IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Evangelene Moore,	:	
Petitioner	:	
	:	
v.	:	No. 1529 C.D. 2009
	:	Submitted: January 22, 2010
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: March 2, 2010

Evangelene Moore (Claimant) petitions pro se for review of the July 15, 2009, order of the Unemployment Compensation Board of Review (Board), affirming the decision of a referee that Claimant was ineligible for 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 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. The employer bears the burden to prove that a discharged employee was guilty of willful misconduct. Gillins v. Unemployment Compensation Board of Review, 534 Pa. 590, 633 A.2d 1150 (1993). Although the Law does not define willful misconduct, it has been construed as (1) the wanton or willful disregard of the employer's interests; (2) the deliberate violation of the employer's rules/directives; (3) the disregard of the standards of behavior which an employer can rightfully

(Footnote continued on next page…)

Claimant worked as a legal secretary for Larry Lefkowitz, Esquire, from February 12, 2007, to February 19, 2009. Claimant regularly completed her work on time. (Finding of Fact No. 3.) However, in February of 2009, Lefkowitz noticed that Claimant was falling behind in her work. Around this time, Claimant also began arriving late for work and leaving early. (Finding of Fact No. 4.) While Claimant was paid for thirty hours of work per week, Claimant actually was working only approximately twenty hours. (Finding of Fact No. 5.)

Lefkowitz approached Claimant regarding her job performance and hours and indicated that he was going to reduce her pay to reflect the hours she actually worked. Claimant became upset and told Lefkowitz "he should do it himself if he was not happy with her work." (Finding of Fact No. 6.) Claimant worked at a second job, and Lefkowitz believed that this second job was interfering with her job responsibilities. When Lefkowitz questioned Claimant regarding this second job, she told Lefkowitz that "it was none of the employer's business." (Finding of Fact No. 11.)

When asked if she wanted to continue working, Claimant responded that "it was up to the employer" and that "he would be doing her a favor if she no longer had to work for him." (Findings of Fact Nos. 14-15.) Lefkowitz informed Claimant that February 20, 2009, would be her last day of work. However,

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(continued…)

expect from an employee; and (4) negligence demonstrating an intentional disregard of the employer's interest or the employee's duties and obligations to the employer. Kelly v. Unemployment Compensation Board of Review, 747 A.2d 436 (Pa. Cmwlth. 2000). Whether or not an employee's actions amount to willful misconduct is a question of law subject to review by this Court. Noland v. Unemployment Compensation Board of Review, 425 A.2d 1203 (Pa. Cmwlth. 1981).

Lefkowitz later decided not to let Claimant work that day, and he packed up her belongings and left them outside his office. (Finding of Fact No. 17.)

Claimant filed a claim for benefits with the Scranton Unemployment Compensation Service Center (Service Center), which determined that Claimant was not ineligible for benefits under section 402(e) of the Law. Lefkowitz appealed, and the case was assigned to the referee for a hearing.

Lefkowitz testified at the April 23, 2009, hearing concerning the facts recited above. Lefkowitz acknowledged that Claimant was seeking a second job in November of 2008 and that he wrote her a reference; however, he believed Claimant would only be working for the Christmas holiday season. (N.T. at 9.) Lefkowitz repeatedly stated that while he paid Claimant for thirty hours of work per week, Claimant only worked twenty-one and a quarter hours. Lefkowitz also testified that Claimant was calling off work more often, usually on a Monday or Friday. Lefkowitz indicated that he finally discharged Claimant because "she was willfully insubordinate" and refused "to do her work in a timely manner." (N.T. at 13.)

Claimant testified that Lefkowitz was aware of her second job at a department store and even had written her a reference for this job. Claimant stated that she had valid reasons for calling off work, including her child's sickness. (N.T. at 19.) As to her schedule, Claimant testified that she had been arriving at work between 9:15 a.m. and 9:30 a.m. since September of 2008. Id. Claimant specifically denied ever telling Lefkowitz to do the work himself or that she no longer wanted to work for him. Id. Claimant did admit telling Lefkowitz that what she did outside of the job was "none of [his] business." (N.T. at 22.)

The referee reversed the Service Center's determination. The referee resolved any conflicts in testimony in favor of Lefkowitz, finding his recollection of events to be more credible. The referee concluded that Claimant's declining job performance and insubordination amounted to willful misconduct that rendered her ineligible for benefits under section 402(e) of the Law. Claimant appealed to the Board, which affirmed the referee's decision and specifically adopted the referee's credibility determinations, findings, and conclusions. (Board op. at 1.) Claimant then filed a petition for review with this Court.

On appeal,[2] Claimant argues that the Board erred in concluding that her actions rose to the level of willful misconduct.[3] We disagree.

Where an employee had previously performed satisfactory work, such as Claimant in this case, a decline in work performance "can be construed as conduct showing intentional and substantial disregard of the employer's interest or the employee's duties and obligation, i.e., wilful [sic] misconduct." Astarb v. Unemployment Compensation Board of Review, 413 A.2d 761, 763 (Pa. Cmwlth. 1980) (citation omitted). An employee's poor attitude, coupled with specific conduct adverse to an employer's interest or detrimental to an employer, also may justify a finding of willful misconduct. Astarb. Moreover, an employer who meets

[2] Our scope of review is limited to a determination of whether constitutional rights were violated, an error of law was committed or whether necessary findings of fact are supported by substantial evidence. Shrum v. Unemployment Compensation Board of Review, 690 A.2d 796 (Pa. Cmwlth.), appeal denied, 548 Pa. 663, 698 A.2d 69 (1997).

[3] Claimant also challenges the Board's credibility determination with respect to the testimony of Lefkowitz. However, credibility determinations are within the exclusive province of the Board and will not be disturbed on appeal. Melomed v. Unemployment Compensation Board of Review, 972 A.2d 593 (Pa. Cmwlth. 2009).

with an employee to discuss his or her job performance "may rightfully expect that the employee will act in a reasonable manner to attempt to resolve any concerns or disputes" and "that the employee will not become abusive or obstructive." Dinkins v. Unemployment Compensation Board of Review, 424 A.2d 606, 607 (Pa. Cmwlth. 1981).[4]

In this case, we agree that Claimant's conduct, including her declining work performance and insolent responses to Lefkowitz, reflect a disregard of Lefkowitz's interests and the standards of behavior which he could rightfully expect from an employee. Thus, the Board properly concluded that Claimant's actions rose to the level of willful misconduct.

Accordingly, we affirm.

PATRICIA A. McCULLOUGH, Judge

[4] As noted above, Claimant responded that Lefkowitz "should do it himself if he was not happy with her work," that the second job was "none of [his] business," and that "he would be doing her a favor if she no longer had to work for him." (Findings of Fact Nos. 6, 11, 15.) Insubordination alone may support a finding of willful misconduct. Spiropoulos v. Unemployment Compensation Board of Review, 654 A.2d 642 (Pa. Cmwlth. 1995); Losch v. Unemployment Compensation Board of Review, 461 A.2d 344 (Pa. Cmwlth. 1983).

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Unemployment Compensation Board of Review, Respondent	:	

ORDER

AND NOW, this 2nd day of March, 2010, the order of the Unemployment Compensation Board of Review is hereby affirmed.

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PATRICIA A. McCULLOUGH, Judge