

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Vanessa C. Bruton,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2521 C.D. 2010
	:	Submitted: July 22, 2011
Unemployment Compensation Board	:	
of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON

FILED: August 31, 2011

Petitioner Vanessa C. Bruton (Claimant) petitions *pro se* for review of an order of the Unemployment Compensation Board of Review (Board). The Board affirmed the Unemployment Compensation Referee's (Referee) decision denying Claimant unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law)¹ based on willful misconduct. For the reasons set forth below, we affirm.

Claimant applied for unemployment compensation benefits after being discharged from her employment as a full-time associate in the Photo Department at Wal-Mart (Employer). The Scranton Unemployment Compensation Service Center (Service Center) issued a determination, finding Claimant ineligible

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

for unemployment compensation benefits under Section 402(e) of the Law. Claimant appealed the Service Center's determination, and an evidentiary hearing was held before the Referee.

Employer presented the testimony of Sharia Jones (Assistant Manager) in support of its position. The Assistant Manager testified that Claimant was discharged for "false misconduct" relating to Claimant's act of using Employer's supplies for personal use and for a lack of respect for other individuals. (Certified Record (C.R.), Item 8.) The discharge occurred after Employer discovered a photo book that Claimant made on Employer's equipment during her scheduled work time. (*Id.*) The Assistant Manager testified that Employer maintained a written policy regarding use of Employer's equipment. (*Id.*) The Assistant Manager entered into the record a copy of Employer's policy, which provides, in part, that "[c]ompany equipment is provided to Associates, at the company's expense, for their use to perform company business. You are responsible for using company equipment appropriately and exercising sound judgment" (*Id.*) The policy further states that, "[c]ompany equipment should be used to perform job duties as intended [Y]ou may use the equipment for limited personal use if that use is occasional and brief, does not interfere with timely job performance, and is not considered inappropriate." (*Id.*) Inappropriate use includes, "use for personal matters in an excessive manner or in a manner that interferes with timely job performance." (*Id.*) Employer could not provide evidence that Claimant received or reviewed the written policy. (*Id.*)

The Assistant Manager testified that an investigation of the incident revealed that Claimant made a paperback book on Employer's Fuji machine, while on company time, and ordered it under a fake name. (*Id.*) In addition, the book

contained a picture of another associate, and Employer was told that this photo was used without that associate's permission. (*Id.*) The Assistant Manager testified that she did not personally question Claimant, but she was present when another assistant manager questioned her about the incident. (*Id.*) She testified that Claimant admitted making the book but that Claimant claimed she was not aware of a company policy prohibiting her conduct; she just made the book for fun. (*Id.*)

Claimant testified to the circumstances surrounding her separation from employment. Claimant testified that she was terminated for "disrespect to the individual" and for mishandling Employer's money. (*Id.*) Initially, Claimant testified that she was not aware of Employer's policy prohibiting personal use of Employer's equipment. (*Id.*) When asked to clarify what kinds of personal use Claimant understood Employer to permit, Claimant then testified that she was not allowed to use Employer's equipment for personal use. (*Id.*) The relevant testimony provides:

R: "All I want to know is were you aware that the employer . . ."

C: "No."

R: ". . . prohibited using the company equipment for personal use?"

C: "No."

R: "So, what was your understanding of what you could use the photo equipment for personal use for? Were you allowed to use it for personal use?"

C: "No. Not really."

R: "So, then you were aware that you weren't supposed to use the photo equipment for . . ."

C: "Yes."

R: ". . . personal use?"

C: "Yes."

(*Id.*)

Claimant further testified that she made the book on company time, with Employer's equipment, using a photograph of another associate, and ordered the book using a fake name. (*Id.*) Claimant then stated that the name was not technically a fake name because it was her middle name. (*Id.*) Claimant testified that she made the book just for fun and that she received the other associate's permission to use her photograph in the book. (*Id.*) Claimant noted that she did not pay for the book, but reported that customers are permitted to refuse products after they are ordered and those customers are not subject to payment for the items they decline to purchase. (*Id.*) Claimant, however, acknowledged she was not acting as a customer when she ordered the book. (*Id.*) Claimant stated that Employer did not question her about the book during the investigation and asserted that Employer only considered the other associate's version of events. (*Id.*) Claimant then testified that on the day she was discharged, Employer questioned her about the incident, and, after she admitted making the book, she was discharged. (*Id.*)

Following the hearing, the Referee issued a decision, which affirmed the Service Center's determination denying unemployment compensation benefits pursuant to Section 402(e) of the Law. The Referee made the following relevant findings:

1. The claimant was employed as a full time Associate in the Photo Department with Wal-Mart earning \$9.90 per hour. The claimant began employment March 23, 2005, and was last employed on June 1, 2010.
2. The employer has a policy which provides in part that company equipment should be used to perform job duties as intended and further establishes Associates should use good judgment and avoid inappropriate use.

3. The claimant ordered a picture book using a false name on company time, which included the use of a photograph of another associate.

4. The employer questioned the claimant about the book, at which time the claimant acknowledged making the book for fun, ordering the book under a fake name on company time, however the claimant contended she had her coworkers [sic] permission to use the photograph.

5. The employer discharged the claimant from employment for inappropriate use of the employer's equipment in making a photo book on company time using a fake name.

(C.R., Item 9.)

The Referee determined that Claimant was discharged for using Employer's equipment to make a photo book on company time, which she ordered by using a fake name. (*Id.*) The Referee noted that Claimant failed to adequately explain why she utilized Employer's equipment to make a book which had no legitimate business use. (*Id.*) While the Referee credited Claimant's testimony that she had permission to use her co-workers photograph, the Referee ultimately determined that Claimant's actions were a clear disregard of the standards of behavior which Employer had the right to expect. (*Id.*) The Referee concluded that Employer met its burden of proving willful misconduct under Section 402(e) of the Law, and, therefore, Claimant is ineligible for unemployment compensation benefits. (*Id.*)

Claimant appealed the Referee's order to the Board, which affirmed the Referee's decision. In its order, the Board adopted and incorporated the Referee's findings of fact and conclusions of law. (C.R., Item 11.) Claimant now

petitions this Court for review of the Board's order. On appeal,² Claimant essentially argues that (1) the Board's findings of fact, adopted from the Referee's findings of fact, are not supported by substantial evidence; and (2) the Board erred in concluding that Claimant's conduct rose to the level of willful misconduct under Section 402(e) of the Law.³

First, we will address whether the Board's findings of fact are supported by substantial evidence. Substantial evidence is defined as relevant evidence upon which a reasonable mind could base a conclusion. *Johnson v. Unemployment Comp. Bd. of Review*, 502 A.2d 738, 740 (Pa. Cmwlth. 1986). In determining whether there is substantial evidence to support the Board's findings, this Court must examine the testimony in the light most favorable to the prevailing party, giving that party the benefit of any inferences that can logically and reasonably be drawn from the evidence. *Id.* A determination as to whether substantial evidence exists to support a finding of fact can only be made upon examination of the record as a whole. *Taylor v. Unemployment Comp. Bd. of Review*, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). The Board's findings of fact are conclusive on appeal only so long as the record taken as a whole contains substantial evidence to support them. *Penflex, Inc. v. Bryson*, 506 Pa. 274, 286, 485 A.2d 359, 365 (1984).

² This Court's standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. § 704. Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. *Hercules, Inc. v. Unemployment Comp. Bd. of Review*, 604 A.2d 1159, 1161 (Pa. Cmwlth. 1992).

³ Claimant waived her argument that Employer failed to follow proper disciplinary procedures because she did not raise this issue at the Referee's hearing or on appeal to the Board. *Dollar Bank v. Swartz*, 540 Pa. 369, 374-75, 657 A.2d 1242, 1245 (1995) (holding legal facts and issues not raised or preserved below may not be addressed for first time on appeal to Commonwealth Court); *Dehus v. Unemployment Comp. Bd. of Review*, 545 A.2d 434, 436 (Pa. Cmwlth. 1988) (holding issues not raised during the hearing below are waived).

Claimant argues that the Board's finding that Employer questioned Claimant about the book is not supported by substantial evidence. In an unemployment case, the Board is the ultimate fact finder and is, therefore, entitled to make its own determinations as to witness credibility and evidentiary weight. *Peak v. Unemployment Comp. Bd. of Review*, 509 Pa. 267, 272, 501 A.2d 1383, 1386 (1985). The Board is also empowered to resolve conflicts in the evidence. *DeRiggs v. Unemployment Comp. Bd. of Review*, 856 A.2d 253, 255 (Pa. Cmwlth. 2004). Claimant's own testimony, however, supports the Board's finding that Employer did, in fact, question Claimant regarding her version of events. Claimant testified that Employer questioned her about the photo book on the day that she was terminated, and, after Claimant disclosed to Employer that she made the book on company time, Employer terminated Claimant's employment. Claimant contends that Employer should have questioned her earlier in its investigation; however, we are unable to discern how this modification to Employer's investigatory tactics would have changed the result. When viewed in a light most favorable to Employer, our review of the record in this case demonstrates that there is substantial evidence to support the Board's findings.

Second, we address Claimant's contention that the Board erred in concluding that her conduct rose to the level of willful misconduct.⁴ Section 402(e) of the Law provides, in part, that an employee shall be ineligible for compensation for any week in which "his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work." The employer bears the burden of proving that the claimant's unemployment is due

⁴ Whether or not an employee's actions amount to willful misconduct is a question of law subject to review by this Court. *Nolan v. Unemployment Comp. Bd. of Review*, 425 A.2d 1203, 1205 (Pa. Cmwlth. 1981).

to the claimant's willful misconduct. *Walsh v. Unemployment Comp. Bd. of Review*, 943 A.2d 363, 369 (Pa. Cmwlth. 2008). The term "willful misconduct" is not defined by statute. The courts, however, have defined "willful misconduct" as:

- (a) wanton or willful disregard of employer's interests,
- (b) deliberate violation of the employer's rules,
- (c) disregard of 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 and obligations.

Grieb v. Unemployment Comp. Bd. of Review, 573 Pa. 594, 600, 827 A.2d 422, 425 (2003).

Claimant argues that her actions did not rise to the level of willful misconduct because she had no prior disciplinary issues with Employer. Willful misconduct includes an employee's deliberate violation of an employer's rule and an employee's disregard of the standard of behavior expected by an employer. *Kentucky Fried Chicken of Altoona, Inc. v. Unemployment Comp. Bd. of Review*, 309 A.2d 165, 168 (Pa. Cmwlth. 1973). An employer, seeking to prove willful misconduct by showing that the claimant violated the employer's rules or policies, must prove the existence of the rule or policy and that the claimant violated it. *Walsh*, 943 A.2d at 369. If, however, the claimant can show good cause for the violation, then there should be no finding of willful misconduct. *Id.* A single incident of misconduct may support a denial of benefits. *Jones v. Unemployment Comp. Bd. of Review*, 373 A.2d 791, 792 (Pa. Cmwlth. 1977).

First, we must determine whether Employer sustained its burden and established a *prima facie* case of willful misconduct as a result of a violation of Employer's policy. In doing so, Employer must initially establish the existence of the policy. Here, Employer maintained a written policy regarding personal use of company equipment. Employer's policy states that equipment is to be used for

company business and that equipment may be utilized for limited personal use if the use is not considered inappropriate. Based on this evidence, Employer sustained its burden of establishing that it maintains a policy that prohibits employees from using company equipment for inappropriate personal matters.

The second requirement of Employer's *prima facie* case is to show that Claimant was or should have been aware of the policy. As discussed in the testimony above, Claimant admitted that she was aware of Employer's policy prohibiting personal use of company equipment. Furthermore, Claimant was unable to adequately explain why she utilized a false name when ordering the book, demonstrating that Claimant recognized her personal use of Employer's Fuji machine was inappropriate. Employer, therefore, met its burden of establishing that Claimant was or should have been aware of Employer's policy.

Additionally, Employer must establish the third requirement of its *prima facie* case by showing that Claimant violated Employer's policy. Employer deemed Claimant's use of the Fuji machine to make a photo book without a business purpose to be an inappropriate use of company equipment. In addition, Claimant admitted she violated the policy by making the photo book on Employer's equipment and on company time. Claimant contends that because she had no prior disciplinary actions against her, she should not have been discharged for willful misconduct. This Court, however, has made clear that even a single incident of misconduct may support a denial of benefits.⁵ Here, Claimant

⁵ This Court has consistently held that a single knowing violation of an employer's rule may be disqualifying. *Maxwell v. Unemployment Comp. Bd. of Review*, 423 A.2d 430 (Pa. Cmwlth. 1980). Though we have recognized that certain minor or insignificant derelictions of duty do not rise to the level of disqualifying conduct, we have repeatedly declined to apply this *de minimis* exception in cases involving a knowing or deliberate violation of an employer's rule. See *Sheetz v. Unemployment Comp. Bd. of Review*, 708 A.2d 884 (Pa. Cmwlth. 1998); *Sun Ship Building v. Unemployment Comp. Bd. of Review*, 385 A.2d 1047 (Pa. Cmwlth. 1976); *Loder v.*

knowingly used Employer's equipment and supplies to create a photo book on work time without Employer's permission. This conduct is a disregard of the standard of behavior an Employer has the right to expect from an employee.⁶ Employer, therefore, satisfied its burden of proving not only that Claimant violated the policy, but also that her conduct rose to the level of willful misconduct.

Because Employer established a *prima facie* case for willful misconduct, the burden shifted to Claimant to establish good cause for her actions of making the photo book on company equipment and on company time. While the employer bears the burden of proving that a claimant's behavior constitutes willful misconduct, it is the claimant who bears the burden of proving good cause for her actions. *Kelly v. Unemployment Comp. Bd. of Review*, 747 A.2d 436, 438-39 (Pa. Cmwlth. 2000). To prove good cause, the claimant must demonstrate that her actions were justifiable and reasonable under the circumstances. *Id.* at 439.

Claimant essentially argues that she had good cause because she did not intentionally violate Employer's policy; she simply made the book for fun. The Board may either accept or reject a witness's testimony, whether or not it is corroborated by other evidence of record. *Peak*, 509 Pa. at 275, 501 A.2d at 1388. Here, the Board determined that Claimant failed to adequately explain her use of company equipment to make a book which had no legitimate business purpose. Further, Claimant's use of a false name to order the book demonstrates that she

Unemployment Comp. Bd of Review, 296 A.2d 297 (Pa. Cmwlth. 1972). Based on our discussion above, it is clear Claimant knowingly violated Employer's policy.

⁶ See *Orend v. Unemployment Comp. Bd. of Review*, 821 A.2d 659 (Pa. Cmwlth. 2003) (holding that claimant's use of his birthdate in lieu of valid claim number to trace third party's license plate number for his personal use was in violation of employer's privacy rules and constituted willful misconduct).

understood her conduct was prohibited by Employer. While the Board credited Claimant's testimony that she had permission to use the other associate's photograph, this did not excuse Claimant's behavior for making the book on Employer's equipment and during working hours. Based on the facts here and in view of the relevant case law, we find Claimant failed to justify her actions of making the photo book. The Board, therefore, properly concluded that Claimant failed to establish good cause for her actions because using Employer's equipment for personal use on company time was not justified or reasonable in light of Employer's policy.

Accordingly, the order of the Board is affirmed.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Vanessa C. Bruton,	:	
	:	
Petitioner	:	
v.	:	No. 2521 C.D. 2010
	:	
Unemployment Compensation Board	:	
of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 31st day of August, 2011, the order of the Unemployment Compensation Board of Review is AFFIRMED.

P. KEVIN BROBSON, Judge