IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sherry F. Clements, Petitioner	:	
v.	:	No. 465 C.D. 2012
	:	Submitted: August 3, 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 JUDGE BROBSON **FILED: September 7, 2012**

Petitioner Sherry F. Clements (Claimant), *pro se*, petitions for review of an order of the Unemployment Compensation Board of Review (Board), which reversed the Unemployment Compensation Referee's (Referee) decision. The Board denied 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.

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

Claimant filed for unemployment compensation benefits after being discharged from employment with the School District of Philadelphia (Employer), effective June 30, 2011. The Philadelphia UC Service Center (Service Center) issued a determination finding Claimant ineligible for unemployment compensation benefits. (Certified Record (C.R.), Item No. 3.) Employer appealed the Service Center's determination, and a Referee conducted an evidentiary hearing.

At the hearing before the Referee, two witnesses testified on Employer's behalf. First, Rhonda Boone, who is employed by Employer as an Unemployment Specialist, testified that Claimant was employed as a Special Education Teacher at the Catherine Elementary School from February 26, 2007, until June 22, 2011. (C.R., Item No. 7 at 4-5.) She further testified that Employer terminated Claimant's employment for excessive tardiness. (*Id.*) Finally, Ms. Boone testified that up until the hearing, she had not communicated with Claimant regarding her discharge. (*Id.* at 6.)

Second, Carol Kofsky, the Principal of Catherine Elementary School, testified that, pursuant to a contract, Employer expected Claimant to arrive to work by 8:20 a.m. (*Id.* at 7-8.) Ms. Kofsky also testified that, as "a teacher of handicapped children," Claimant was responsible for receiving the school bus in the morning for purposes of assisting students off the bus and to the classroom. (*Id.* at 12.) The bus would arrive around 8:25 a.m. (*Id.*)

Ms. Kofsky further testified that Employer follows a progressive disciplinary policy with regard to tardiness, which it applies and enforces uniformly. (*Id.*) Under the policy, frequent tardiness may lead to termination. (*Id.* at 9.) Ms. Kofsky testified that, to track punctuality, Employer requires teachers to

sign in when they arrive to work. (*Id.* at 8.) Ms. Kofsky testified that after 8:20 a.m., she draws red circles next to the names of teachers on the sign-in list who are late. (*Id.*) As a result, tardy teachers "sign[-]in in the circle." (*Id.*)

Ms. Kofsky testified that Claimant was habitually late for work. (*Id.* at 9-12 and Employer's Exhibit ("EE") 1.) On November 29, 2010, Employer issued a Warning Memo to Claimant, because she was late eleven times for a total of 125 minutes during the September 2009 and November 2010 time period. (C.R., Item No. 7 at 11.) Employer informed Claimant that additional tardiness would lead to more severe disciplinary action. (*Id.*) On March 8, 2011, Claimant received another written warning, detailing that she had been tardy an additional fifteen times for a total of 195 minutes since the November 29, 2010 warning. (*Id.* at 11-12.) On April 27, 2011, at a second-level hearing regarding the March 8, 2011 warning, Employer suspended Claimant for ten days without pay. (*Id.* at 9.) Ms. Kofsky testified that, at the hearing, Employer warned Claimant that "any future incidents . . . would result in disciplinary action, which can include termination." (*Id.*) Subsequent to the March 8, 2011 warning, Claimant was late again for an additional four days for a total of 76 minutes. (*Id.* at 10.) As a result, Ms. Kofsky testified that she issued another written warning to Claimant on May 11, 2011, and recommended that Claimant "be immediately dismissed" from employment. (*Id.* and EE 1.)

Ms. Kofsky testified that Claimant was late on two more occasions following the May 11, 2011 warning. (C.R., Item No. 7 at 8.) Specifically, on May 16, 2011, Claimant was five minutes late for work, and on May 25, 2011, Claimant arrived to work twenty-two minutes late. (*Id.* at 7-8.) Finally, Ms. Kofsky testified that "every time [Claimant's] late, I have to free up someone

else from their job to go and meet the children and take them off the bus and bring them into the school." (*Id.* at 12.)

In response, Claimant testified that she did not agree with the May 11, 2011, warning, because she had not been late since the April 27, 2011 hearing and the attendant suspension. (*Id.* at 15.) Indeed, Claimant testified that the tardiness at issue occurred between the March 8, 2011 warning and the April 27, 2011 hearing, in particular on March 21, March 31, April 13, and April 26, 2011. (*Id.*) Claimant, however, did not dispute being late on May 16, 2011, and May 25, 2011. (*Id.* at 15-16.) In explaining her tardiness for May 16, 2011, Claimant testified that a disabled vehicle on Interstate 95 caused her tardiness. (*Id.* at 21.) With regard to May 25, 2011, Claimant testified that emergency road construction on the Blue Route caused her to be twenty-two minutes late. (*Id.* at 16.) She was stuck in traffic. (*Id.*) Claimant further testified that she attempted to rectify her problems of tardiness, but, given her commute from New Castle, Delaware to Philadelphia, Pennsylvania, unforeseen traffic situations inevitably would arise. (*Id.*) Claimant admitted that she understood that continued tardiness would result in her discharge from employment. (*Id.* at 22.) Finally, Claimant testified that Employer terminated her employment for excessive tardiness at the conclusion of the 2010-2011 school year. (*Id.* at 18.)

Following the hearing, the Referee issued a decision, which reversed the Service Center's determination, thereby finding Claimant eligible for unemployment compensation benefits. (C.R., Item No. 8.) Employer appealed the Referee's order to the Board.

On appeal, the Board reversed the Referee's decision. In so doing, the Board issued its own findings of fact and conclusions of law. The Board found as follows:

1. The claimant was last employed as a special education teacher by the School District of Philadelphia from February 2007, at a final bi-weekly rate of $2,969 and her last day of work was June 22, 2011.

2. The employer has a progressive disciplinary policy providing for discharge of an employee for excessive tardiness.

3. The claimant had a history of excessive tardiness and had progressed through the employer's disciplinary policy to the final warning stage; the claimant was aware that any further incident of tardiness would result in her discharge.

4. Part of the claimant's job duties required her to be present when the students' bus arrived in the morning to receive the children and assist them in getting to the classroom.

5. In the final incident, the claimant arrived at work twenty-two minutes late.

6. The claimant asserted that unexpected road construction caused her tardiness.

7. Traffic issues had caused the claimant's tardiness on previous occasions.

8. Despite the numerous warnings for tardiness, and awareness that her job was in jeopardy, the claimant never altered the time she departed her home for work.

9. The claimant was discharged for excessive tardiness.

(C.R., Item No. 10.)

Based on the above-listed findings, the Board concluded that Claimant engaged in willful misconduct and failed to establish good cause for her actions. (*Id.*) Specifically, the Board reasoned that, despite being on notice that any further tardiness might give rise to termination, Claimant failed to adjust her "departure time and [did not leave] her home earlier to allow for [traffic] delays." (*Id.*) As a result, the Board determined that Claimant was ineligible for unemployment compensation benefits. (*Id.*) Claimant now petitions this Court for review.

On appeal,[2] Claimant propounds two arguments for review. First, she argues that substantial evidence does not exist to support the Board's finding of fact number 8. Second, Claimant argues that the Board committed an error of law by concluding that Claimant's actions constituted willful misconduct.[3]

First, we will address Claimant's argument that substantial evidence does not exist to support the Board's findings of fact. 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

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[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. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704.

[3] We note that on March 13, 2012, the Board denied Claimant's request for reconsideration of its January 27, 2012 order. We also note that Claimant did not appeal to this Court the Board's refusal to reconsider its order. To the extent that she challenges the refusal, we conclude that she has waived it. Issues that are not raised in a petition for review, or that are not fairly comprised therein, are waived and, therefore, will not be addressed by the court. Pa. R.A.P. 1513(a); *Lausch v. Unemployment Comp. Bd. of Review*, 679 A.2d 1385, 1391 (Pa. Cmwlth. 1996), *appeal denied*, 547 Pa. 745, 690 A.2d 1164 (1997).

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).

Here, Claimant argues that substantial evidence does not exist to support the Board's finding that "[Claimant] never altered the time she departed her home for work." She asserts that the Board's finding is predicated on Rhonda Boone's statement that "[Claimant] never made adjustments," as contained in Employer's appeal from the Referee's order. (C.R., Item No. 9.) Claimant argues that the Board could not rely on Ms. Boone's statement. To support this argument, Claimant asserts that Ms. Boone had no personal knowledge of Claimant's work situation because she had not met with her prior to the Referee hearing.

Based on Claimant's own testimony, we disagree with her that the Board's finding of fact is based only on Ms. Boone's statement. Specifically, Claimant testified that she "*always* left [her] house about, probably like 6:45 [a.m.]." (C.R., Item No. 7 at 21. (emphasis added).) Accordingly, when viewed in a light most favorable to Employer, our review of the record demonstrates that there is substantial evidence to support the Board's finding regarding Claimant's failure to alter her departure time.

We next address Claimant's argument that the Board erred in concluding that her actions constituted willful misconduct. 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 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 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.

Grieb v. Unemployment Comp. Bd. of Review, 573 Pa. 594, 600, 827 A.2d 422, 425 (2003). 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. The claimant's habitual tardiness, after the receipt of warnings, "is sufficient evidence to sustain a finding of willful misconduct." *Markley v. Unemployment Comp. Bd. of Review*, 407 A.2d 144, 146 (Pa. Cmwlth. 1979). Once an employer, however, has met its burden, the burden then shifts to the claimant to show good cause as justification for the conduct considered willful. *McKeesport Hosp. v. Unemployment Comp. Bd. of Review*, 625 A.2d 112, 114 (Pa. Cmwlth. 1993). 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).

Here, Employer met its burden of proving willful misconduct by providing testimony and documentation establishing that it had a policy against tardiness and that Claimant, despite being aware of that policy and the consequences for violating it, continued to arrive to work after 8:20 a.m. – *i.e.*, late. The sole issue, therefore, is whether Claimant met her burden of demonstrating good cause for her tardiness. *McKeesport Hosp.*, 625 A.2d at 114. To prove "good cause," a claimant must demonstrate that her actions were justifiable and reasonable under the circumstances. *Kelly v. Unemployment Comp. Bd. of Review*, 747 A.2d 436, 439 (Pa. Cmwlth. 2000).

Here, Claimant's sole argument is that unforeseen traffic problems caused her to be late on May 16, 2011, and May 25, 2011. She claims that she was stuck in traffic. We, however, note that Claimant was aware of the traffic problems in the morning. Claimant also was aware, especially after her April 27, 2011 hearing, that further tardiness would lead to her discharge from employment. Yet, despite the fact that traffic issues often caused her to be tardy, Claimant continued to leave home around 6:45 a.m. We, thus, agree with the Board that Claimant did not establish good cause for her tardiness because she did not adjust her departure time for work. Accordingly, Claimant's tardiness constituted willful misconduct.

For the foregoing reasons, we affirm the Board's order.

P. KEVIN BROBSON, Judge

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O R D E R

AND NOW, this 7th day of September, 2012, the order of the Unemployment Compensation Board of Review is hereby AFFIRMED.

P. KEVIN BROBSON, Judge