unemployment Compensation Review Board*, 567 Pa. 298, 787 A.2d 284 (2001). There, our supreme court made clear that health care professionals are not to be held to a higher standard of care than any other employees for purposes of determining whether conduct is disqualifying under section 402(e) of the Law. The claimant in *Navickas* was a nurse who was suspended for making a mistake in the pediatric care unit of her employer's hospital. A few months after returning to work, the claimant administered an antibiotic to a child without properly diluting it. The hospital's policy required employees to consult a medical reference book when in doubt as to the dilution ratio. The claimant glanced at the reference book but did not read it carefully, and she was fired for administering the medication improperly.

[3] Initially, responding to a notice of Claimant's application for benefits, Employer stated that Claimant was discharged for "violation of residents rights, neglect of clients, excessive tardiness." (Record Item 3.) Subsequently, Employer completed a questionnaire and stated that Claimant was terminated for violating a work rule. (Record item 3.) As support for that assertion, Employer attached its policy on employee conduct, which lists twenty conduct code violations including "abuse of clients." Employer's policy does not define this phrase, nor does the policy address food preparation. Employer also submitted copies of written warnings/corrective actions concerning past issues and events that were totally unrelated to the reasons given for Claimant's discharge.

Reasoning that health care workers are held to a higher standard of care than other employees, the Commonwealth Court held that a nurse's *inadvertent* or *negligent* mistake constituted willful misconduct. Our supreme court flatly rejected the application of a higher standard for health care workers and stated as follows:

> [W]e have rejected the notion that mere negligence suffices to prove willful misconduct under the statute. Indeed, our working definition of willful misconduct speaks only of negligence of such a magnitude as to "indicat[e] an **intentional disregard**" of the employer's interest or the employee's duties. *Caterpillar, Inc.*,[4] 703 A.2d at 456 (emphasis supplied); *Myers*,[5] 625 A.2d at 625. Moreover, in *Myers*, this Court cited with approval to a Commonwealth Court formulation which held that an employee's negligence constitutes willful misconduct only if "'it is of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer.'" *Id., quoting Coleman v. Unemployment Compensation Board of Review*, 47 Pa. Commw. 113, 407 A.2d 130, 131-32 (Pa. Cmwlth. 1979) (further citation omitted). Accordingly, the *Myers* Court further reasoned, "it follows that an employer cannot demonstrate willful misconduct by 'merely showing that an employee committed a negligent act, but instead must present evidence indicating that the conduct was of an intentional and deliberate nature.'" 625 A.2d at 625, *quoting Bucher v. Unemployment Compensation Board of Review*, 76 Pa. Commw. 282, 463 A.2d 1241, 1243 (Pa. Cmwlth.1983). In a footnote, the *Myers* Court specifically noted its refusal to adopt a standard which

[4] *Caterpillar, Inc. v. Unemployment Compensation Board of Review*, 550 Pa. 115, 703 A.2d 452 (1997).

[5] *Myers v. Unemployment Compensation Board of Review*, 533 Pa. 373, 625 A.2d 622 (1993).

> would improperly equate "negligence and "willful misconduct," concepts which, the Court noted, "are not interchangeable:"

Id., 567 Pa. at 306-07, 787 A.2d at 289-90.

Applying the same analysis here, I conclude that Employer did not satisfy its burden of proving willful misconduct. Claimant's version of events was the only first hand account of the incidents at issue, and Employer's witnesses did not rebut that testimony. In fact, the record reflects that: the investigator who looked into the events found only *negligence* with respect to both the slipper and the lunch incident, (N.T. at 40); and, after Claimant sought review of her discharge, Employer's director of residential services determined that Claimant was properly discharged for "*negligence* involving a consumer." (Record Item 10, Exh. E-1) (emphasis added).

The majority's analysis, i.e., Claimant knew of the list of restricted foods and nonetheless packed a restricted food, (majority op. at 6-7), implicitly concludes that Claimant failed to establish good cause for violating Employer's policy. However, pursuant to the holding in *Navickas*, the burden *does not shift to Claimant* until Employer establishes that her violation of its policy was deliberate, and Employer did not do so here.

More important, the majority's decision is premised on a characterization of Claimant's conduct that is not supported by any evidence of record. The majority states that Claimant knew that peanut butter was a restricted food and concludes that Claimant "ignored" the rule/food restriction when she packed the client's lunch. (Majority op. at 6, 8.). However, there is not a shred of

evidence in this record reflecting that Claimant consciously disregarded the rule; under these circumstances, I cannot understand the majority's conclusion that Claimant's conduct "amounts to disobedience of a direct instruction." (Majority op. at 8.) Indeed, in light of the UCBR's admission that its Findings of Fact, No. 35 is *not* supported by substantial evidence, the majority's holding suggests that this court continues to consider the nature of Claimant's employment and applies a higher standard of care to its analysis, despite our supreme court's directive in *Navickas*.

Accordingly, I would reverse.

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ROCHELLE S. FRIEDMAN, Judge