

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Zubayda Jackson, :
 :
 Petitioner :
 :
 v. : No. 1848 C.D. 2010
 :
 : Submitted: March 4, 2011
 Unemployment Compensation Board :
 of Review, :
 Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH

FILED: October 14, 2011

Zubayda Jackson (Claimant) petitions, pro se, for review of the August 12, 2010, order of the Unemployment Compensation Board of Review (Board), which affirmed the decision of a referee determining that Claimant is ineligible for unemployment compensation benefits under section 402(e) of the Unemployment Compensation Law (Law).¹ We now affirm.

Claimant was employed by a partnership, CSJ Enterprises (Employer), as a store manager at Employer's McDonald's Restaurant. (Finding of Fact No. 1.) Claimant was aware of Employer's policy prohibiting any form of harassment, joking remarks, or abusive conduct that demeans or shows hostility toward an individual

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 her unemployment is due to her discharge or temporary suspension from work for willful misconduct connected to her work.

based upon her race, color, gender, religion, national origin, or other prohibited basis, and which creates an intimidating, hostile, or offensive work environment, unreasonably interferes with her work performance, or otherwise adversely affects her employment opportunity. (Findings of Fact Nos. 2, 3.)

During her employment, Claimant supervised a female assistant manager (AM) who was Hispanic. (Finding of Fact No. 4.) In the course of her employment, Claimant and the AM made semi-insulting remarks to one another in a joking manner which pertained to race and nationality. (Finding of Fact No. 5.)

In January of 2010, the AM sent text messages to Claimant on a cellular telephone provided by Employer regarding another employee's birthday that the AM wanted to celebrate at the restaurant. (Finding of Fact No. 6.) Claimant responded by text message and indicated that she felt that the AM had upset other non-management employees in the restaurant by inviting some, and not others, to a party outside of work. (Finding of Fact No. 6.) Claimant also stated by text message, "Do not be in here acting a fool on (certain employees') bdays if u distract the crew u will go home..." and "U are a dick eater...so I can't hate u are so joe^[2] its in ur blood..." and "...get a f---kin life or in ur case ur ass whipped." (Finding of Fact No. 6.)

On February 13, 2010, the AM came to the restaurant on her day off with a gift or gifts for another worker or workers, which upset a coworker who did not receive a gift. (Finding of Fact No. 8.) On February 18, 2010, Claimant gave the AM a written warning for bringing some of the employees gifts, indicating that it could be considered to be favoritism and that the AM would be suspended if it occurred again. (Finding of Fact No. 9.) The AM thought that the written warning

² Claimant and the AM understood the term "Joe" to refer to Hispanic individuals. (Finding of Fact No. 7).

was unfair and that Claimant was setting her up to be discharged because Claimant did not personally like her. (Finding of Fact No. 10.)

On February 19, 2010, the AM met with Employer's partner to complain that Claimant was harassing her and she showed him some of Claimant's text messages from January. (Finding of Fact No. 11.) On February 20, 2010, Employer's partner discharged Claimant citing "racial comments" and creating a threatening environment as the reasons. (Finding of Fact No. 12.)

Claimant filed a claim for benefits with the Scranton UC Service Center (Service Center) which determined that Claimant was ineligible for benefits under section 402(e) of the Law. (Certified Record (CR) Item No. 5.) Claimant appealed, and the case was assigned to a referee for a hearing. (CR Item Nos. 8, 11, 14.) Claimant testified at the hearing and admitted that she had sent the text messages to the AM. (N.T. 5/7/10³ at 42-43.)

Ultimately, the referee affirmed the Service Center's determination that Claimant was ineligible for benefits under section 402(e) of the Law. (CR Item No. 16.) The referee noted that Claimant and the AM generally disliked each other and each referred to the other's race or national origin, so that Claimant did not intend to discriminate against the AM by issuing the written warning. (CR Item No. 16 at 2.) Rather, Claimant had angry responses to the AM's behavior that affected the restaurant, especially the multiple text messages sent in January of 2010. (CR Item No. 16 at 2.)

However, the referee determined that Claimant was expected to be more careful with her statements with the AM because she was the AM's supervisor and had the authority to impose discipline or otherwise affect the AM's job. (CR Item

³ "N.T. 5/7/10" refers to the transcript of the referee's hearing.

No. 16 at 3.) As a result, the referee concluded that Claimant's statements to the AM were a violation of Employer's harassment policy and that Claimant is ineligible for benefits under section 402(e) of the Law. (CR Item No. 16 at 3.)

Claimant appealed to the Board, which affirmed the referee's decision by expressly adopting and incorporating the referee's findings and conclusions. (CR Item No. 18.) Claimant then filed the instant petition for review.^{4,5}

As noted above, pursuant to section 402(e) of the Law, an employee is ineligible for unemployment compensation benefits when she has been discharged from work for willful misconduct connected with her 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.

The Law does not define the term "willful misconduct" under section 402(e); however, our Supreme Court has held that willful misconduct "includes those actions constituting a deliberate violation of the employer's rules or a disregard of the standard of behavior which the employer has a right to expect of an employee." Burchell v. Unemployment Compensation Board of Review, 848 A.2d 1082, 1084 (Pa. Cmwlth. 2004). Where, as here, the employer seeks to establish willful

⁴ On August 24, 2010, Claimant filed a request for reconsideration with the Board. (CR Item No. 19.) The Board denied Claimant's request on September 14, 2010. (CR Item No. 21.)

⁵ 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; Shrum v. Unemployment Compensation Board of Review, 690 A.2d 796 (Pa. Cmwlth.), appeal denied, 548 Pa. 663, 698 A.2d 69 (1997).

misconduct based on a work rule violation, the employer is required to prove that the work rule existed and that the work rule was violated. Conemaugh Memorial Medical Center v. Unemployment Compensation Board of Review, 814 A.2d 1286 (Pa. Cmwlth. 2003). If the employer establishes that the work rule existed, that it was reasonable, and that it was violated, the burden of proof then shifts to the claimant to show that she had good cause for her conduct or action. 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 give that party the benefit of all inferences that can be logically and reasonably drawn from the testimony. Id.

The sole claim⁶ raised by Claimant in this appeal is that the Board's determination that she is ineligible for benefits under section 402(e) of the Law is not

⁶ Claimant also alleges that the Board erred in determining that she is ineligible for benefits under section 402(e) of the Law because the Law was repealed on May 22, 1933, and, therefore, section 402(e) does not exist. However, the foregoing allegation of error regarding the Board's decision has been waived for purposes of appeal because Claimant did not raise this claim in the petition for review that she filed in this Court. Pa.R.A.P. 1513(d); Werner v. Zazyczny, 545 Pa. 570, 681 A.2d 1331 (1996) (Commonwealth Court was correct in refusing to consider issues not fairly comprised in objections raised in petition for review); Jimoh v. Unemployment Compensation **(Footnote continued on next page...)**

supported by substantial evidence. Specifically, Claimant contends that she did not send the text messages to the AM and that Employer did not introduce a cellular phone into evidence to support a finding that she sent the text messages to the AM.

However, as noted above, at the referee's hearing Claimant admitted to sending the text messages to the AM. See N.T. 5/7/10 at 42-43. Claimant's admission constitutes substantial evidence supporting the Board's finding of fact in this regard. Flores v. Unemployment Compensation Board of Review, 686 A.2d 66 (Pa. Cmwlth. 1996); Criswell v. Unemployment Compensation Board of Review, 393 A.2d 1071 (Pa. Cmwlth. 1978). In short, Claimant's allegation of error in this regard is patently without merit.

Accordingly, the order of the Board is affirmed.

PATRICIA A. McCULLOUGH, Judge

(continued...)

Board of Review, 902 A.2d 608 (Pa. Cmwlth. 2006) (issue not raised in the stated objections in the petition for review nor "fairly comprised therein" is waived and will not be addressed by this Court); Tyler v. Unemployment Compensation Board of Review, 591 A.2d 1164 (Pa. Cmwlth. 1991) (same).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Zubayda Jackson,	:	
	:	
Petitioner	:	
	:	No. 1848 C.D. 2010
v.	:	
	:	
Unemployment Compensation Board	:	
of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 14th day of October, 2011, the August 12, 2010, order of the Unemployment Compensation Board of Review is hereby affirmed.

PATRICIA A. McCULLOUGH, Judge