

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Cindy L. Lines,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 206 C.D. 2008
	:	
Unemployment Compensation Board of Review,	:	Submitted: April 25, 2008
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: July 1, 2008

Cindy L. Lines (Claimant), pro se, petitions for review of an order of the Unemployment Compensation Board of Review (Board), which affirmed the Referee’s decision denying her benefits under Section 402(e) of the Unemployment Compensation Law (Law).¹ On appeal, Claimant argues that the Board erred in concluding that her conduct rose to the level of willful misconduct. For the reasons discussed herein, we affirm the order of the Board.

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

Claimant applied for unemployment compensation benefits after being discharged from her employment with Odd Fellows Home of Pennsylvania (Employer). The Lancaster UC Service Center (Department) denied benefits pursuant to Section 402(e) of the Law. Claimant appealed the Department's determination, and an evidentiary hearing was held before a Referee at which Claimant, represented by counsel, along with two witnesses, and three witnesses for Employer appeared. The Referee issued a decision denying Claimant benefits pursuant to Section 402(e) of the Law. In doing so, the Referee made the following findings:

1. The claimant was last employed on August 6, 2007, by Odd Fellows Home of Pennsylvania as a full-time certified nursing assistant, paid \$12.00 per hour. The claimant had been employed for approximately one year.
2. The employer has a policy which provides for termination for resident mistreatment, neglect, abuse (verbal, sexual, physical, mental, involuntary seclusion, or misappropriation of resident property) or create or contribute [sic] to unsanitary conditions.
3. The claimant was aware of the employer's policy.
4. The employer's employee code of conduct provides for discharge for resident mistreatment, neglect, abuse of any kind and misappropriation of resident property/money and discourteous conduct toward any resident, visitor, doctor or employee, and inefficiency, inability and/or gross or repeated negligence in the performance of assigned duties.
5. The claimant was aware of the employer's employee code of conduct.
6. On August 1, 2007, the claimant responded to a resident who requested to go to the bathroom that the resident knew what to do and affirmed when the resident said that she should pee in her diaper.
7. The director of activities was with the resident when the claimant advised the resident that she should pee in her brief.
8. The director of activities advised the director of human resources of the incident and the incident was referred for investigation.

9. The claimant was suspended pending the outcome of investigation.
10. On August 2, 2007, the employer concluded its investigation after interviewing all individuals present and found that the claimant had violated the employer's policy and code of conduct in advising the resident to soil herself rather than to take her [sic] bathroom.

(Referee's Decision/Order, Findings of Fact ¶¶ 1-10.) Based on the above-mentioned findings, the Referee concluded that Claimant's conduct in requesting the resident to soil herself in violation of Employer's policies, of which the Claimant was or should have been aware, rose to the level of willful misconduct. Accordingly, the Referee determined that Claimant was ineligible to receive benefits under Section 402(e) of the Law. Subsequently, the Board issued an order affirming the Referee's decision. In its order, the Board adopted the Referee's findings of fact and conclusions of law, and found the testimony of Employer's witnesses to be credible. Claimant now petitions this Court for review.²

Claimant argues that the Board erred in concluding that her conduct rose to the level of willful misconduct and contests the Board's finding that she engaged in the conduct alleged by Employer.³

² "The Court's review is limited to determining whether constitutional rights were violated, whether an error of law was committed, whether a practice or procedure of the Board was not followed or whether the findings of fact are supported by substantial evidence in the record." Western & Southern Life Ins. Co. v. Unemployment Compensation Board of Review, 913 A.2d 331, 334 n.2 (Pa. Cmwlth. 2006).

³ In Claimant's Statement of Questions Involved, she presents the following four issues for review: (1) that the Board erred when it determined Employer met its burden of establishing that Claimant's actions amounted to willful misconduct sufficient to deny benefits under Section 402(e) of the Law; (2) that the Board erred when it relied on findings based on hearsay evidence, properly objected to and not corroborated by competent evidence to support a determination of willful misconduct; (3) that the Board erred and abused its discretionary power when it relied on findings

Section 402(e) of the Law provides, in pertinent part, that an employee shall be ineligible for compensation for any week “[i]n 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 term “willful misconduct” has been defined as:

(1) the wanton and willful disregard of the employer’s interest, (2) the deliberate violation of rules, (3) the disregard of standards of behavior which 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.

Kentucky Fried Chicken of Altoona, Inc. v. Unemployment Compensation Board of Review, 309 A.2d 165, 168-69 (Pa. Cmwlth. 1973). The employer has the burden of proving willful misconduct, and when a charge of willful misconduct is based on the violation of a work policy, the employer must establish: (1) the existence of the policy or rule; (2) that the employee was or should have been aware of the policy or rule; and (3) that the employee violated the policy or rule. Lyons v. Unemployment Compensation Board of Review, 533 A.2d 1144, 1146 (Pa. Cmwlth 1987). Once the employer sets forth a prima facie case of willful misconduct, the burden then shifts to the claimant to establish good cause as justification for her actions. McKeesport Hospital v. Unemployment Compensation Board of Review, 625 A.2d 112, 114

that could not reasonably be deduced from the testimony and/or were not supported by sufficient substantial evidence; and (4) that the Board erred when it failed to consider all of the circumstances surrounding Claimant’s termination for willful misconduct. We have consolidated these issues into the issues set forth in the text.

(Pa. Cmwlth. 1993).⁴ Whether the employee’s conduct rose to the level of willful misconduct is a question of law, which is fully reviewable by this Court. County of Luzerne v. Unemployment Compensation Board of Review, 611 A.2d 1335, 1337 (Pa. Cmwlth. 1992).

First, we must determine whether Employer sustained its burden and established a prima facie case of willful misconduct. In doing so, Employer must initially establish the existence of a policy or rule. Here, Employer’s “Rules To Protect Us All” and the “Employee Code of Conduct,” prohibited the mistreatment, neglect, or abuse (verbal, sexual, physical, mental, and involuntary seclusion) of a resident. (UC Service Center Exs. 15 and 18, Record Item No. 4.) Violation of these policies is grounds for immediate termination. Claimant does not contest the existence of these policies.

The second requirement of Employer’s prima facie case is to show that Claimant was or should have been aware of these policies. The Board found that Claimant was aware of Employer’s policies, and this finding is supported by the evidence of record. The record indicates that Claimant signed an acknowledgment that she received and understood the “Rules To Protect Us All,” as well as the “Employee Code of Conduct.” (UC Service Center Exs. 16 and 19, Record Item No. 4.) Claimant does not dispute that she was aware of these policies, and in her brief to this Court, acknowledges that one of her assigned duties is to “take care of

⁴ Good cause exists where an employee’s actions are justifiable or reasonable under the circumstances. Frumento v. Unemployment Compensation Board of Review, 351 A.2d 631, 634 (Pa. Cmwlth. 1976).

[residents'] most intimate needs, like . . . assisting them with . . . trips to the bathrooms.” (Claimant’s Br. at 6.)

Additionally, Employer must establish the third requirement of its prima facie case by showing that Claimant violated Employer’s rule or policy. Here, Claimant asserts that the Board erred in finding that she had violated Employer’s policies for two reasons. She first challenges the Board’s factual findings, arguing that the incident with the resident over which she was fired never occurred. In doing so, Claimant challenges the Board’s credibility determinations. However, it is well settled that the Board is the ultimate finder of fact and arbiter of credibility. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 270, 501 A.2d 1383, 1385 (1985). Claimant's contention that the evidence as a whole fails to support the Board's decision is devoid of merit. The record before this Court contains testimony from Employer’s witness, Christine Janicelli, which supports the Board’s findings. Although Claimant presented witnesses who testified to the contrary, the Board found Ms. Janicelli credible when she testified that she was in the room with Claimant when Claimant advised the resident to soil herself:

I went into the resident’s room to ask the resident a question and [Claimant] was in there. And the resident told me that she needed to use the bathroom. And I turned to [Claimant] and asked her if she could take her to the bathroom. And [Claimant] said to the resident, you know where to go. And the resident said, in my diaper. And [Claimant] said yes.

(Hr’g Tr. at 15.) “Credibility of witnesses and the resolution of conflicting testimony are matters for the Board to decide; the Board’s findings in such matters, when supported by substantial evidence, in the absence of fraud, are binding upon this

Court.” Hussar v. Unemployment Compensation Board of Review, 432 A.2d 643, 646 (Pa. Cmwlth. 1981).⁵ Therefore, this Court will not revisit the Board’s credibility determinations on appeal because they are supported by substantial evidence.

However, Claimant also argues that Ms. Janicelli’s testimony was hearsay and, therefore, the Board erred as a matter of law in relying on hearsay evidence. Claimant argues that without Ms. Janicelli’s testimony, there is no substantial evidence to support the Board’s findings. We disagree.

Contrary to Claimant’s argument, Ms. Janicelli’s testimony is not hearsay. Hearsay evidence is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Pa. R. Evid. 801(c). In the case at bar, Ms. Janicelli testified that she was with the resident when the resident requested to be taken to the restroom. (Hr’g Tr. at 15.) Ms. Janicelli testified that she requested the Claimant to assist the resident and that Claimant responded by telling the resident she knew where to go and then agreeing with the resident when she said “in my diaper.” (Hr’g Tr. at 15.) Ms. Janicelli was present at the Referee’s hearing and was subject to cross-examination by Claimant’s counsel. Ms. Janicelli’s testimony was based on her first-hand, eyewitness account of a conversation in which she and Claimant were participants. Thus, Ms. Janicelli’s statement was not hearsay and could properly be

⁵ “Substantial evidence is correctly defined as ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” Peak, 509 Pa. at 275, 501 A.2d at 1387 (quoting Murphy v. Department of Public Welfare, 480 A.2d 382, 386 (Pa. Cmwlth. 1984)).

relied on by the Board to support its finding that Claimant violated Employer's work policies.

Therefore, Employer has set forth a prima facie case of willful misconduct. The burden then shifts to Claimant to show good cause for her actions. However, Claimant does not argue that she had good cause for her actions or that Employer's policies were unreasonable. This Court has found that failure to attend to the changing of bed-pans and assisting residents in use of the restroom, in elder care facilities, is willful misconduct for which the denial of benefits is appropriate. DeBias v. Unemployment Compensation Board of Review, 440 A.2d 1290 (Pa. Cmwlth. 1982). Therefore, we conclude that the Board did not err in concluding that Claimant's actions rose to the level of willful misconduct.

Accordingly, we affirm the Order of the Board.

RENÉE COHN JUBELIRER, Judge

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	:	
Respondent	:	

ORDER

NOW, July 1, 2008, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **affirmed**.

RENÉE COHN JUBELIRER, Judge