IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mary A. Criss, Petitioner	:	
v.	:	No. 1290 C.D. 2009
	:	Submitted: January 15, 2010
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON FILED: February 25, 2010

Mary A. Criss (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board). The Board affirmed the Unemployment Compensation Referee's (Referee) decision denying Claimant benefits under Section 402(e) of the Unemployment Compensation Law (Law).[1] Claimant argues that the Board erred in determining that Claimant's conduct rose to the level of willful misconduct. For the reasons set forth below, we affirm.

Claimant applied for unemployment compensation after being discharged from her employment with Allegheny Valley Schools (Employer). The Erie UC Service Center (Service Center) issued a determination, finding Claimant

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

ineligible for benefits under Section 402(e) of the Law. Claimant appealed the Service Center's determination, and an evidentiary hearing was held before the Referee. During the hearing, Claimant testified on her own behalf and presented the testimony of two of her coworkers, Thomasina Garner and Marlene Clayton. Richard Rizzutto, the Director of Human Resources, Joy Frenz, the House Manager at Centerville Pike, and Theresa Cox, Administrator, testified on behalf of Employer. Following the hearing, the Referee issued a decision, in which he made the following relevant findings:

1. The Claimant was last employed by Allegheny Valley Schools where she performed the job duties of house aide at a final rate of pay of $9.17 per hour. She began this employment August 7, 2006, and her last day of work was December 17, 2008.

2. In relevant part, the employer rule prohibits sleeping during work hours.

3. The Claimant was aware of the employer rule.

4. The employer provides group homes for mentally and physically disabled individuals.

5. On December 17, 2008, the Claimant was scheduled to work beginning December 17, 2008, at 11:00 p.m. and her shift ended at 7:00 a.m. on December 18, 2008.

6. At approximately 3:30 [a.m.] on December 18, 2008, the supervisor went to the group home at which time she opened the front door and observed the Claimant on a recliner her feet were up, her head laying on her right arm with her eyes closed, sleeping.

7. The Claimant had not been feeling well due to a certain medical circumstance.

8. The Claimant did not request to go home because of the medical circumstance.

9. The Claimant admitted that she dozed off.

10. The Employer terminated the Claimant's employment for sleeping during duty hours.

11. The Claimant filed an application for unemployment compensation benefits with an effective date of December 28, 2008, thereby establishing a weekly benefit amount of $216 and a partial benefit credit of $87.

12. The Claimant signed for and received unemployment compensation benefits for the weeks at issue as follows: $216 for each of the weeks ending 1/10/09, 1/24/09, 1/31/09, 2/7/09, 2/14/09 and 2/21/09.

13. The Claimant was paid a total of $1,512 in unemployment compensation benefits.

14. The Claimant was overpaid a total of $1,512 in unemployment compensation benefits.

15. The Claimant did not intentionally or deliberately mislead or misadvise the unemployment authorities in order to receive benefits for which she was not eligible.

(Reproduced Record (R.R.) 3a.) Based on the findings of fact, the Referee concluded that Claimant violated Employer's policy when she was sleeping during working hours and that Claimant's behavior was in disregard of Employer's interest and the standard of behavior Employer has the right to expect of an employee. Under the circumstances, Claimant's actions rose to the level of willful misconduct, and she was, therefore, ineligible to receive benefits under Section 402(e).[2]

[2] The Referee affirmed the Service Center's determination in regard to overpayment of benefits. The Referee imposed a $1,512 non-fault overpayment of benefits to be recouped in accordance with Section 804(b) of the Law, 43 P.S. § 874(b).

Claimant appealed to the Board, which affirmed the Referee's determination. In its order, the Board adopted the Referee's findings of fact and conclusions of law. Claimant now petitions this Court for review of the Board's order. On appeal,[3] Claimant argues that the Board erred in concluding that her conduct rose to the level of willful misconduct under Section 402(e).[4]

Section 402(e) provides, in part, that an employee shall be ineligible for compensation for any week in which "his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work." 43 P.S. § 802(e). The employer bears the burden of proving that the claimant's unemployment is due to the claimant's willful misconduct. *Walsh v. Unemployment Comp. Bd. of Review*, 943 A.2d 363 (Pa. Cmwlth. 2008). The term "willful misconduct" is not defined by statute. The courts, however, have defined "willful misconduct" as follows:

> (1) an act of wanton or willful disregard of employer's interests, (2) a deliberate violation of the employer's rules, (3) a disregard of standards of behavior which the employer has a right to expect of an employee, or (4) negligence indicating an intentional disregard of the employer's interest or of the employee's duties and obligation to the employer.

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[3] This Court's standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. § 704. Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. *Hercules, Inc. v. Unemployment Comp. Bd. of Review*, 604 A.2d 1159 (Pa. Cmwlth. 1992).

[4] Claimant does not challenge the Board's findings of facts. Therefore, the findings are conclusive and binding on this Court upon review. *Campbell v. Unemployment Comp. Bd. of Review*, 694 A.2d 1167 (Pa. Cmwlth. 1997).

Grieb v. Unemployment Comp. Bd. of Review, 573 Pa. 594, 827 A.2d 422 (2003). An employer, seeking to prove willful misconduct by showing that the claimant violated the employer's rules or policies, must prove the existence of the rule or policy and that the claimant violated it. *Walsh*, 943 A.2d at 369. If, however, the claimant can show good cause for the violation—*i.e.*, "that the actions which resulted in the discharge were justifiable and reasonable under the circumstances"—then there should be no finding of willful misconduct. Whether an employee's conduct constituted willful misconduct is a matter of law subject to this Court's review. *Id.* at 368.

Regardless of the existence of a written workplace rule or policy on the subject, this Court has consistently held that sleeping on the job constitutes willful misconduct sufficient to disqualify a claimant from receipt of unemployment compensation benefits under Section 402(e) of the Law. *See*, *e.g.*, *L. Washington & Assocs., Inc., v. Unemployment Comp. Bd. of Review*, 662 A.2d 1148, 1149 (Pa. Cmwlth. 1995) ("It is without question that if Claimant was, in fact, sleeping on the job, such behavior would constitute willful misconduct disqualifying him from receiving unemployment compensation benefits."); *Biggs v. Unemployment Comp. Bd. of Review*, 443 A.2d 1204, 1205 (Pa. Cmwlth. 1982) (holding that sleeping, or dozing, on the job found to be willful misconduct even in the absence of a written employment rule prohibiting it).

Here, Employer sustained its burden to establish a prima facie case of willful misconduct. Employer established that its policy specifically provides that any employee found asleep while on duty, "shall be discharged for a period of up to five (5) working days and may be subject to immediate dismissal. Each instance is reviewed on an individual basis." (R.R. 6a.) The Board found that Claimant

knew about Employer's policy, and the finding is supported by the evidence of the record. (R.R. 1a, 3a, 13a.) Employer, thus, met its burden of proving that its policy existed and that Claimant was aware of such policy. The Board also found that Claimant was asleep while on duty, which, even in the absence of a written policy, in and of itself constitutes prima facie evidence of willful misconduct. (R.R. 1a.) Accordingly, the record clearly shows that Employer met its burden in making out a prima facie case for willful misconduct.

Claimant, however, claims that the Board erred in finding that her conduct rose to the level of willful misconduct and also claims that she had good cause for her actions. She contends that her actions do not rise to the level of willful misconduct because the facts do not establish a prolonged period of sleep. Claimant argues that her acts were not deliberate but that she had a bad leg and needed to sit down and rest, and she dozed off due to pain and exhaustion. Finally, Claimant contends that Employer's policy was vague and improperly applied to a first time violation, which should more reasonably result in a temporary suspension.

First, we reject Claimant's argument that her conduct did not rise to the level of willful misconduct because she only "momentarily dozed" off. We find no distinction between dozing and sleeping for purposes of eligibility for unemployment compensation benefits, and Claimant cites to no case law in support of her position. Moreover, even if we recognized "dozing" as a separate and distinct state of consciousness between awake and asleep that does not rise to the level of willful misconduct under Section 402(e) of the Law, whether Claimant in this case was "dozing" or "sleeping" when found by Employer was a factual issue. The record establishes that Claimant was found to have been "sleeping," not

"momentarily dozing." The Referee specifically found that the supervisor observed Claimant "sleeping" and that Claimant admitted that she "dozed" off. (R.R. 3a.) Even assuming this reflects a conflict in the testimony, the Board and the Referee resolved this conflict in Employer's favor. In denying benefits, the Referee reasoned that Claimant "violated work rules when she was sleeping during working hours." (R.R. 4a.) Furthermore, the Board determined that Employer credibly established that Claimant was "asleep" while she was at work. (R.R. at 1a.) There was no finding that Claimant was "only dozing" or that she slept for only a short duration. As these findings by the Board and Referee are supported by substantial evidence, the Court must accept them on appeal. *See Biggs*, 443 A.2d at 1205 (noting that referee and Board "were unpersuaded by claimant's testimony that his dozing was justified" and that their findings, support by substantial evidence, were conclusive on appeal).

Second, we must reject Claimant's argument that her actions were not deliberate and, therefore, should not constitute willful misconduct because she dozed off due to pain and exhaustion. The Board found that Employer credibly established that Claimant was sleeping while she was at work. Claimant did not contact her supervisor or request to go home due to her pain and discomfort. There is no evidence that she took any steps to prevent herself from falling asleep. Instead, there is record evidence that she purposefully reclined in a chair with her feet up in the middle of the night, knowing that she was tired and in pain and that Employer prohibited employees from sleeping. Under these circumstances, we cannot say that her conduct was justifiable and reasonable under the circumstances—circumstances that, we note, include the awesome responsibility of

caring for mentally and physically disabled individuals in a group home setting. (R. 14a.)

Finally, we must reject Claimant's argument that a determination of willful misconduct is not warranted given Employer's policy on sleeping at work. Claimant appears to take the position that the Board erred in concluding that Claimant's conduct rose to the level of willful misconduct because Employer could have chosen to impose a lesser sanction on Claimant's behavior. In this instance, Employer determined that Claimant's actions were severe enough to warrant her discharge. Employer's policy clearly provides that Employer will individually review each instance of an employee asleep at work. (R.R. 6a.) The sleeping employee, at a minimum, will be suspended for five work days and may be subject to immediate dismissal. *Id.* Employer's policy clearly provides that falling asleep at work may, at Employer's discretion, result in termination. Thus, while Employer could have subjected Claimant to a lesser penalty, its decision to terminate is consistent with its policy and does not form a basis for a determination that Claimant did not engage in willful misconduct.

Given the record before us, we cannot conclude that the Board erred when it determined that Claimant's conduct rose to the level of willful misconduct and that she is, therefore, ineligible for benefits under Section 402(e).

Accordingly, we must affirm the order of the Board.

P. KEVIN BROBSON, Judge

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O R D E R

AND NOW, this 25th day of February, 2010, the order of the Unemployment Compensation Board of Review is hereby affirmed.

P. KEVIN BROBSON, Judge