

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lori L. Robson, :
Petitioner :
 :
v. : No. 1737 C.D. 2007
 : Submitted: February 1, 2008
Unemployment Compensation :
Board of Review, :
Respondent :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE McCLOSKEY

FILED: March 11, 2008

Lori L. Robson (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board), affirming the decision of a Referee denying Claimant benefits on the grounds of willful misconduct pursuant to Section 402(e) of the Unemployment Compensation Law (Law).¹ We affirm.

Claimant began working for Quaker Steak and Lube (Employer), a combination bar/restaurant, on August 2, 2005. Claimant was employed as a bartender. On February 6, 2007, she was terminated for igniting a shot of alcohol and serving it to a customer.

At the hearing before the Referee, Nadine Berbel, vice-president of administration, testified on behalf of Employer. She stated that Claimant admitted to

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

igniting a shot of alcohol and serving it to a customer. Claimant was then fired for violating a work rule.

Ms. Berbel alleged that Employer participated in a national training program for bartenders entitled "Training For Intervention Procedures," which is commonly referred to as "TIPS." (R.R. at 20a). She explained that in the fall of 2006, a TIPS class was held at the worksite. She stated that Claimant participated in the class and received a passing grade. Ms. Berbel claimed that at that class, Claimant learned that igniting alcohol was prohibited by Employer.

Edward Randall, executive vice-president, also testified on behalf of Employer. He stated that he attended the TIPS class with Claimant. Mr. Randall explained that he routinely attended the TIPS classes to inform the bartenders of any rule changes and/or to answer questions. He claimed that during that particular class, a class member asked a question about igniting shots of alcohol. Mr. Randall stated that in response to the question, he informed the class that the bartenders were prohibited from igniting shots of alcohol for customers. He also informed the class that the bartenders should not permit the customers to ignite shots of alcohol.

Claimant testified that on February 6, 2007, a customer requested "a shot of 151" Rum. (R.R. at 27a). She then asked the customer if he wanted her to light the shot of alcohol. The customer replied in the affirmative. Claimant indicated that she subsequently ignited the shot of alcohol and served it to the customer. The customer then attempted to drink the shot of alcohol while it was still ignited, thereby burning himself.

Claimant stated that she was not aware of any rule prohibiting her from igniting shots of alcohol. She claimed she did not recall Mr. Randall discussing the issue at a TIPS class. She further claimed to have witnessed other bartenders igniting

shots of alcohol. However, she did not know if a manager/supervisor ever witnessed alcohol being ignited.

Claimant also introduced Employer's training manual into evidence.² The manual was last updated in December, 2005. It did not address the issue of igniting alcohol. However, the manual did provide that drinks could be "served with plastic swords, paper parasols, fireworks, roses, or any other odds and ends." (R.R. at 65a). Claimant argued that as the manual permitted fireworks in drinks, igniting a shot of alcohol was permissible pursuant to the manual.

Following the hearing, the Referee determined that Mr. Randall credibly testified that he informed Claimant that drinks should not be ignited. Thus, the Referee further determined that Claimant violated a work rule in serving an ignited drink to a customer. As such, the Referee denied Claimant unemployment compensation benefits.

Claimant appealed to the Board. The Board determined that Employer's witnesses were credible and resolved all conflicts in their favor. As to the training manual, the Board concluded that the allowance of fireworks did not conflict with a prohibition against ignited shots of alcohol and Claimant was expressly informed of the prohibition against igniting shots of alcohol at the TIPS training session. As such, the Board determined that Claimant violated a work rule and was ineligible for unemployment compensation benefits.

Claimant now appeals to this Court.³ Claimant first alleges that she did not engage in willful misconduct by igniting a shot. Claimant alleges that Employer failed

² Claimant received this manual from Employer when she was hired in 2005.

³ Our scope of review is limited to determining whether the Claimant's constitutional rights were violated, whether an error of law was committed, or whether substantial evidence supports the findings of fact. Steinberg Vision Associates v. Unemployment Compensation Board of Review, 624 A.2d 237 (Pa. Cmwlth. 1993). Whether a Claimant's conduct constitutes willful misconduct is a **(Footnote continued on next page...)**

to establish that a rule existed prohibiting her conduct. Claimant alleges that the only rules that existed at the time of the incident were the written rules in the employee manual, which did not prohibit ignited shots of alcohol and which did permit fireworks.

The employer has the burden of establishing that willful misconduct has occurred. Once this burden is met, the claimant has the burden of establishing her actions did not constitute willful misconduct under the circumstances or that there was good cause for the behavior. Kelly, 747 A.2d at 438-39.

Willful misconduct is defined as follows:

- (1) an act of wanton or willful disregard of the employer's interest;
- (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; and
- (4) negligence indicating an intentional disregard of the employer's interest or the employee's duties and obligations to the employer.

Altemus v. Unemployment Compensation Board of Review, 681 A.2d 866, 869 (Pa. Cmwlth. 1996), petition for allowance of appeal denied, 547 Pa. 757, 692 A.2d 567 (1997).

To meet its burden of proof in establishing willful misconduct as to the violation of a work rule, an employer must establish the existence of the rule, that the employee was aware of the rule and that the rule was violated. Arbster v. Unemployment Compensation Board of Review, 690 A.2d 805 (Pa. Cmwlth.), petition for allowance of appeal denied, 549 Pa. 718, 701 A.2d 579 (1997). Once employer has

(continued...)

question of law subject to our review. Kelly v. Unemployment Compensation Board of Review, 747 A.2d 436 (Pa. Cmwlth. 2000).

met its burden, the burden shifts to the claimant to prove that the rule was unreasonable or that there was good cause for violating it. Gillins v. Unemployment Compensation Board of Review, 534 Pa. 590, 633 A.2d 1150 (1993).

In the instant case, Employer presented evidence that Claimant was specifically told by Mr. Randall, at a TIPS class, that bartenders were not to ignite shots of alcohol. The Board, as the ultimate finder of fact, accepted Mr. Randall's evidence as credible. Baldauf v. Unemployment Compensation Board of Review, 854 A.2d 689 (Pa. Cmwlth. 2004). As such, Employer met its burden of proving that said work rule existed and that Claimant was aware of the work rule at the time she committed the violation. We reject Claimant's argument that the employee manual was the sole resource guide to the rules. The fact that the manual permitted "fireworks" in drinks is irrelevant. Claimant did not place a firework in a drink, she ignited a shot; contrary to a specific directive by Employer.⁴

Claimant also alleges that the finding that there was a verbal rule prohibiting the igniting of shots of alcohol was not supported by substantial evidence. Claimant argues that the conversation between Mr. Randall and an unknown third party, who allegedly asked the question regarding igniting shots of alcohol, is impermissible hearsay.

Hearsay is an out-of court statement offered to prove the truth of the matter asserted. Pa. R.E. 801(c). Generally, the evidentiary rules in unemployment compensation actions are relaxed and hearsay may be admitted as evidence. However, a finding of fact based solely on hearsay evidence is impermissible, as hearsay evidence must be corroborated by competent evidence of record. Johnson v. Unemployment

⁴ Claimant did not allege that anyone in the restaurant/bar ever ignited any type of fireworks and placed them into drinks.

Compensation Board of Review, 869 A.2d 1095 (Pa. Cmwlth.), petition for allowance of appeal denied, 585 Pa. 699, 889 A.2d 90 (2005).

We accept Claimant's argument that the question posed to Mr. Randall constitutes hearsay, as the person alleged to have asked the question did not testify at the hearing and the statement was offered to establish that an issue was raised regarding igniting shots of alcohol. However, we reject Claimant's conclusion that this somehow negates Mr. Randall's response to the question. Mr. Randall testified that he addressed the TIPS class and informed the class that bartenders were not permitted to ignite shots of alcohol. Mr. Randall's testimony as to what he said, regardless of whether it was in response to a question, is not hearsay and it is Mr. Randall's response to the question that sets forth the work rule. Thus, Employer presented substantial evidence that there was a work rule prohibiting the igniting of shots.

Accordingly, the order of the Board is affirmed.

JOSEPH F. McCLOSKEY, Senior Judge

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Board of Review,	:	
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ORDER

AND NOW, this 11th day of March, 2008, the order of the Unemployment Compensation Board of Review is affirmed.

JOSEPH F. McCLOSKEY, Senior Judge