IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nancy E. Coluzzi, Petitioner	:	
v.	:	No. 637 C.D. 2011
Unemployment Compensation Board of Review, Respondent	:	Submitted: August 12, 2011

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: September 19, 2011

Nancy E. Coluzzi (Claimant), *pro se*, petitions for review of an order of the Unemployment Compensation Board of Review (Board) affirming the Referee's decision denying Claimant unemployment compensation benefits pursuant to 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) provides in pertinent part:

> An employe shall be ineligible for compensation for any week---
>
> (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 the act.

Claimant was last employed as a full-time Staffing Coordinator by Medical Staffing Network (Employer) from December 1, 2006 through November 4, 2010. On November 5, 2010, Claimant filed an internet claim for unemployment compensation benefits with the Erie UC Service Center (Service Center) initially alleging that she was unemployed due to lack of work. Employer filed a response to Claimant's claim wherein Employer stated that Claimant was discharged for a rule violation, specifically, personal use of a work computer. Claimant then filed a response to Employer's contentions denying that she violated Employer's rule regarding personal use of a work computer.

By Notice of Determination mailed December 3, 2010, the Service Center ruled that Claimant was eligible for benefits pursuant to Section 402(e) of the Law. The Service Center determined that although there was conflicting information, the facts indicated that Claimant did not violate a rule. Employer appealed and a hearing before the Referee ensued on January 18, 2011.

In support of its appeal, Employer presented the testimony of its branch manager, Jill Guianen. Employer was represented by its Tax Consultant, David Balzer. Claimant's Union Representative, Mark Coluzzi, appeared as Claimant's advocate. Claimant testified on her own behalf.

Based on the evidence presented the Referee made the following findings of fact. Employer has an internet computer policy that does not allow employees to use the computer for personal use. Claimant was made aware of this policy at the time of hire and through the employee handbook.

From May 24, 2010, through August 8, 2010, Claimant was on medical leave. During this time, Claimant's email account was transferred to her manager. The manager began receiving hundreds of personal emails addressed to Claimant.

On August 8, 2010, Claimant returned to work and Employer met with her concerning her computer Internet usage. From August 8, 2010 through November 2010, Employer monitored Claimant's computer and Internet usage and discovered that Claimant made over 5,000 personal hits on the computer. On November 4, 2010, Claimant was involuntarily discharged due to violating Employer's computer and Internet policy.

As a result of the foregoing findings, the Referee concluded that Employer met its burden of proving that Claimant was terminated for willful misconduct. The Referee stated that Employer provided evidence and testimony of its computer and Internet policy and that Claimant violated the policy. The Referee stated further that there was no evidence on the record that Claimant had good cause for violating Employer's policy. Accordingly, the Referee determined that Claimant was ineligible for unemployment compensation benefits pursuant to Section 402(e) of the Law.

Claimant appealed the Referee's decision to the Board. The Board concluded that the Referee's determination was proper under the Law and adopted and incorporated the Referee's findings and conclusions. The Board pointed out that Claimant did not credibly establish why there were 5,000 incidents of going on the work computer for non-work reasons from August 8, 2010, until November 4, 2010. Therefore, the Board affirmed the Referee's decision. This *pro se* appeal by Claimant followed.

Initially, we note that this Court's review of the Board's decision is set forth in Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704, which provides that the Court shall affirm unless it determines that the adjudication is in violation of the claimant's constitutional rights, that it is not in accordance with law, that provisions relating to practice and procedure of the Board have been violated, or that any necessary

findings of fact are not supported by substantial evidence. See Porco v. Unemployment Compensation Board of Review, 828 A.2d 426 (Pa. Cmwlth. 2003). Findings of fact are conclusive upon review provided that the record, taken as a whole, contains substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977). Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. Hercules v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992). 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 Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985).

Willful misconduct has been judicially defined as that misconduct which must evidence the wanton and willful disregard of employer's interest, the deliberate violation of rules, the disregard of standards of behavior which an employer can rightfully expect from his employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional substantial disregard for the employer's interest, or the employee's duties and obligations. Frumento v. Unemployment Compensation Board of Review, 466 Pa. 81, 351 A.2d 631 (1976). Whether an employee's conduct constituted willful misconduct is a matter of law subject to this Court's review. Miller v. Unemployment Compensation Board of Review, 405 A.2d 1034 (Pa. Cmwlth. 1979).

The burden of proving willful misconduct rests with the employer. Brant v. Unemployment Compensation Board of Review, 477 A.2d 596 (Pa. Cmwlth. 1984). In order to prove willful misconduct by showing a violation of employer rules or policies, the employer must prove the existence of the rule or policy and that it was violated. Caterpiller, Inc. v. Unemployment Compensation Board of Review, 654 A.2d

199 (Pa. Cmwlth. 1995); Duquesne Light Company v. Unemployment Compensation Board of Review, 648 A.2d 1318 (Pa. Cmwlth. 1994).

Willful misconduct is not found where a claimant can show good cause for her actions, i.e., that the actions which resulted in the discharge were justifiable and reasonable under the circumstances. Perez v. Unemployment Compensation Board of Review, 736 A.2d 737 (Pa. Cmwlth. 1999). While the employer bears the burden of proving that a claimant's behavior constitutes willful misconduct, it is the claimant who bears of the burden of proving good cause for her actions. Id.

As a preliminary matter, we will first address the Board's contention that Claimant has waived any challenge to the Board's findings of fact and to whether Employer provided evidence of a computer user policy by failing to raise these issues in her petition for review. We disagree that Claimant has waived any challenge to the Board's findings of fact. While Claimant does not challenge the Board's findings by specifically listing each verbatim or by number, the statement set forth in her petition for review fairly comprises a challenge to the Board's findings that she violated Employer's computer user policy.

With respect to the issue raised by Claimant in her brief of whether Employer provided evidence of a computer user policy, we agree that Claimant has not specifically raised this issue in her petition for review nor can we conclude that the issue is fairly comprised therein. Therefore, this issue is waived. Pa.R.A.P. 1513; McDonough v. Unemployment Compensation Board of Review, 670 A.2d 749, 750 (Pa. Cmwlth. 1996) (Issue argued in the brief on appeal, but not raised in the petitioner's petition for review or fairly comprised therein, will not be considered.). We note, however, that Claimant's arguments in support of this issue are really arguments in support of the issue preserved by Claimant of whether Employer met its

burden of proving that Claimant's actions violated the computer user policy. In addition, a copy of Employer's Computer, Internet and Network User Policy was admitted into evidence without objection. See Certified Record (C.R.) at Item 8, Transcript of Testimony at 2.

In support of her appeal, Claimant contends that the Board's finding that she violated Employer's computer user policy is not supported by substantial evidence. Claimant contends that Employer did not offer any reports or documentation to support its claim that she violated its policy. Claimant argues that she only received unsolicited emails on her work computer and that Employer did not present any eye witness testimony or other evidence that she personally logged onto her work computer for personal reasons in violation of Employer's computer user policy. We disagree.

The Board found that from August 8, 2010 through November 2010, Employer monitored Claimant's computer and internet usage and discovered that Claimant made over 5,000 personal hits on the computer. This finding is supported by the testimony of Employer's branch manager, Jill Guianen. Ms. Guianen testified that Employer ran a report which tracked Claimant's internet usage on her work computer beginning August 8, 2010 through November 4, 2010. See C.R., Transcript of Testimony at 7. The report consisted of 700 pages and showed that Claimant had 5,533 hits on AOL. Id. Ms. Guianen testified further that there was no reason why a Staffing Coordinator would be hitting on AOL. Id. at 8. The report also showed when Claimant received unsolicited emails. Id. However, Ms. Guianen testified that the hits on AOL were not unsolicited. Id. Ms. Guianen distinguished, through her testimony, Claimant's receipt of unsolicited emails and Claimant's activity of actually accessing AOL via her work computer. Id. at 7-8.

The Board specifically stated that Claimant did not credibly establish why there were 5,000 incidents of going on the work computer for non-work reasons from August 8, 2010 until November 4, 2010. Accordingly, the Board's finding that Claimant violated Employer's computer usage policy is supported by substantial evidence. See Peak (The Board is the ultimate fact finder and is, therefore, entitled to make its own determinations as to witness credibility and evidentiary weight.).

Finally, Claimant argues that the Referee erred when instructing Employer not to give evidence or testimony regarding hits on Claimant's computer that occurred while Claimant was on medical leave. Claimant does not cite to exactly where in the Transcript of Testimony the Referee instructed Employer in this regard nor does a review of the entire Transcript of Testimony reveal such an instruction. See C.R., Item 8, Transcript of Testimony. Moreover, the credible testimony of record supports the Board's finding that Claimant violated Employer's computer user policy after she returned from medical leave during the period August 8, 2010 through November 4, 2010. As such, the time period during which Claimant was away from work on medical leave is irrelevant.

Accordingly, the Board's order is affirmed.

JAMES R. KELLEY, Senior Judge

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O R D E R

AND NOW, this 19th day of September, 2011, the order of the Unemployment Compensation Board of Review entered in the above-captioned matter is affirmed.

JAMES R. KELLEY, Senior Judge