IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Traci King, Petitioner	:	
v.	:	No. 2657 C.D. 2010
	:	Submitted: July 8, 2011
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: August 24, 2011**

Traci King (Claimant), representing herself, petitions for review from an order of the Unemployment Compensation Board of Review (Board) denying her claim for benefits under Section 402(e) of the Unemployment Compensation Law (Law) (relating to willful misconduct).[1] Claimant essentially contends the Board, through its referee, denied her due process right to a fair hearing by allowing uncorroborated hearsay testimony from a biased witness and by improperly limiting her right to cross-examination. Claimant also contends the Board erred in denying her benefits after her former employer, the City of New Kensington (Employer), withdrew its objection to her application for benefits. For the reasons that follow, we affirm.

[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 states an employee shall be ineligible for compensation for any week in which his unemployment is due to willful misconduct connected to her work.

Background

Claimant worked for Employer as a police officer from 1992 until her discharge in 2008 for conduct unbecoming a police officer. Following her discharge, Claimant applied for unemployment benefits. The local service center determined Claimant eligible for benefits under Section 402(e) (willful misconduct)[2] on the basis that Employer failed to provide information showing Claimant's involvement in the incident that caused her separation from employment.

Employer appealed. At a hearing before a referee, Employer presented testimony from its police chief, Charles Korman (Police Chief). He testified that the Federal Bureau of Investigation (FBI) had surveillance video of Claimant, in a hotel room while on duty, allegedly giving an FBI informant a bottle of prescription drugs. The video also showed Claimant allegedly engaging in sex with the informant. The parties viewed the surveillance video at the hearing.

In addition, Claimant admitted having sex in a patrol car while on duty. See Notes of Testimony (N.T.), 10/21/08, at 38. Claimant further testified such conduct was not unusual, but probably inappropriate for a police officer. Id.

[2] Willful misconduct within Section 402(e) is defined by the courts as: a) wanton and willful disregard of an employer's interests; 2) deliberate violation of rules; 3) disregard of the standards of behavior which an employer can rightfully expect from an employee; or 4) negligence showing an intentional disregard of the employer's interests or the employee's duties and obligations. Grieb v. Unemployment Comp. Bd. of Review, 573 Pa. 594, 827 A.2d 422 (2002). The employer bears the initial burden of establishing a claimant engaged in willful misconduct. Id.

After the hearing, the referee issued a decision reversing the service center and denying Claimant benefits under Section 402(e) on the basis that her conduct evidenced a disregard of the standards of behavior that Employer has a right to expect.

Claimant appealed, and the Board remanded to the referee for a hearing providing Claimant an opportunity to question Police Chief about his own alleged sexual misconduct, or that of other officers, while on duty. Only Claimant appeared at the second hearing.

Thereafter, the Board directed the referee to schedule a third hearing to again provide Claimant the opportunity to cross-examine Police Chief regarding his alleged sexual misconduct or that of other officers participated on duty. The Board advised that if Employer again failed to appear, the Board may disregard its evidence.

Before the third hearing occurred, Employer withdrew its objection to Claimant's application for unemployment benefits. Only Claimant attended the third hearing. The referee reviewed the documents of record, which indicated Employer withdrew its objection to Claimant's application as part of a settlement agreement in a discrimination case Claimant brought against Employer in federal court. At this hearing, the referee advised Claimant that Employer's withdrawal of its objection did not mean Claimant was entitled to benefits. See N.T., 09/02/10, at 5.

Ultimately, the Board issued a decision denying benefits under Section 402(e) of the Law. The Board made the following pertinent findings:

> 2. [Police Chief] received a report from the [FBI] that [Claimant] had been under surveillance since the summer of 2007.
>
> 3. [Claimant] allegedly provided prescription drugs to an informant, allegedly had sexual intercourse in a hotel room while on duty, and had sexual relations in her squad car while on duty.
>
> 4. [Claimant] admitted to having sexual relations in her squad car while on duty.
>
> 5. [Claimant] was discharged for, amongst other things, having sexual relations in her squad car while on duty.

Bd. Op., 10/13/10, Findings of Fact Nos. 2-5 (emphasis added).

The Board rejected Employer's evidence of Claimant's alleged misconduct at the hotel as insufficient to establish Claimant committed these acts. Id. at 2. However, the Board determined that Claimant's admission of engaging in sexual relations in her squad car fell below the standard of conduct Employer can expect of its employees while on duty. Id. The Board rejected Claimant's statement that this incident occurred years ago as not credible. Id. Accordingly, the Board denied benefits. Claimant petitions for review.[3]

[3] Our review is limited to determining whether the necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Dep't of Corr. v. Unemployment Comp. Bd. of Review, 943 A.2d 1011 (Pa. Cmwlth. 2008).

Issues

Claimant contends the Board denied her right to a fair hearing and an opportunity to be heard by allowing uncorroborated hearsay testimony from a "biased and complicit witness" and by improperly limiting her right to cross-examination. Claimant also contends the Board erred in denying her benefits after Employer withdrew its objection to her application.

Discussion

A.

Claimant first contends the Board, through its referee, denied her a fair hearing by allowing Employer to present hearsay evidence, through Police Chief, from unknown and anonymous FBI sources. Claimant further asserts her attempts to cross-examine Police Chief were stymied by a flurry of objections. "Due process of law, of course, must be provided in unemployment compensation proceedings." Hall v. Unemployment Comp Bd. of Review, 584 A.2d 1097, 1101 (Pa. Cmwlth. 1997).

Claimant asserts the Board issued its denial based solely on the testimony of Police Chief, who provided the referee with a "cascade of hearsay evidence" allegedly generated by anonymous FBI agents. We disagree. In its decision, the Board stated:

> In this case [Employer] has alleged a series of actions that lead to [Claimant's] termination. Specifically, it alleges that [Claimant] gave prescription medication to an informant, that she had sexual relations in a hotel room while on duty, and that she lied during the course of an investigation. However, [Employer] has failed to

> offer sufficient credible testimony or evidence that [Claimant] actually committed those alleged acts.

Bd. Op. at 2.

Clearly, the Board did not rely on Police Chief's testimony regarding the FBI investigation or the surveillance video. Consequently, this evidence had no prejudicial effect on Claimant.

Rather, the Board relied on Claimant's admission of having sex on duty while in her patrol car. At the first hearing, Claimant testified on cross-examination as follows:

> Employer's Lawyer (EL): Did you have sex in the patrol car while on duty?
> Claimant (C): That, at what?
> EL: Ever?
> C: Sure.
> EL: Do you think that's appropriate conduct for a police officer?
> C: It's not unusual conduct.
> EL: Is it appropriate for a police officer?
> C: Probably not.

N.T., 10/21/08, at 38.

Claimant's admission of disqualifying misconduct, engaging in sex in a patrol car while on duty as a police officer, is sufficient by itself to support a finding of willful misconduct under Section 402(e) of the Law. See, e.g., Lindsay v. Unemployment Comp. Bd. of Review, 789 A.2d 385 (Pa. Cmwlth. 2001) (claimant's admission to imbibing alcohol before arriving at work is enough to

support a finding of willful misconduct); Tundell v. Unemployment Comp. Bd. of Review, 404 A.2d 434 (Pa. Cmwlth. 1979) (an admission of sleeping on the job establishes a *prima facie* case of willful misconduct).

At the first hearing, Police Chief testified Employer considered Claimant's engaging in sex in a patrol car as a ground for termination. N.T., 10/21/08, at 23. Claimant admitted doing so. Id. at 38. We discern no error in the Board's reason that such conduct falls below a reasonable standard that Employer can rightfully expect from its police officers while on duty. Such conduct is obviously contrary to a reasonable standard of behavior for police officers. See, e.g., Burchell v. Unemployment Comp. Bd. of Review, 848 A.2d 1082 (Pa. Cmwlth. 2004) (holding it is contrary to reasonable standards of behavior to use employer's computer to download graphic obscene material, even absent an express rule prohibiting such conduct).

Furthermore, Claimant's unsupported allegations that other officers, especially Police Chief, engaged in similar sexual activities while on duty does not establish just cause for her misconduct.[4] Where an employee clearly deviates from a reasonable standard of behavior that an employer has a right to expect, evidence that the policy was not uniformly enforced will not change the result. Id.

[4] At the first hearing, Police Chief testified he did not remember any other officer being caught having sex on duty. N.T., 10/21/08 at 27-28. Although Claimant stated there is documentation to the contrary, she did not have it with her. Id. at 28.

In summary, the Board's denial of benefits under Section 402(e) of the Law is supported by Claimant's admission of having sex in her patrol car while on duty, not by Police Chief's testimony regarding the FBI investigation. Therefore, we discern no prejudice from the process Claimant received. See Hall (no due process violation where referee's conduct of hearing, although impatient, did not substantially prejudice claimant).

B.

Claimant next argues the Board has no standing or legal right to step into Employer's shoes and oppose her claim after Employer withdrew its objection to her application for benefits. "The [B]oard simply has no standing to prosecute its own opinion in Commonwealth [C]ourt since the objector below has stepped out of the fight." Claimant's Br. at 10.

Claimant's argument lacks merit. An employer and employee cannot determine the employee's entitlement to benefits by a subsequent agreement through which the employer withdraws its allegation of misconduct. Sill-Hopkins v. Unemployment Comp. Bd. of Review, 563 A.2d 1288 (Pa. Cmwlth. 1989). Consequently, Employer's agreement to withdraw its objection to Claimant's application for unemployment benefits has no binding effect on the Board. Id.

Conclusion

For these reasons, we discern no error. Accordingly, we affirm.

ROBERT SIMPSON, Judge

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O R D E R

AND NOW, this 24th day of August, 2011, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge