

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Bernice P. Robinson,	:	
	:	
Petitioner	:	
v.	:	No. 775 C.D. 2010
	:	Submitted: September 24, 2010
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	
	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY

FILED: December 7, 2010

Bernice P. Robinson (Claimant) petitions for review from an order of the Unemployment Compensation Board of Review (Board) which affirmed the decision of a referee denying Claimant unemployment compensation benefits under Section 402(e) of the Unemployment Compensation Law (Law), due to her willful misconduct.¹ We affirm.

The facts as found by the referee are as follows:

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 that an employee shall be ineligible for unemployment compensation benefits where the unemployment is due to a discharge for “willful misconduct.”

1. The Claimant was employed by Beaumont Retirement Home as a Housekeeper at a rate of \$13.31 per hour that began May 25, 1998 and last worked on September 28, 2009.
2. The Employer has a policy that provides in part, that cell phones are prohibited during work hours.
3. The Employer allows employees to receive or make emergency telephone calls with authorization, which the Claimant was or should have been aware.
4. The Claimant was in a progressive warning status because of various infractions and [was] issued a final warning on August 26, 2008 providing that further infractions would result in her termination.
5. On or about September 28, 2009, the supervisor and housekeeping director were making rounds in the facility during which they came upon the Claimant, assigned to clean a client's residence, and overheard the Claimant on her cell phone.
6. The Claimant was confronted and instructed to get off the telephone and to resume work.
7. The Claimant explained that she was on the phone speaking with her dentist concerning a medical matter and was experiencing dizziness because her glucose levels were high.
8. The Claimant was later summoned to the office at which time she was discharged for violating the cell phone policy. She was held to have incurred another infraction following the final warning that provided the next disciplinary action would result in termination.
9. The Claimant did not have authorization to be on her cell phone during work hours.

(Referee's decision at 1, 2.)

Based on the above, the referee determined that Claimant, who was in a final warning status, engaged in willful misconduct by violating Employer's cell phone use policy when she used the phone during working hours. Although Claimant needed to speak with her dentist, Claimant did not seek authorization before using the phone during work hours. Accordingly, the referee denied benefits. Claimant appealed to the Board, which adopted the referee's findings and conclusions and affirmed the decision denying benefits. This appeal followed.²

We initially observe that a claimant will be ineligible for unemployment benefits if her unemployment is the result of willful misconduct by deliberately violating an employer's work rule. Arbster v. Unemployment Compensation Board of Review, 690 A.2d 805, 807 (Pa. Cmwlth. 1997), petition for allowance of appeal denied, 549 Pa. 718, 701 A.2d 579 (1997). An employer bears the initial burden of proving the existence of a reasonable rule or policy and the fact that the claimant violated that rule or policy. Id. at 809. The burden then shifts to the

² This court's review is limited to determining whether constitutional rights were violated, errors of law committed or whether the findings are supported by substantial evidence. Sheets v. Unemployment Compensation Board of Review, 708 A.2d 884 (Pa. Cmwlth. 1998).

claimant to prove that she had good cause for the rule or policy violation. Doyle v. Unemployment Compensation Board of Review, 426 A.2d 756, 757 (Pa. Cmwlth. 1981).

In this case, Claimant initially argues that Employer did not meet its burden of proving that Claimant violated a work rule. We disagree. At the hearing, Employer introduced a “Beepers, Pagers and Cell Phone Policy” which states:

Personal phone calls may be made during break or meal time on the pay phone or on a personal cell phone. Calls must be made in designated break areas. Use of an office telephone or a resident’s/patient’s phone is prohibited.

Cell phones must be turned off at all times unless used during a designated break or lunch.

(Exhibit 10a.) Claimant signed the document on November 9, 2001 and also acknowledged at the hearing that she was aware of the policy. In this case, there is no dispute that on September 28, 2009, Claimant used a cell phone in a client’s residence during working hours. Such was contrary to Employer’s policy.

Claimant maintains, however, that Employer had another cell phone policy dated August 4, 2009, and that such policy, which “requested” that cells phones be turned off when in a common area, superseded the

November 9, 2001 policy. We observe that the November 9, 2001 policy applied to employees only. The August 4, 2009 policy applied to “residents, family members, guests, employees, private companies, vendors, etc.” (Exhibit 10.) While we agree with Claimant that the August 4, 2009 policy merely requests cooperation from all individuals who enter the retirement home and does not prohibit the use of cell phones, the November 9, 2001 policy, applicable to Claimant and all employees, prohibited cell phones from being turned on unless an employee was on break or lunch. Moreover, no mention is made in the August 4, 2009 policy that it supersedes the November 9, 2001 policy.

Next, we address the issue of whether Claimant had good cause for violating Employer’s policy. As found by the Board, Claimant “was on the phone speaking with her dentist concerning a medical matter and was experiencing dizziness because her glucose was high.” (Finding of Fact #7.) Although Claimant needed to speak with her dentist, Claimant did not have authorization to make the call. As testified to by Employer’s witness, and found by the Board, Employer allows employees to receive or make emergency phone calls with authorization, and Claimant was or should have been aware of that policy. Although Claimant needed to call her dentist, such did not excuse her from seeking authorization.

The facts in this case are similar to those in Partsch v. Unemployment Compensation Board of Review, 439 A.2d 1331 (Pa. Cmwlth. 1982). Therein, the claimant was a truck driver who made deliveries. The employer had a rule that employees were required to radio the dispatcher for authorization to return without completing their deliveries. Although he spoke with the dispatcher, the claimant did not seek the dispatcher's authorization before he returned without making his last two deliveries. The claimant argued that he had good cause for violating the employer's policy because he had medical issues, including a sore leg and numb foot, rendering driving difficult and he was so clouded with pain that he did not request authorization. This court agreed with the Board that such did not excuse him from following the employer's policy and requesting authorization before returning with undelivered goods.

In this case, like Partsch, Claimant violated Employer's work policy. Claimant used a cell phone in a client's residence during working hours. Although Claimant did need to speak with her dentist, such did not excuse her from first seeking authorization from her supervisor.

In accordance with the above, the decision of the Board is affirmed.

JIM FLAHERTY, Senior Judge

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	:	
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	:	

ORDER

Now, December 7, 2010, the order of the Unemployment Compensation Board of Review, in the above-captioned matter, is affirmed.

JIM FLAHERTY, Senior Judge