

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jenna S. Spell,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2431 C.D. 2010
	:	
Unemployment Compensation	:	Submitted: April 1, 2011
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: September 13, 2011

Jenna S. Spell (Claimant), pro se, petitions for review of an Order of the Unemployment Compensation Board of Review (Board) that affirmed the Unemployment Compensation (UC) Referee’s (Referee) Decision finding her ineligible for benefits under Section 402(e) of the Unemployment Compensation Law (Law).¹ On appeal, Claimant argues that the Board overlooked relevant record

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 802(e). Section 402(e) provides that a claimant is not eligible for benefits for any week in which her unemployment was due to the claimant’s work-related willful misconduct.

evidence while improperly crediting hearsay evidence. For the following reasons, we affirm.

Claimant worked as a bank operations manager for Dollar Bank (Employer) between June 25, 2007, and March 23, 2010, when Employer fired her for substandard performance and unprofessional conduct. Claimant applied for UC benefits on March 24, 2010. The UC Service Center determined that Claimant was ineligible for benefits under Section 402(e). Claimant appealed, and a hearing was held before the Referee on June 17, 2010. Claimant and a representative of Employer, Claimant's supervisor, testified. On the basis of the testimony and documents entered into evidence, the Referee affirmed the Service Center's determination. Claimant filed an appeal to the Board, and Employer filed a response. After considering the record, the Board affirmed the Referee's decision. In doing so, the Board made the following findings of facts:

1. The claimant was employed between June 25, 2007 and March 23, 2010 as an operations manager for Dollar Bank located in Penn Hills.
2. The claimant worked at a very busy bank branch and was part of the management team expected to manage staff effectively.
3. The claimant was counseled and warned about her performance in this area in June 2007 and on several occasions in December 2009.
4. The employer received complaints on the claimant's behavior, specifically, throwing things, and using profanity at work.
5. On December 23, 2009, claimant was counseled with a written warning about such behavior.

6. The claimant in response to such counseling, yelled and threw keys at the employer and was combative.
7. The claimant also responded she was ready to leave and quit, the bank did not pay her enough for what she had and she had a college degree.
8. On March 12, 2010, the employer became concerned that the claimant had failed to assist customers when assistance was needed.
9. The employer observed the claimant on the phone and twice had to inform the claimant that customers were waiting.
10. While the claimant was addressing some work issues on the phone, the claimant agreed that she also engaged in some personal conversation.
11. The employer met with the claimant on March 17, 2010 with respect to her actions that day as well as the warning that had been issued in December 2009.
12. The claimant became upset, yelled that she was being singled out, was not being paid enough to do her work, and was leaving anyway in August.
13. The claimant left and went on vacation and when she returned the employer discharged the claimant for her actions on March 17, 2009, [sic] and continued issues regarding her anger.

(Board's Decision, Findings of Fact (FOF) ¶¶ 1-13.) The Board acknowledged that Claimant "did not agree with the performance warning about waiting on customers." (Board's Decision at 3.) However, the Board concluded that Claimant's behavior in response to the warning "does rise to the level of willful misconduct and was intentional" in the wake of previous warnings. (Board's Decision at 3.) The Board found Employer's witness credible as to Claimant's displays of bad temper at work

and did not credit Claimant's explanation of good cause. (Board's Decision at 2-3.) Claimant now petitions this Court for review.²

On appeal, Claimant essentially denies that her workplace behavior amounted to willful misconduct. In a one paragraph argument, Claimant makes two points: that the Board's finding of willful misconduct is not supported by the record evidence; and that her conduct upon receiving the warning is defensible because other employees at the branch were in the habit of swearing, yelling, and being rude.³ (Claimant's Br. at 7.)

Claimant argues that the Board's conclusion of willful misconduct is unsupported by substantial evidence and that the Board overlooked important facts. In her Petition for Review, Claimant contends that: "my work was always complete. . . . [I] never [had] any blemishes on any of my evaluations. . . . The two reprimands received were based on hearsay." (Petition for Review ¶ 3.) Claimant expands upon those assertions in her brief, stating: "[t]here were a lot of hearsay statements made with no documents or names of witnesses. The [B]oard erred when it failed to consider the positives of my employment. . . . The [B]oard failed to ask what qualified the Project Support person to make her negative observations." (Claimant's Br. at 7.)

² In unemployment proceedings, our "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 and Southern Life Insurance Co. v. Unemployment Compensation Board of Review, 913 A.2d 331, 334 n.2 (Pa. Cmwlth. 2006).

³ For ease of resolution, we have rearranged the order of Claimant's arguments.

Whether the actions of a claimant rise to the level of willful misconduct, disqualifying the claimant for benefits, “is a question of law that is subject to plenary review by the court.” Docherty v. Unemployment Compensation Board of Review, 898 A.2d 1205, 1209 (Pa. Cmwlth. 2006). Although the Law does not define willful misconduct, our Supreme Court has defined willful misconduct on the job as “a) wanton or willful disregard for an employer’s interests; b) deliberate violation of an employer’s rules; c) disregard for standards of behavior which an employer can rightfully expect of an employee; or d) negligence indicating an intentional disregard of the employer’s interest or an employee’s duties or obligations.” Navickas v. Unemployment Compensation Board of Review, 567 Pa. 298, 304, 787 A.2d 284, 288 (2001). Where violation of a work rule is the basis for a charge of willful misconduct, the employer’s burden is to “prove the existence of the rule, the reasonableness of the rule and the fact of its violation.” Eshbach v. Unemployment Compensation Board of Review, 855 A.2d 943, 947 (Pa. Cmwlth. 2004). Moreover, the use of vulgar or abusive language shows a disregard for behavior that an employer has the right to expect from an employee. Leone v. Unemployment Compensation Board of Review, 885 A.2d 76, 81 (Pa. Cmwlth. 2005).

Initially, we appreciate that Claimant has a different version of the events that led to her discharge; however, that Claimant may have given “a different version of the events, or . . . might view the testimony differently than the Board, is not grounds for reversal if substantial evidence supports the Board’s findings.” Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994). After reviewing the record, we conclude, like the Board, that Employer met its burden. The Board found Employer’s witness credible in her

testimony that Claimant was counseled against “yelling, profanity and throwing things when unhappy with work” and that Claimant even responded abusively during the counseling itself. (Board’s Decision at 2-3; Hr’g Tr. at 5-10, R. Item 11.) The Law is clear that the Board is the ultimate finder of fact and arbiter of witness credibility. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 269-70, 276-77, 501 A.2d 1383, 1385, 1388 (1985). Thus, as long as the Board’s factual findings are supported by substantial evidence, those findings are conclusive on appeal. Geesey v. Unemployment Compensation Board of Review, 381 A.2d 1343, 1344 (Pa. Cmwlth. 1978). Claimant did not deny that she used profanity, abusive language, or that she received warnings that this behavior violated Employer’s policy. Pursuant to Leone, Claimant’s profanity and abuse fell below a standard of professionalism that Employer had a right to expect and violated Employer’s policy against unprofessional conduct. That standard was made clear to Claimant on a number of occasions when she received counseling, coaching, or written warnings from Employer. (FOF ¶¶ 4-6, 11, 12.) Accordingly, there is substantial evidence to support the Board’s conclusion that Claimant’s ongoing behavior, and in particular her actions at her last coaching session on March 17, 2010, amounted to willful misconduct. (Board’s Decision at 3.)⁴

⁴ As the Board observes, Claimant did not specifically challenge any of the Board’s Findings of Fact. Any findings of the Board that are not challenged are conclusive on appeal. Hessou v. Unemployment Compensation Board of Review, 942 A.2d 194, 198 (Pa. Cmwlth. 2008). A general challenge does not suffice; Board findings must be “specifically” challenged or else we do not review them. Id. Claimant neither mentions any specific finding of the Board that would be challenged by her arguments, nor does she indicate where facts supporting her arguments appear in the record evidence. To the extent that Claimant’s assertions of hearsay and that her supervisor’s “refusal to tell [Claimant] who made the complaints,” (Petition for Review ¶ 3), would challenge the Board’s finding that “[E]mployer received complaints on . . . [C]laimant’s behavior” (FOF ¶ 4), that challenge is unavailing. The complaints were not the reason for Claimant’s termination and were not admitted to show the truth of the matter asserted. They merely led to meetings where
(Continued...)

Once the employer's burden is met, a claimant who appeals a finding of ineligibility must "demonstrate either that the rule is unreasonable or that good cause existed to violate the rule." Docherty, 898 A.2d at 1208. To determine whether a claimant had good cause for aberrant behavior, the court must view the issue in light of the attendant circumstances. Id. This "requires a consideration of all of the circumstances, including the reasons for the employee's noncompliance with the employer's directives." Navickas, 567 Pa. at 304, 787 A.2d at 288 (internal quotation omitted). The Supreme Court, in Navickas, recognized that this determination may "depend . . . upon an individual employee's specific occupation or work situation. . . [and] the specific circumstances governing a particular occupation or workplace." Id. Moreover, "if an employee's actions are justifiable and reasonable under the circumstances, they will not be regarded as willful misconduct." Frey v. Unemployment Compensation Board of Review, 589 A.2d 300, 305 (Pa. Cmwlth. 1991).

Here, Claimant contends that swearing and shouting were justified in her circumstances because other employees in the bank branch swore and shouted. (Claimant's Br. at 7.) Claimant defends her shouting and her use of profanity at work because of "the tone of the office set forth by the manager with her own profanity, yelling and treatment of employees and customers." (Claimant's Br. at 7.)

Claimant received coaching. Employer's witness credibly testified that Claimant was terminated because of her poor performance and her inability to control her temper. (Hr'g Tr. at 8-10, R. Item 11.) The Board credited Employer's account of Claimant's hostile reaction to Employer's attempt to counsel her on March 17, 2010. (Board's Decision at 3.) Other than the one indirect reference to a finding of the Board with regard to complaints, Claimant gives no specific indication regarding which of the Board's factual findings she means to challenge. Accordingly, those findings are conclusive. Hessou, 942 A.2d at 198

However, the credited record evidence is contrary to Claimant's arguments. Employer's witness credibly testified that neither she nor any other employee "used profanity, [threw] keys or stomped around the office." (Hr'g Tr. at 25, R. Item 11.) We are bound by the Board's credibility determination and may not revisit it on appeal. Peak, 509 Pa. at 269-70, 276-77, 501 A.2d at 1385, 1388. Accordingly, the Board did not err or abuse its discretion in concluding that "[C]laimant did not credibly establish good cause for her actions." (Board Decision at 3.)

Accordingly, we affirm the Order of the Board.

RENÉE COHN JUBELIRER, Judge

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ORDER

NOW, September 13, 2011, the Order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge