

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Davina Dukes,	:
	:
Petitioner	:
	:
v.	: No. 626 C.D. 2012
	: Submitted: October 12, 2012
Unemployment Compensation	:
Board of Review,	:
	:
Respondent	:

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
SENIOR JUDGE COLINS**

FILED: November 16, 2012

Davina Dukes (Claimant), *pro se*, petitions for review of the order of the Unemployment Compensation Board of Review (Board) affirming the decision of a Referee that Claimant is ineligible for unemployment compensation benefits under Section 402(e) of the Unemployment Compensation Law (Law).¹ 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 provides, in pertinent part:

An employe shall be ineligible for compensation in any week

(Footnote continued on next page...)

Claimant filed a claim for unemployment compensation benefits upon the termination of her employment as a sales representative for All Source Sales Group (Employer). The UC Service Center concluded that Claimant had been discharged for reasons that constitute willful misconduct under Section 402(e) of the Law, for an alleged dishonest act involving a shortage of cash from sales. (Record Item No. 5, Notice of Determination, August 2, 2011.) As a result, unemployment compensation benefits were denied.

Claimant appealed this determination and a hearing was conducted before a Referee. (Record Item No. 9, Referee's Hearing, Transcript of Testimony (H.T.), September 22, 2011, at 1-17.) At the Referee hearing, Employer was represented, via telephone, by Alicia Seabury, the Payroll Manager, and Donald Porges, the company Secretary. Claimant participated in person. Claimant's job involved the sale of jewelry sets to various stores, with responsibility to collect cash and credit card receipts from such sales, convert cash into money orders, and mail credit card receipts and money orders to Employer. (H.T. at 13.) The Payroll Manager testified that Claimant had a full-time position, with a salary based entirely upon commission, and was employed for approximately one month, from November 25, 2010 until the last day she reported sales, on December 24, 2010. (H.T. at 4-5.) The Payroll Manager stated that Claimant was discharged from her employment because of missing funds, and explained that Claimant notified Employer, on December 27, 2010, that a portion of the money she had been

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(e) in which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work, irrespective of whether or not such work is "employment" as defined in this act.

collecting for sales had been stolen from her apartment over Christmas. (H.T. at 5.) She testified that Claimant reported to Employer that she had filed a police report with the Haverford Township Police Department (HTPD), but stated that Employer never received a copy of a police report. (*Id.*) The Payroll Manager testified that Employer had conducted an investigation regarding the incident. (H.T. at 6.) She testified that, based upon the sales recap sheets Claimant had provided Employer, the amount of money not turned in by Claimant was determined to equal \$7,093.40, but indicated that Employer had recovered \$3,304.76 of those funds. (*Id.*) On cross-examination by Claimant, the Payroll Manager stated that Employer notified Claimant by telephone that her employment was terminated, and further noted that Claimant was told that she was being discharged because of the missing monies, and if she wanted to return to work, she would have to pay the monies back. (H.T. at 9.) Employer's company Secretary testified that Employer offered Claimant and her daughters,² who were at home during the time when the money was alleged to have been stolen, the opportunity to take a polygraph test, and they refused. (H.T. at 12, 16.)

Claimant testified that contrary to what the Payroll Manager had testified, she had, in fact, told Employer that she and her daughters were willing to take a polygraph test. (H.T. at 14.) Claimant further stated:

[The monies] were stolen from my home in a drawer. I kept the monies in a drawer each day until I was able to get to the post office and send them to them. The theft would've occurred between the 25th – that Saturday and

² Claimant testified that, in addition to her two daughters, another person, her dog walker, was in her home during the period when the funds were alleged to have been stolen; she testified that she reported this information to HTPD when she made her report. (H.T. at 14.)

the 26th – well, that Friday. From Friday to Sunday, the monies would've gone missing. Monday I went – Monday, the 27th, I went to look in my drawer for those monies and they were gone. I immediately called the employer, reported it to the employer. I also contacted the police and reported it to the police. There is a police report that corroborates my story.

(Id.)

Early in the proceeding, when Claimant indicated that she had brought the police report with her to the hearing, the Referee advised her that the Telephone Hearing Regulations with which she had been provided specified that documents must be submitted to the Referee's office at least five days prior to the hearing. (Record Item 8, Notice of Hearing.) Claimant then asked the Referee whether she might refer to the police report, and the Referee responded “[y]ou can offer testimony about it.” (H.T. at 2.)

On September 28, 2011, the Referee issued a decision, finding that “Claimant was discharged when she failed to turn in sales money received from customers...” (Record Item 10, Referee's Decision, Findings of Fact (F.F.) ¶2.)

The Referee further found:

4. Claimant reported that someone broke into her apartment and stole the money but did not provide the Employer with any documentation or other evidence to support her claim at the time of the incident.

5. Claimant was responsible for safeguarding the Employer's receipts.

(F.F. ¶¶ 4,5.) The Referee reasoned that in the present case, Claimant had a responsibility to safeguard Employer's cash receipts, and failed to do so without good cause, and therefore concluded that there was willful misconduct on Claimant's part. (Referee's Decision at 2.)

In its decision and order dated December 19, 2011, the Board adopted and incorporated the Referee's findings and conclusions. (Record Item No. 12, Board's Order.) The Board further stated:

Additionally, the Board discredits the [C]laimant's assertion that the money was stolen from her home, as she did not present the alleged police report into evidence. Even if the money was stolen, the [C]laimant admitted that she left the money for which she was accountable basically unsecured in a drawer.

(Board's Order.)

Pursuant to Section 402(e) of the Law, an employee is ineligible for unemployment compensation benefits when she has been discharged from work for willful misconduct connected with her work. *Guthrie v. Unemployment Compensation Board of Review*, 738 A.2d 518 (Pa. Cmwlth. 1999). The burden of proving willful misconduct rests with the employer. *Id.* Willful misconduct is defined as: (1) the wanton and willful disregard of the employer's interests; (2) the deliberate violation of the employer's rules; (3) the disregard of standards of behavior that an employer can rightfully expect from his employees; or (4) negligence that manifests culpability, wrongful intent, evil design, or an intentional and substantial disregard for the employer's interests or the employee's duties and obligations. *Oliver v. Unemployment Compensation Board of Review*, 5 A.3d 432, 438 (Pa. Cmwlth. 2010) (*en banc*). Once the employer has met its burden, the burden shifts to an employee to show good cause for his or her actions. *Perez v. Unemployment Compensation Board of Review*, 736 A.2d 737 (Pa. Cmwlth. 1999). An employee establishes good cause by showing that his or her conduct was justified or reasonable under the circumstances. *Id.*

On appeal,³ Claimant argues first, that the Board⁴ erred in concluding that the Referee's determination was proper, because the Referee did not allow Claimant to enter into evidence the police report that, Claimant alleges, supports her claim that money was stolen out of a bedroom drawer in her home, as well as other documents relevant to Claimant's case. (Claimant's Brief at 10.) Claimant contends she was therefore denied due process and reasonable assistance as a *pro se* party under Pennsylvania law.

Upon review of the record, we find that no prejudice to Claimant resulted from her inability to introduce into evidence the police report she filed with HTPD. Although the physical report was never admitted, its contents were discussed fully by both sides before the Referee. At the hearing, Claimant stated repeatedly that she had filed a police report, although she never provided a copy of the report to Employer. In her appeal from the UC Service Center's determination, Claimant stated that she supplied Employer with the HTPD responding officer's direct contact information, but stated that Employer had never followed up by contacting HTPD. (Record Item 6, Claimant's Petition for Appeal from Determination.) However, the Payroll Manager testified that a telephone call was made to HTPD in the course of Employer's investigation. (H.T. at 5-6.) She testified that the police officer to whom Employer spoke said there was no

³ Our review is limited to determining whether the Board's adjudication is in violation of constitutional rights, whether an error of law was committed, or whether the factual findings are supported by substantial evidence. 2 Pa.C.S. § 704; *Nolan v. Unemployment Comp. Bd. of Review*, 797 A.2d 1042, 1045 n.4 (Pa. Cmwlth. 2002).

⁴ The Board did not file a brief in this appeal.

evidence of a break-in.⁵ No evidence was offered by Claimant to indicate that HTPD determined that a break-in occurred at Claimant's home, nor was any other documentation or evidence offered to support her claim that receipts were stolen from a drawer in her bedroom. In her brief, Claimant admits that HTPD closed the investigation. (Claimant's Brief at 8.) The Board discredited Claimant's assertion that the money was stolen from her home and stated, "[e]ven if the money was stolen from her home, the [C]laimant admitted that she left the money for which she was accountable basically unsecured in a drawer." (Board's Order.)

In addition to the police report, Claimant argues that other documents and testimony relevant to her case were similarly precluded by the Referee, who thereby denied her the assistance required under 34 Pa. Code §101.21(a). This Code section relates to the conduct of hearings, and requires the Referee, as tribunal, to assist an unrepresented party by advising her as to her rights, aiding her in examining and cross-examining witnesses, and providing her every assistance compatible with the discharge of his official duties as Referee. Our review of the hearing transcript reveals only *one* other item that was precluded from the record, namely, an email from Claimant to Employer allegedly sent in January, 2011. (H.T. at 10-11, 13.) Claimant argued that it supported her contention that she agreed to a polygraph test; conversely, Employer argued that the email established

⁵ We note that although this testimony was admitted into the record without objection, it constitutes hearsay. The rule on hearsay evidence is well-settled. Hearsay evidence, properly objected to, is not competent to support a finding; hearsay evidence submitted without objection will be given its natural and probative effect and may support a finding if it is corroborated by any competent evidence in the record, but a finding of fact based solely on hearsay will not stand. *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Cmwlth. 1976). Here, the Referee made no specific finding as to the contents of the police report, finding rather that although Claimant reported that money was stolen from her apartment, she provided "no documentation or other evidence to support her claim."

that Claimant was now contradicting herself, because in it she stated that she had been notified by Employer that money was missing, and she responded, via email, to inform Employer that the money had, in fact, been stolen. (H.T. at 10.) The Referee stated that he would not allow the parties to refer to a document that was not in the record; he did, however, permit Claimant to question the company Secretary about the email:

Claimant: ...I'm going to take away the date then. Did you ever receive an email indicating my acceptance of taking a polygraph?

Mr. Porges: No. I have not received an email to that effect.

(H.T. at 13.) Claimant testified that she agreed to take a polygraph test, and the company Secretary testified that Claimant, as well as Claimant's family members refused to do so. (H.T. at 12, 14, 16.) In the course of the hearing, the Referee made every effort to assist Claimant in her cross-examination of Employer's witnesses, and carefully questioned Claimant in a manner calculated to elicit any and all facts and testimony probative of her case. In short, a full and fair hearing was provided.

In her appeal to the Board from the Referee's decision, Claimant referred to, and attached, various documents, none of which were part of the record at the Referee hearing; the Board properly declined to consider this extra-record evidence.⁶ (Record Item 11, Claimant's Petition for Appeal from Referee's

⁶ The documents referenced in Claimant's appeal to the Board include: (i) the police report about which Claimant was permitted to testify at the Referee hearing; (ii) recap sheets prepared by Claimant recounting the amount she was short; (iii) the email to Employer, about which there **(Footnote continued on next page...)**

Decision/Order w/Attachments; Board's Order.) *Sub judice*, Claimant argues that because one of these documents, Employer's Employee Handbook, does not contain any instructions or guidelines on how to secure and safeguard Employer's cash receipts, her practice of storing cash and credit card slips in an unlocked bedroom drawer should be viewed as reasonable in the circumstances, and she should not have been held accountable for money she alleges was stolen. We find no merit in this argument. As a sales representative who was required to handle large sums of cash to be forwarded to her employer, Claimant can be charged with knowledge that such sums must be safeguarded in a diligent fashion.

The Referee found, and the Board affirmed the Referee's finding, that Claimant was discharged for her failure to safeguard Employer's cash receipts, without good cause. Employer established that Claimant, as a sales representative, was responsible to collect credit card slips and cash from sales, convert cash to money orders, and submit all receipts due to Employer. There is no dispute that Claimant collected cash and credit card slips from sales of Employer's jewelry sets, but failed to turn them in. The Board discredited Claimant's assertion that the cash and credit card slips were stolen from her apartment, and we are bound by the Board's credibility determinations. *Guthrie*, 738 A.2d at 521. Accordingly, we affirm the Board's decision.

JAMES GARDNER COLINS, Senior Judge

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was conflicting testimony from Claimant and Employer's witness at the Referee hearing; and (iv) portions of Employer's Employee Handbook.

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ORDER

AND NOW, this 16th day of November, 2012, the order of the Unemployment Compensation Board of Review in the above-matter is affirmed.

JAMES GARDNER COLINS, Senior Judge