

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Philadelphia Parking Authority, :
Petitioner :
v. : No. 2157 C.D. 2007
Unemployment Compensation : Submitted: April 4, 2008
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: May 22, 2008

The Philadelphia Parking Authority (Employer) petitions for review of an order of the Unemployment Compensation Board of Review (Board), affirming the decision of a Referee, awarding Joan P. Loftus (Claimant) unemployment compensation benefits. We reverse.

Claimant began working for Employer as a clerk trainee on September 26, 2005. On December 5, 2006, she was terminated by Employer. Employer provided Claimant with a letter stating that the termination was for the following reasons: being absent from work without leave; failing to notify a supervisor in a timely fashion as to absences from work; repeatedly leaving the work area; refusing to attend a motor vehicle auction; and being habitually late for work. Claimant was documented as being one hour late for work on December 4, 2006, and thirty minutes late for work on December 5, 2006.

At the hearing before the Referee, Employer's handbook was admitted into evidence. (R.R. 3a-5a). Claimant signed an acknowledgement of receipt of the handbook on July 27, 2006. (R.R. at 6a). The handbook provided that certain actions could result in immediate termination. These actions included leaving the premises without permission; disregarding policies or procedures; loafing or failing to carry out work assignments; failing to observe executive orders, directives, or other work rules; insubordination; unsatisfactory work performance; and excessive absence or tardiness.

Corinne O'Connor, a director for Employer, testified on behalf of Employer. She stated that when Claimant was hired, Claimant informed Employer that she had been diagnosed with Obsessive Compulsive Disorder (OCD). Ms. O'Connor stated that, because of the OCD, Claimant washed her hands often. She stated that Claimant was permitted to be away from her desk to wash her hands.

Ms. O'Connor testified that Claimant was hired to do computer work and to answer the phones. However, this did not work out, so Claimant was sent to complete paperwork at the motor vehicle auctions.¹ Later, Claimant informed Ms. O'Connor that she would not be attending the motor vehicle auctions anymore. Claimant cried and stated that the work was too much for her.

Ms. O'Connor testified that Claimant was also reprimanded regarding her boyfriend. Apparently, Claimant's boyfriend became unemployed, so he decided to come to work with Claimant. He did not come inside the building with Claimant. He instead remained in the parking lot and Claimant began leaving work at numerous times throughout the day to visit with him outside. Ms. O'Connor informed Claimant that if

¹ Ms. O'Connor stated that Claimant was not getting her work done as Claimant used the computer to "surf the internet." (R.R. at 35a).

she continued to go outside to meet with him, she would be terminated. Ms. O'Connor stated that while she did not see Claimant outside with her boyfriend after this warning, other employees informed her that Claimant continued to meet with her boyfriend.

Ms. O'Connor explained that Claimant was originally scheduled to work from 9:30 a.m. to 6:00 p.m. However, Claimant was late to work on a daily basis. Ms. O'Connor stated that she had twelve departments to supervise and it became tedious to begin looking for Claimant everyday at 9:30 a.m. Everyone else in the building, including Ms. O'Connor, began work at 8:30 a.m. Therefore, in October, 2006, Ms. O'Connor changed Claimant's hours to 8:30 a.m. to 5:00 p.m. Ms. O'Connor explained that she changed Claimant's hours so that they would start at the same time. Thus, it would be easier for her to determine if Claimant arrived on time. She stated that Claimant continued to arrive late. When Ms. O'Connor asked Claimant why she was late, Claimant would state that she had stopped to talk to someone.

Michell Chiffens, the manager of attendance policies for Employer, also testified on behalf of Employer. She explained that she monitored employee sick time and documented whether or not it was approved. She stated that Claimant was absent without approval on October 31, 2006, because Claimant failed to report her absence by calling "the sick line." (R.R. at 39a). An attendance sheet was entered into evidence. The sheet also indicated that Claimant was absent without approval on September 19, 2006. Claimant was disciplined by not being paid for the two days she was absent without approval.

Claimant testified next. She stated that Ms. O'Connor told her that if she failed to go to the motor vehicle auction she would be discharged. Claimant stated that she never refused to go to the auction. She was also informed that she was not

permitted to go outside of the facility to visit with her boyfriend. Claimant stated that once she was told this, she only went outside during her lunch break.

Claimant also admitted that she was warned about being late for work. She agreed that after she was warned, she still continued to be late. She claimed that her lateness was due to having OCD. She stated that the OCD caused her to have anxiety and wash her hands repeatedly. She explained that she washed her hands after getting dressed, after brushing her teeth and after brushing her hair. She claimed that she tried to get up earlier, but she would still end up being late for work. She stated that she got up at 6:00 a.m. in the morning when she was due at work for 9:30 a.m. When her starting time was changed to 8:30 a.m., she continued to get up at 6:00 a.m. When asked why she did not get up earlier, she stated she was “just in a routine.” (R.R. at 44a).

As to the two absences, Claimant alleged that she had a medical slip for the September date in her desk at work, but it was lost when her desk was emptied. As to the October date, she stated that when she was absent, she was required to call the office one hour prior to the start of her shift. She stated that she had actually called approximately one-half hour after her shift had started.

The Referee determined that Claimant was docked pay for being absent without leave; therefore her absences did not cause her termination. He also determined that she never refused to attend the motor vehicle auction and after being warned about leaving the building during work hours, only visited her boyfriend at lunch time.

The Referee agreed that Claimant was habitually late to work. However, he found that the Claimant had established good cause for her lateness, i.e., her OCD. He concluded that she worked to the best of her ability and that her conduct did not rise to the level of willful misconduct.

Employer then appealed to the Board. The Board affirmed the determination of the Referee. Employer now appeals to this Court.² Employer alleges that the Board erred in finding that Claimant's conduct of being habitually late to work did not constitute willful misconduct.

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.

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

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 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 present case, Employer established that it had a work rule allowing for dismissal due to excessive tardiness. (R.R. at 5a). Claimant admitted she was aware of the rule, was late on numerous occasions and was warned about being late by Employer. Claimant admitted that even after being warned, she continued to be late. As such, Employer met its burden of proof of establishing that a work rule as to tardiness existed, that Claimant was aware of the rule and that Claimant violated the rule. As Employer met its burden, the burden shifted to Claimant to establish that she had good cause for violating the rule.

Claimant alleged that she had OCD, which causes her to wash her hands repeatedly. Claimant alleged that this condition caused her difficulties with her morning routine and therefore caused her to be late. Employer argues that Claimant has failed to establish good cause, because in order to establish that a mental disorder caused her lateness, she must provide expert testimony in support of the matter.

In Jordan v. Unemployment Compensation Board of Review, 684 A.2d 1096 (Pa. Cmwlth. 1996), the claimant was a custodian at school from 1989 to 1995. He had suffered a head injury as a teenager and, as a result, suffered from physical imbalance, depression, emotional outbursts and a mood disorder. The school acknowledged the claimant's disabilities and accommodated his needs throughout the course of his employment. However, in 1995, the claimant was absent from work for three days and did not notify the school. Upon his return to work, he was advised that

he needed to contact the school when he was going to be absent. Approximately one week later, the claimant was absent from work for two days. He did not contact the school until the evening of the second day. At that time, he was told to report to work the next day. He did not report to work the following day. He claimed that he did not report to work because he thought he would be fired. The school claimed that if the claimant had reported to work, he would have been reprimanded, not fired. However, when Claimant did not report to work as ordered, he was fired.

At the hearing before the Referee, the claimant alleged that he did not attend work because he was unable to get out of bed due to his mood disorder. The Referee determined that the claimant failed to establish good cause for his behavior. The Board agreed, finding that the claimant's disorder did not negate the deleterious nature of his actions. The claimant then appealed to this Court.

We noted that in support of his claim that he had a mood disorder, the claimant submitted a physician's certification of his mental condition. The certification stated that the claimant had an organic mood disorder that could prevent him from working for three or more days. We found this evidence to be insufficient. We explained that the certification did not establish why it was reasonable for the claimant to fail to contact the school. We further found that the claimant's testimony that he was suffering from a disorder was insufficient to establish good cause, because "[a]lthough arguably an expert on his own condition, Claimant is not an expert in the field of mental disorders." 684 A.2d at 1100.

Further, in Department of the Navy, Navy Air Warfare Center, Aircraft Division Warminster v. Unemployment Compensation Board of Review, 632 A.2d 622 (Pa. Cmwlth. 1993), the claimant submitted fraudulent travel vouchers to his employer in the amount of \$30,000.00. The claimant was fired and later pleaded guilty to making

fraudulent claims against the government. However, at the hearing before the Referee, he claimed that his actions did not constitute willful misconduct because he suffered from OCD. He claimed that the disorder predisposed him to act in certain ways when under stress.

The Referee concluded that the claimant's actions were willful. However, the Board reversed. The Board found that the claimant established good cause for violating the employer's rules in that the claimant was suffering from OCD and this impaired his judgment. As such, it was determined that the claimant did not intentionally violate the employer's rules.

The employer then appealed to this Court. We determined that the Board committed error, holding as follows:

The Board erred in relying on the testimony of [the claimant] regarding the possible effects of his personality disorder on his judgment and behaviors. [The claimant] was not competent to offer an opinion in this regard since there is nothing in the record that he possessed sufficient skill, knowledge or expertise in the field of mental disorders.

Department of the Navy, 632 A.2d at 635. [citation omitted].

Additionally, in Brady v. Unemployment Compensation Board of Review, 539 A.2d 936 (Pa. Cmwlth. 1988), the claimant was terminated after assaulting a co-worker. He claimed that his actions were not willful because it was an impulsive manifestation of Post-Traumatic Stress Disorder (PTSD) and anxiety disorder, due to his combat experiences in the Vietnam War.

The Referee and the Board concluded that psychological factors relating to the Claimant's combat experience could not mitigate a finding of willful misconduct. The claimant appealed to this Court. We did not affirm the Board's decision based on

its conclusion that the claimant's psychological condition could not establish good cause. We instead concluded that we did not need to reach the issue, stating as follows:

Nowhere in the record are we able to find testimony by a person possessing sufficient skill, knowledge or experience in the field of mental disorders that, in his or her opinion, the assault committed by the claimant was an impulsive manifestation of PTSD. Such testimony is necessary in the present situation because it is less than obvious that the assault committed by the claimant was attributable to the mental disorder he was laboring under, so that the causal connection between the two could be inferred by the fact-finder, without the aid of expert testimony.

Brady, 539 A.2d at 225.³

In the present case, while we are sympathetic with Claimant, we cannot neglect the fact that Claimant failed to present expert testimony as to the nature of her mental disorder. Claimant merely testified that she had OCD, which caused her to wash her hands after each of her morning activities and, thus, caused her to be late for work. Expert testimony was needed to provide a proper diagnosis of Claimant's mental disorder and to explain how the mental disorder affects Claimant's judgment and behavior. Expert testimony was also necessary to explain how a diagnosis of OCD could cause a person to be habitually late for work involuntarily, i.e., why simply waking earlier would not rectify the problem or why the disorder would cause someone to be one hour late for work one day, but only thirty minutes late for work the following day. As Claimant failed to present sufficient evidence establishing that her OCD condition constituted good cause for violating Employer's work rule regarding

³ The claimant had introduced a report by his treating psychologist. However, the report was rejected by the Referee as hearsay.

excessive tardiness, the Board erred in concluding that Claimant's actions did not rise to the level of willful misconduct.

Accordingly, the order of the Board is reversed and Claimant's claim for benefits is denied.

JOSEPH F. McCLOSKEY, Senior Judge

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Board of Review,	:	
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ORDER

AND NOW, this 22nd day of May, 2008, the order of the Unemployment Compensation Board of Review is reversed and Joan P. Loftus' claim for unemployment compensation benefits is denied.

JOSEPH F. McCLOSKEY, Senior Judge