IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Fe E. Wagner,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2490 C.D. 2011
	:	Submitted: August 24, 2012
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY SENIOR JUDGE COLINS **FILED: October 5, 2012**

Fe E. Wagner (Claimant), *pro se*, petitions for review of the October 28, 2011 order of the Unemployment Compensation Board of Review (Board), affirming and adopting the decision of the referee to deny Claimant unemployment compensation benefits. The Board concluded that Claimant was ineligible for benefits because her discharge from employment by Macy's Department Store (Employer) was due to violations of Employer's price adjustment policy that amounted to willful misconduct under section 402(e) of the Unemployment Compensation Law (Law).[1] We affirm.

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[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

(Footnote continued on next page…)

Claimant was employed as a sales associate with Employer from June 20, 2005 until March 22, 2011. (Record Item (R. Item) 12, Referee's Decision and Order, Findings of Fact (F.F.) ¶1.) As a sales associate, Claimant had the discretion to provide customers with discounts of ten percent or less for items that were damaged or shopworn. (R. Item 12, F.F. ¶4.) However, Employer's price adjustment policy required a manager's authorization for all discounts above ten percent and prohibited unauthorized price adjustments that caused Employer's merchandise to be bought or sold at a price other than the "intended price." (R. Item 12, F.F. ¶¶2, 3; R. Item 3, Employer Separation Information - Macy's Associate Guide ¶37.)

In order to enforce its price adjustment policy, Employer's Loss Adjustment Department had the capability to generate Associate Discount Reports (ADR), which provided a breakdown of the discounts attached to each sales associate's employee identification number. (R. Item 12, F.F. ¶5; R. Item 3, Employer Separation Information – Claimant's ADR, January 1, 2011 to February 15, 2011.) Following receipt of an anonymous complaint concerning Claimant's application of unauthorized discounts, Employer's Loss Adjustment Manager generated an ADR to examine the discounts attached to Claimant's employee identification number for the period between January 1, 2011 and February 15, 2011. (R. Item 12, F.F. ¶¶5, 6; R. Item 11, Transcript of Testimony (T.T.) at 10, 17.) The ADR revealed that Claimant had overridden the computerized register to give customers discounts between ten and twenty-five percent a total of sixty times

(continued…)

week in which his or her unemployment is due to discharge for willful misconduct connected to his or her work. 43 P.S. § 802(e).

during the month and a half period examined. (R. Item 12, F.F. ¶¶5, 6.) Based on this report, Employer's Loss Prevention Manager concluded that the Claimant had given an excessive number of discounts to customers. (*Id*.)

On March 22, 2011, Claimant was escorted off the sales floor at the close of her shift and taken to a meeting with Employer's Loss Prevention Manager and Loss Prevention Supervisor, so that they could discuss with her the Loss Prevention Department's conclusion that Claimant had been providing customers with excessive discounts in violation of Employer's price adjustment policy. (R. Item 12, F.F. ¶7, R. Item 11, T.T. at 19, 43-44.) The meeting with Claimant lasted two hours. (R. Item 11, T.T. at 19, 44.) In a statement written by Employer's Loss Prevention Manager, which Claimant signed at the close of their meeting, Claimant admitted that she provided customers with discounts in order to gain their loyalty and to receive commissions on the resulting sales. (R. Item 12, F.F. ¶¶8, 9; R. Item 3, Employer Separation Information – Claimant's Loss Prevention Statement.) Following her signed admission, Employer's Loss Prevention Manager left the meeting and brought the signed statement to Employer's Human Resources Manager, requesting that she come speak with Claimant. (R. Item 12, F.F. ¶10.) Employer's Human Resources Manager spoke with Claimant, first questioning the veracity of the statement, to which Claimant made no response, next explaining the disciplinary and termination process, and finally informing Claimant that she was suspended effective immediately. (R. Item 12, F.F. ¶¶12-14.)

On March 23, 2011, Claimant telephoned Employer's Human Resources Manager and stated that she was upset and confused about the statement she signed and that she would like to meet to discuss the statement and her

employment.[2] (R. Item 12, F.F. ¶¶15-17.) Although Employer's Human Resources Manager scheduled a meeting with Claimant on March 24, 2011, Claimant did not attend the meeting or respond to the Human Resources Manager's attempts to contact her by telephone. (R. Item 12, F.F. ¶¶7, 8.) Claimant's husband contacted Employer's Human Resources Manager to explain that his wife was upset, however, the conversation was limited due to Employer's policy against discussing the status of its employees with relatives. (R. Item 12, F.F. ¶19.) Employer's Human Resources Manager again attempted to contact Claimant by telephone on March 26, 2011, to discuss her situation, and after again receiving no response, on March 27, 2011, Employer's Human Resources Manager discharged Claimant from her employment for violating Employer's price adjustment policy. (R. Item 12, F.F. ¶20, 21.)

Following discharge from her employment as a sales associate, Claimant filed for unemployment compensation benefits on April 17, 2011, with the Duquesne Unemployment Compensation Service Center. (R. Item 2, Claimant Separation Information.) Claimant's initial application for unemployment compensation was denied, because the unemployment compensation representative concluded that Claimant's discharge from employment had been due to willful misconduct. (R. Item 6, May 9, 2011 Notice of Determination.) Claimant appealed and a hearing was held before a referee on July 5, 2011, where Claimant was represented by counsel. (R. Item 11.) The referee issued a July 7, 2011

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[2] Claimant is not a native English speaker. (R. Item 12, F.F. ¶16.) Although the challenges presented by lack of fluency in non-native language and culture should not be minimized, Claimant presented no evidence that the existence of any such challenges in her life affected the termination of her employment. Similarly, in pressing her claim, first with the assistance of counsel and then *pro se*, Claimant has at no point alerted the courts that her access has been hampered by a lack of fluency or that as a non-native English speaker she required assistance.

decision and order, finding Claimant ineligible for unemployment compensation benefits under Section 402(e) of the Law, because Employer had carried its burden of demonstrating that Claimant was aware of its price adjustment policy and had violated the policy, and because Claimant had failed to demonstrate that she had good cause for the violation. (R. Item 12, Referee's Decision and Order, Reasoning.) In the referee's discussion of Claimant's failure to demonstrate good cause for her violation of Employer's price adjustment policy, the referee specifically noted Claimant's failure to "repudiate" the statement authored by the Loss Prevention Manager that she signed, even though given ample opportunity to do so by Employer's Human Resources Manager, and Claimant's failure to offer any corroborating witness testimony, such as from her manager or a fellow sales associate, to substantiate Claimant's own testimony that she believed the discounts she provided were proper. (*Id.*)

Claimant, represented by counsel, appealed the referee's order to the Board. By October 28, 2011 order, the Board adopted the referee's findings and conclusions, and affirmed the referee's decision. (R. Item 16, Board's Order.) Claimant appealed to this Court.

Whether or not an employee's conduct constitutes willful misconduct, rendering the employee ineligible for unemployment compensation benefits, is a question of law subject to this Court's appellate review. *Rossi v. Unemployment Comp. Bd. of Review*, 544 Pa. 261, 266, 676 A.2d 194, 197 (1996). The term willful misconduct as used in Section 402(e) of the Law has been defined by the courts as: (1) the wanton and willful disregard of the employer's interests, (2) the deliberate violation of rules, (3) the disregard of standards of behavior which an employer can rightfully expect from its 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. *Guthrie v. Unemployment Comp. Bd. of Review*, 738 A.2d 518, 521 (Pa. Cmwlth. 1999); *see also Curran v. Unemployment Comp. Bd. of Review*, 124 A.2d 404, 405-406 (Pa. Super. 1956). In the examination of whether a claimant's conduct constitutes willful misconduct due to the deliberate violation of a work rule or policy, the initial burden is borne by the employer; the employer must first demonstrate the existence of the rule, the reasonableness of the rule, and the fact of its violation. *Chapman v. Unemployment Comp. Bd. of Review*, 20 A.3d 603, 607 (Pa. Cmwlth. 2011). If an employer is able to satisfy this initial burden, the burden then shifts to the claimant to demonstrate that she had good cause for the violation of employer's work rule by establishing that the actions taken were justified or reasonable under the circumstances. *Id.* If a claimant is unable to meet this burden, the claimant will be found ineligible to receive unemployment compensation benefits under Section 402(e) of the Law. 43 P.S. § 802(e).

The issues raised by Claimant for our review are interrelated and go to the heart of the Board's conclusion that Claimant is ineligible to receive unemployment compensation.[3] Claimant contends that the price adjustment policy

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[3] In an unemployment compensation appeal, this Court's scope of review is limited to determining whether an error of law was committed, whether constitutional rights were violated, or whether necessary findings of facts are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704; *Maskerines v. Unemployment Comp. Bd. of Review*, 13 A.2d 553, 555 n.3 (Pa. Cmwlth. 2011). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *On Line Inc. v. Unemployment Comp. Bd. of Review*, 941 A.2d 786, 788 n.7 (Pa. Cmwlth. 2008). In unemployment compensation proceedings, the Board is empowered to resolve conflicts in the evidence and determine the credibility of witnesses, and when supported by substantial evidence of record, the Board is the ultimate finder of fact, as its findings are binding and conclusive on appeal. *Id.*

maintained by Employer was not in fact the policy in effect and was therefore neither reasonable nor violated. Claimant also argues that Employer's determination that the discounts she gave were "excessive" was arbitrary and does not reflect any specific policy previously articulated by Employer.

At Claimant's hearing, Employer's Human Resources Manager testified that Employer maintained a price adjustment policy that prohibited selling or purchasing merchandise for other than the intended price, and identified the section of Employer's handbook identifying this policy, as well as Claimant's signature acknowledging receipt and understanding of the "policies, procedures, and standards" contained within Employer's handbook. (R. Item 11, T.T. at 26; R. Item 3, Employer Separation Information - Macy's Associate Guide ¶37, Macy's Associate Acknowledgment.) On cross-examination by Claimant's counsel, Employer's Human Resources Manager testified that sales associates, like Claimant, have discretion when offering discounts, but if the discount is more than ten percent they must seek approval from a Manager. (R. Item 11, T.T. at 35.) Employer's Human Resources Manager also explained that Claimant's termination was rooted in the "excessive" number of policy violations, but that Employer did not maintain a specific number of allowable policy violations. (R. Item, T.T. at 34.)

Employer's Loss Prevention Manager testified that his position is responsible for protecting Employer's assets by investigating losses that occur within the company, which includes enforcing Employer's price adjustment policy by monitoring Employer's sales associates and responding to complaints concerning their conduct. (R. Item 11, T.T. at 9-10.) He testified that upon receiving a complaint about Claimant, he generated an ADR for Claimant that

showed sixty separate discounts over a month and a half period, applied by manually overriding Employer's computerized register system, and then observed Claimant via camera during two transactions where she applied the ten percent discount allowable for shopworn items, but that Claimant did not first examine the items.[4] (R. Item 11, T.T. at 10, 12, 22-23.)

The testimony of Employer's two witnesses, and supporting documents, clearly constitutes substantial evidence of Employer's policy concerning price adjustments, the limits on sales associates' discretion when applying discounts to transactions, the reasonableness of protecting Employer's assets through such a policy, and the fact of Claimant's violation of Employer's policy. The burden then shifted to Claimant.

Claimant testified that she did not believe she violated Employer's policy when providing discounts to her customers. (R. Item 11, T.T. at 47.) She explained that manual price adjustments were sometimes required, providing examples such as when inventory is incorrect during a sale and a product specifically requested by a customer is located only after the sale is over, requiring a sales associate to manually input the sales price in order to complete the transaction at the later date. (R. Item 11, T.T. at 42.) She also testified about instances where her managers handed out coupons to the sales associates and instructed them to provide the discount coupons to customers, as well as her understanding of the permissible ten percent discount for shopworn items and the

[4] Specifically, Employer's Loss Prevention Manager testified, and the ADR showed: nineteen discounts of ten percent, fourteen discounts of fifteen percent, twenty-three discounts of twenty percent, and four discounts of twenty-five percent, all of which were applied manually. (R. Item 11, T.T. at 12; R. Item 3, Employer Separation Information – Claimant's ADR, January 1, 2011 to February 15, 2011.)

lack of any articulated limit on the number of those discounts allowed each sales associate. (R. Item 11, T.T. at 42-44, 46-47.)

Claimant also offered the testimony of a frequent customer of Employer, who outlined her experiences receiving solicited and unsolicited coupon discounts at Employer's various stores, but acknowledged that she did not know if the coupon discounts she received were authorized or resulted in reprimands. (R. Item 11, T.T. at 39-40.) Claimant did not produce any other witnesses, such as one of her managers or fellow sales associates, to corroborate her testimony that the discounts she provided to customers were standard practice. Claimant likewise failed to offer any documents to suggest that she was following changes in the price adjustment policy articulated by a superior or that the discounts she provided were comparable with other sales associates' practices.

Claimant contends that Employer's characterization of her discounts as "excessive," without articulating a particular limitation on the number of allowable discounts, demonstrates that Employer's policy was not reasonable or uniformly enforced. However, Claimant failed to offer evidence that the policy was not evenly enforced. Absent such evidence, Employer's decision to allow for a closer examination of individual price adjustments, rather than drawing bright lines, does not render its establishment and enforcement of its price adjustment policy unreasonable. Further, Claimant's argument failed to account for the large number of discounts Claimant provided that were above the ten percent threshold or to dispute the fact that she failed to get authorization for those transactions. (R. Item 11, T.T. at 12.) Claimant did not carry her burden.

Employer established through credible testimony and documentary evidence that Claimant violated a clear, articulated, reasonable policy over sixty

times in a period of less than two months; Claimant failed to carry her burden of establishing that her violations were reasonable under the circumstances. (R. 12 Item , F.F. ¶¶2-6, 8.) The Board's conclusion that Claimant's conduct amounted to willful misconduct under the Law is supported by substantial evidence within the record and free from error.

Claimant also challenges the Board's conclusion that her silence when questioned by Employer's Human Resources Manager as to the veracity of the Loss Prevention statement she signed was an admission of its truth.

In the statement authored by Employer's Loss Prevention Manager and signed by Claimant after their meeting, Claimant admits to violating Employer's price adjustment policy. (R. Item 3, Employer Separation Information – Claimant's Loss Prevention Statement.) The referee, in the decision affirmed and adopted by the Board, noted that Claimant had a number of opportunities to repudiate the Loss Prevention Statement, including initially with Employer's Human Resources Manager and at the later proposed meeting that Claimant failed to attend, but that Claimant did not deny the veracity of the statement until testifying at the hearing. (R. Item 11, Referee's Decision and Order, Reasoning.); *see Levin v. Van Horn*, 412 Pa. 322, 327, 194 A.2d 419, 421 (1963) (Recognizing admission by silence as an admission by a party-opponent and therefore falling within an exception to the rule against hearsay.); Pa. R. E. 803(25)(b) ("The statement is offered against a party and is:…(b) a statement of which the party has manifested an adoption or belief in its truth….").

Claimant argues that under the circumstances here, her silence does not constitute an admission. However, the testimony of Employer's two witnesses found credible and supported by documents of record, combined with the lack of

credible testimony or supporting evidence, either documentary or in the form of testimony, offered by Claimant, satisfies the substantial evidence standard. Thus, regardless of whether the admission by silence is competent evidence under the circumstance, the Board's conclusion that Claimant is ineligible for unemployment compensation under the Law due to willful misconduct would not be disturbed. Accordingly, we decline to address this issue.

The Board is affirmed.

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JAMES GARDNER COLINS, Senior Judge

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Petitioner	:	
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	:	
Unemployment Compensation Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 5th day of October, 2012, the final order of the Unemployment Compensation Board of Review in the above-captioned matter is AFFIRMED.

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JAMES GARDNER COLINS, Senior Judge