IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Barbara Newman, Petitioner	:	
v.	:	No. 1261 C.D. 2010
Unemployment Compensation Board of Review, Respondent	:	Submitted: November 19, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: January 6, 2011

(Claimant), pro se, petitions for review of the order of the Unemployment Compensation Board of Review (Board) affirming the decision of a Referee that Claimant is ineligible for unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law).[1] We affirm.

[1] Act of December 5, 1936, Second Ex. Sess. P.L. (1937) 2897, as amended, 43 P.S. § 802(e). Section 402(e) of the Law provides, in pertinent part:

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

(Continued....)

Claimant filed a claim for unemployment compensation benefits upon the termination of her employment as a residential advisor with Girard College (Employer). The Altoona UC Service Center representative concluded that Claimant had been discharged for reasons that constitute willful misconduct under Section 402(e) of the Law. As a result, benefits were denied.

Claimant appealed this determination and a hearing was conducted before a Referee. See N.T. 3/23/10[2] at 1-16. On March 24, 2010, the Referee issued a decision disposing of the appeal in which he made the following relevant findings of fact:

> 2. The claimant knew, or should have been aware, that it was a violation of the employer's rules and policies for an employee to engage in boisterous or disruptive activity in the work place, to be absent without authorization from their work station during the work day, to display unsatisfactory performance or conduct or to fight or threaten violence in the work place. Employees were further informed that these were considered serious infractions, which could result in immediate termination.
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> 3. On the claimant's last day of work she and a co-worker engaged in a verbal argument which became elevated to the extent that it became physical. The two argued about both work related and personal matters and the co-worker threw or pushed a printer at the claimant and the claimant threw a telephone receiver at the co-worker.
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> 4. Both employees left their assigned work place and went outside leaving their wards unattended.

> connected with his work, irrespective of whether or not such work is "employment" as defined in this act.

[2] "N.T. 3/23/10" refers to the transcript of the hearing conducted before the Referee on March 23, 2010.

> 5. The employer conducted an investigation of the events described in the findings above and, as a consequence, both employees were terminated.

Referee's Decision at 1.

> Based on the foregoing, the Referee concluded:
>
> Here the claimant admittedly engaged in confrontational behavior with a co-worker. Based on the claimant's recollections, as she was the only one at the hearing with first hand testimony concerning these events in their entirety, the claimant is not the instigator. Nevertheless, the claimant did violate the employer's rules and policies and has failed to justify her leaving her duty area and her wards unattended or her throwing a telephone receiver at a co-worker.

Referee's Decision at 2. As a result, the Referee issued an order affirming the Service Center's determination that Claimant was not entitled to receive benefits under Section 402(e) of the Law. Id.

On March 29, 2010, Claimant appealed the Referee's decision to the Board. On June 4, 2010, the Board issued an order adopting and incorporating the Referee's findings and conclusions, and affirming the Referee's decision denying Claimant benefits.[3] Claimant then filed the instant petition for review.[4]

In this appeal, Claimant contends[5] the Board erred in determining that she was ineligible for compensation benefits under Section 402(e) of the Law.

[3] The Board's order also denied Claimant's request for a rehearing.

[4] This Court's scope of review in an unemployment compensation appeal is limited to determining whether an error of law was committed, whether constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704; Hercules, Inc. v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992).

[5] In the interest of clarity, we reorder the claims raised by Claimant in this appeal.

More specifically, Claimant contends: (1) the Board's determination that she violated Employer's work rule prohibiting her from engaging in boisterous or disruptive activity in the workplace is not supported by substantial evidence; (2) the Board erred in determining that she did not have good cause to violate Employer's work policy prohibiting her from unauthorized absence from her work station in the dormitory; and (3) the Board erred in determining that she did not have good cause for violating Employer's work rule prohibiting her from engaging in boisterous or disruptive activity in the workplace.

As noted above, pursuant to Section 402(e) of the Law, an employee is ineligible for unemployment compensation benefits when he had been discharged from work for willful misconduct connected with his work. Guthrie v. Unemployment Compensation Board of Review, 738 A.2d 518 (Pa. Cmwlth. 1999). The burden of proving willful misconduct rests with the employer. Id. Whether an employee's conduct constitutes willful misconduct is a question of law subject to this Court's review. Id.

Although willful misconduct is not defined by statute, it has been described as: (1) the wanton and willful disregard of the employer's interests; (2) the deliberate violation of rules; (3) the disregard of standards of behavior that an employer can rightfully expect from his employee; or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer's interests or the employee's duties and obligations. Id. (citing Kentucky Fried Chicken of Altoona, Inc. v. Unemployment Compensation Board of Review, 309 A.2d 165, 168-169 (Pa. Cmwlth. 1973)).

Thus, a violation of an employer's work rules and policies may constitute willful misconduct. Id. An employer must establish the existence of the work rule and its violation by the employee. Id. If the employer proves the

existence of the rule, the reasonableness of the rule, and the fact of its violation, the burden of proof shifts to the employee to prove that he had good cause for his actions. Id. The employee establishes good cause where his actions are justified or reasonable under the circumstances. Id.

In addition, it is well settled that the Board is the ultimate finder of fact in unemployment compensation proceedings. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985); Chamoun v. Unemployment Compensation Board of Review, 542 A.2d 207 (Pa. Cmwlth. 1988). Thus, issues of credibility are for the Board which may either accept or reject a witness' testimony whether or not it is corroborated by other evidence of record. Peak; Chamoun. Findings of fact are conclusive upon review provided that the record, taken as a whole, contains substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977). This Court must examine the evidence in the light most favorable to the party who prevailed before the Board, and to give that party the benefit of all inferences that can be logically and reasonably drawn from the testimony. Id.

When viewed in a light most favorable to Employer, our review of the certified record in this case demonstrates that there is substantial evidence supporting the Board's findings regarding the existence of Employer's rules prohibiting boisterous or disruptive activity in the workplace and unauthorized absence from the dormitory, the reasonableness of the rules, and the fact of their violation. See N.T. 3/23/10 at 3-6, 7-8, 9, 10-11.[6] More specifically, the testimony of Employer's Human Resources Director and Vice President support the Board's

[6] See also Exhibits E-1, E-2 and 6A that were admitted into evidence without objection at the hearing before the Referee. Certified Record (CR) Item Nos. 2, 8.

findings in this regard. See id. Moreover, in her testimony, Claimant admitted that she was involved in an altercation with a co-worker in which she threw a telephone receiver while they were in the dormitory, and that she had walked out of the dormitory and, ultimately, had walked outside the gates of Employer's campus. See id. at 12-16. However, Claimant also provided testimony supporting her assertion that she had good cause for her actions in this regard. See id.

As noted above, the Board was free to credit the foregoing evidence regarding the violation of Employer's work rules and to discredit evidence to the contrary. Peak; Chamoun. In addition, those findings are conclusive on appeal as they are supported by the foregoing substantial evidence. Taylor. As Employer satisfied its burden of proof in this regard, the burden then shifted to Claimant to establish good cause such that her actions were justified or reasonable under the circumstances. Guthrie.

In support of her burden, Claimant recites portions of her testimony at the hearing before the Referee supporting her assertion that she had good cause for her actions. See Appellant's Brief at 10. However, in the Referee's opinion that was adopted in its entirety by the Board, he specifically stated, "Nevertheless, the claimant did violate the employer's rules and policies and has failed to justify her leaving her duty area and her wards unattended or her throwing a telephone receiver at a co-worker." Referee's Opinion at 2.

As noted above, the Board is the ultimate finder of fact in unemployment compensation proceedings. Peak; Chamoun. In addition, issues of credibility are for the Board which may either accept or reject a witness' testimony whether or not it is corroborated by other evidence of record. Id. Thus, although Claimant presented evidence which, if believed, could satisfy her burden of proof,

the Board rejected her testimony and its determination in this regard is patently not subject to our review.

Moreover, although Claimant recites facts in her appellate brief which contradict the Board's determinations with respect to good cause for violating Employer's rules, this does not compel the conclusion that its determinations in this regard should be reversed. See, e.g., Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-1109 (Pa. Cmwlth. 1994) ("[T]he fact that Employer may have produced witnesses who gave a different version of events, or that Employer might view the testimony differently than the Board, is not grounds for reversal if substantial evidence supports the Board's Findings.").

In short, there is ample substantial evidence demonstrating the existence of Employer's rules with respect to Employer's rules prohibiting boisterous or disruptive activity in the workplace and unauthorized absence from the dormitory thereby leaving the students unsupervised, the reasonableness of the rules, and the fact of their violation. As a result, the Board did not err in determining that Claimant is ineligible for unemployment compensation benefits pursuant to Section 402(e) of the Law.[7,8]

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[7] See, e.g., Perez v. Unemployment Compensation Board of Review, 427 A.2d 763, 764 (Pa. Cmwlth. 1981) ("From this evidence there is little, if any, basis from placing the onus of blame on one rather than the other of the combatants. The other employee's references to the appellant's nationality were offensive and provocative but the appellant's rejoinders were clear challenges to fight. The issue of this case is only that of whether the appellant's conduct constituted willful misconduct. It clearly did. In the not dissimilar case of *Unemployment Compensation Board of Review v. Vojtas*, [351 A.2d 700, 702 (Pa. Cmwlth. 1976)], we wrote by Judge, now Justice, Wilkinson that [']([P])articipation in a fight with the knowledge that such activity is contrary to company policy is intentional misconduct, substantial misconduct, and in deliberate violation of the employer's rules. Even without a stated policy, this type of conduct is in total disregard of the employer's interest and of the most basic standards of behavior which

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any employer demands.[']"); Harshman v. Unemployment Compensation Board of Review, 425 A.2d 1186, 1187-1188 (Pa. Cmwlth. 1981) ("On … his last day of employment for the [employer], the petitioner was scheduled to work at his employer's plant from 12:00 midnight to 8:00 a.m. during which time he would be the only employee on the premises. At midnight … however, he was in a bar located close to the employer's plant and at that time he called the employee whom he was to relieve and told that employee either to come to the bar for a drink or to go home. The employee then went home. The petitioner did not himself go to the plant until approximately 1:00 a.m. He was shortly thereafter discharged for leaving the plant unattended…. [T]he petitioner's argument that he would have had to arrive at his employer's plant, dismiss the employee he was to replace and then leave before he could be discharged for 'leaving the plant unattended' is not persuasive. We cannot condone his blatant dereliction of the duty he owed to his employer and we note, of course, that the other employee left the plant only because petitioner instructed him to do so, and the petitioner must now, therefore, accept full responsibility for the consequences of his action….").

[8] In support of her claim regarding her entitlement to benefits, Claimant relies upon the opinion of this Court in Roberts v. Unemployment Compensation Board of Review, 977 A.2d 12 (Pa. Cmwlth. 2009). In Roberts, pursuant to a work rule, the claimant was required to remain within "close reach" of his "one-to-one" special needs client in a residential facility. However, the claimant was discharged for violating this work rule because it was discovered that he had gone to the kitchen to prepare breakfast for his client after securing the client in his bed with the bedrail in place. In reversing the Board's denial of benefits, this Court stated the following, in pertinent part:

> Given Claimant's uncontradicted testimony that Employer permitted and even required "one-to-one" clients be left alone briefly, notwithstanding its close supervision rule, there is a question about whether Claimant even violated Employer's rule. Assuming Employer's rule was inflexible, however, Claimant showed good cause to violate it. Claimant was attending to a basic need of Client, having secured Client in his bed, while he left Client for approximately five minutes. The evidence established good cause for Claimant's violation of the work rule and, thus, the Board erred in finding that Claimant's actions constituted willful misconduct.

Roberts, 977 A.2d at 17-18.

In contrast, in the instant case, there was evidence presented which contradicted with Claimant's version of the events underlying her purported good cause for violating Employer's reasonable work rules. For example, Claimant testified that she remained calm and did not raise her voice during the altercation in which she was involved on Employer's campus. See N.T. 3/23/10 at 12, 14. However, Employer's Vice President testified at the hearing that she

(Continued....)

observed that Claimant was extremely agitated and that she was verbally arguing with another residential advisor in the roadway on Employer's campus. See id. at 10-11. In addition, the Vice President testified that "[i]t seems to me that the argument was loud enough to draw attention and also at some point I was worried that it would become physical." Id. at 11.

Likewise, Claimant testified at the hearing that she only threw the telephone receiver at her co-worker after the co-worker had pushed a computer printer at her in the office in the dormitory. See N.T. 3/23/10 at 13-14. However, Employer's Investigative Report, which was admitted as Exhibit 6A at the hearing without objection, states the following, in pertinent part:

> [Claimant]'s testimony is not supported by the observations of [two co-workers] who both saw the printer and the monitor on the floor in front of the desk ([Claimant] was seated behind the desk). [A student] explained that she was in her dorm and heard the argument in the office but did not go in. [Another student] told the interviewers that she was approaching the office because of the loud argument and heard the printer and the monitor fall. She went in and observed [Claimant] throw the phone at [her co-worker] and observed that the printer and the monitor were on the floor in front of the desk. After [Claimant] left the room, [Employer's Human Resources Director] tried to push or shove the printer toward the chair where [Claimant] was sitting and could not. It was attached to the Ethernet cable which prevented the printer from moving in that direction. The Ethernet cable would not prevent [Claimant] from pushing it off the desk in the direction of [her co-worker].
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> * * *
>
> Particularly disturbing is the allegation by [Claimant] that she was assaulted by [her co-worker] when she shoved the printer into her chest. That allegation is not supported by [her co-worker]'s statement and is refuted by the various witness' observations of the printer, monitor and keyboard on the floor in front of the desk, not on the floor where [Claimant] was seated.

CR Item No. 2 at 6, 8.

Thus, although the Board could accept Claimant's testimony as credible in part, there was not uncontradicted evidence establishing good cause for her actions in this case. Based on the foregoing, it is clear that Claimant's reliance upon Roberts is misplaced.

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

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O R D E R

AND NOW, this 6th day of January, 2011, the order of the Unemployment Compensation Board of Review, dated June 4, 2010, at No. B-500726, is AFFIRMED.

JAMES R. KELLEY, Senior Judge