

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Patricia A. Kenyon, :
Petitioner :
 :
v. : No. 84 C.D. 2010
 : Submitted: August 27, 2010
Unemployment Compensation :
Board of Review, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: September 28, 1010

Patricia A. Kenyon (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) affirming the decision of the Unemployment Compensation Referee (Referee) finding her ineligible for benefits under Section 402(e) of the Unemployment Compensation Law¹ (Law)

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

(Footnote continued on next page...)

because her actions amounted to willful misconduct. Finding no error in the Board's decision, we affirm.

Claimant was employed as a front desk administrator with Comprehensive Physical Therapy (Employer) from November 3, 2008, until June 30, 2009, with a final rate of pay of \$12 per hour. Between March and June of 2009, Claimant received several verbal and written warnings for not completing her work in a satisfactory manner. On June 29, 2009, Employer discovered that Claimant had again failed to complete her work, which had a negative impact on Employer's potential financial reimbursement from its patients' insurance and Medicare plans, resulting in Claimant's termination. Claimant filed an unemployment compensation claim, which the Department of Labor and Industry's Office of UC Benefits denied, finding Claimant ineligible for benefits under

(continued...)

irrespective of whether or not such work is
"employment" as defined in this act.

While the term "willful misconduct" is not specifically defined in the Law, our courts utilize the following definition:

(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 Compensation Board of Review, 573 Pa. 594, 600, 827 A.2d 422, 425 (2003) (citing *Navickas v. Unemployment Compensation Review Board*, 567 Pa. 298, 304, 787 A.2d 284, 288 (2001)). The court must consider all the facts and circumstances when making this determination, including the employee's proffered reasons for noncompliance.

Section 402(e) of the Law because her actions showed a willful disregard for Employer's interests and she failed to show good cause for her actions. Claimant appealed this decision to the Referee.

Before the Referee, Tiffany McCormick (Ms. McCormick), Employer's front desk supervisor, testified that she conducted Claimant's initial 90-day review in February 2009, when she was given a non-satisfactory performance rating. Claimant received this rating because she was not completing all the pre-authorizations necessary for certain insurance companies and based on her attitude, abrupt conversations and behavior, failure to utilize her time efficiently, failure to prioritize, and failure to ask for help. Ms. McCormick conducted a follow-up review with Claimant approximately 3 to 4 weeks later, at which time she felt Claimant had made strides in correcting these issues. Also, Ms. McCormick testified that Claimant was completing her paperwork duties, such as tracking the dollar amounts for Medicare patients, and Claimant demonstrated she was capable of performing her job functions.

Ms. McCormick testified that nothing "big" happened with Claimant over the next few weeks, and there were no issues for her to address. However, at the end of May or early June, Amanda Black (Ms. Black),² Claimant's immediate supervisor, contacted her and stated she was having issues with Claimant's excessive cell phone and text messaging during work hours; online shopping and

² Ms. Black did not testify before the Referee.

personal use of the computer/internet;³ re-evaluations not being tracked appropriately; and the appropriate forms not being placed in patients' charts. Ms. Black attempted to address these issues verbally with Claimant and issued verbal warnings to her on June 2 and 10, 2009. However, the issues allegedly continued and Ms. McCormick held a meeting with Claimant on June 11, 2009, at which time she issued her a written "Employee Warning Notice."⁴ At this meeting, Ms. McCormick learned that Claimant had once again stopped filling out the forms to track the dollar amounts for Medicare patients. She allegedly asked Claimant if there was a reason why the forms were not being completed and Claimant replied that she just stopped doing the forms. Ms. McCormick instructed her that she needed to start completing the forms again immediately because without these forms, Medicare would deny Employer any claims submitted in excess of the cap imposed and this could negatively impact Employer. However, when Ms. McCormick filled in for Claimant on June 29, 2009, she found that no preparation had been done the day before – Claimant failed to prepare the billing sheets; she failed to prepare the patient charts; and she had not tracked any of the dollar amounts for Medicare patients as she was specifically instructed to do during their meeting two weeks prior. When Claimant returned to work, Ms. McCormick asked her why her work was not completed, and Claimant simply replied that she thought she had completed the necessary paperwork. Claimant was then

³ Employer's handbook specifically prohibits personal use of the internet and work computers during work hours, and Claimant signed an acknowledgement form stating she received a copy of the handbook on November 3, 2008.

⁴ Claimant signed the Employee Warning Notice and checked the box indicating that she was in agreement. She also wrote on the form, "I do agree with the carelessness of my work performance and failure to follow instruction." (Hearing Transcript at 12).

discharged for not performing the duties of her job as outlined in the written warning she received and addressed during the prior meeting.

On cross-examination, Ms. McCormick admitted that when Claimant began her employment she had no medical background or knowledge and that Claimant asked her to review her work to ensure it was being done correctly. Ms. McCormick also admitted that during the June 11, 2009 meeting she asked Claimant if there was any reason why she was not performing her job duties as she had previously. In response, Claimant stated she was distracted by some personal issues, in particular her mother being ill. However, Ms. McCormick also told Claimant that if her personal life was getting in the way of her performing her job, she could take several days off and “get herself together.” Ms. McCormick also testified that she informed Claimant that “[t]he number one priority at the front desk is doing the front desk work,” not helping Ms. Black with the patients or cleaning the facility. (Hearing Transcript at 15).

Roseann Swegel (Ms. Swegel), the fiscal manager, testified on behalf of Employer that tracking Medicare payments and completing pre-authorizations were part of Claimant’s job duties. Failure to properly track the Medicare payments and ensure a modifier was added before a patient reached his or her cap resulted in Medicare’s denial of Employer’s claim. According to Ms. Swegel, this cost Employer time and money, especially if its appeals were not granted. She also testified that if a pre-authorization was not completed, an insurance company would deny Employer’s claim for that patient visit. Employer typically lost all of its reimbursement funds when a pre-authorization was not completed because it was “very, very rare” that an appeal would be granted.

Claimant testified that she did her best at her job, but that she was inexperienced in the medical field, this was something completely new for her, and that she was trying her best “to learn everything that needed to be learned.” (Hearing Transcript at 18). She claimed she frequently asked Ms. McCormick to check her paperwork because she was not confident she was completing it accurately. She also testified that she called other co-workers on numerous occasions with questions and that she referred to her handbook when needed. According to Claimant, Ms. Black asked her several times to utilize her work computer for personal tasks, such as buying Ms. Black concert tickets, researching prices on personal gifts, and looking at Ms. Black’s pictures posted on a social networking website. Ms. Black allegedly informed her that the rules were different at their particular facility, they could bend the rules, and because of all this, the rule prohibiting personal use of the internet and computer did not seem as important as Employer claimed it was. Claimant also testified that after her written warning on June 11, 2009, she did not use her computer, and she stuck her nose in the charts, reviewing them as often as she possibly could.

Claimant testified that towards the end of her employment, the facility she worked at had expanded, it had more patients, and the schedule was extremely packed. Employer did not provide her with additional help from other facilities, so it was up to Claimant to “get those patients out the door and to get them the treatment that they were paying for.” (Hearing Transcript at 19). In addition to her front desk responsibilities, Claimant had to assist Ms. Black in caring for the patients, doing the laundry, making the beds, and cleaning the facility. According to Claimant, when she questioned Ms. McCormick about these additional duties she was told “the first priority of [Employer] is to care for the patients and to get them out the door, we can pick up everything else afterward.” (Hearing Transcript

at 19). Claimant testified that this is when her duties at the front desk “laxed.” However, she insisted that she completed all of the prep work necessary for June 29, 2009 – she double-checked her work in the patient charts, she completed the billing forms, and she was in the process of tracking the Medicare billing.

The Referee found Claimant ineligible for benefits under Section 402(e) of the Law because Employer “presented sufficient, competent evidence to establish that the [C]laimant’s unsatisfactory work performance was not the result of mere inability but rather was due to the [C]laimant’s failure to make a good faith effort to meet the standards established by the employer.” (Referee Decision of October 1, 2009 at 2). The Referee found Employer warned Claimant her job was in jeopardy due to failure to complete her work. Despite these warnings, Claimant failed to prepare billing sheets for treatment; failed to pull the patient charts; failed to request pre-authorization for visits which resulted in payment issues; and failed to track the dollar amounts for Medicare patients as specifically directed by Employer. Claimant had previously demonstrated she was capable of performing these duties and had no justification for her conduct; therefore, her actions amounted to willful misconduct.

Claimant appealed to the Board claiming, *inter alia*, she did not intentionally violate Employer’s rules and she demonstrated good cause for her unsatisfactory work performance. The Board affirmed, finding the testimony of Employer’s witnesses credible and that, based upon this testimony, Employer established that from March 2009 until early June 2009, Claimant satisfactorily performed her job duties and demonstrated she was capable of performing these functions. However, from that point forward, Claimant continually failed to

complete her assigned work and she failed to offer sufficient credible testimony to establish her decrease in work. This appeal followed.⁵

On appeal, Claimant argues that Employer's mere dissatisfaction with her work does not constitute willful misconduct because the evidence demonstrates her efforts to serve Employer's interests, provide services to its patients, and abide by and act upon the demands of two different supervisors whose instructions sometimes conflicted. She also claims that her testimony established "inadvertent or unintended violations of [Employer]'s rules, brought about and caused by clinic understaffing, by overbooking of patient appointments, and by assigning [her] additional physical duties" rather than an intentional disregard of Employer's interest or of her duties to Employer. We disagree.

Claimant is correct in her statement that mere inexperience, incompetence or inability to perform a job or specific job duties does not constitute willful misconduct. *Cullison v. Unemployment Compensation Board of Review*, 444 A.2d 1330, 1332 (Pa. Cmwlth. 1982) (citing *Fidelity Electric Co. v. Unemployment Compensation Board of Review*, 399 A.2d 1183 (Pa. Cmwlth. 1979)). However, it is well-established that an employee's failure to work up to his or her full, proven ability must be construed as willful misconduct because it is conduct demonstrating an intentional disregard of the employer's interest or the employee's obligations and duties. *Cullison*, 444 A.2d at 1332 (quoting *Kosmalski*

⁵ The Court's scope of review in this matter is limited to determining whether there was a constitutional violation or error of law, whether any practice or procedure of the Board was not followed, and whether the necessary findings of fact are supported by substantial evidence. *Procito v. Unemployment Compensation Board of Review*, 945 A.2d 261 (Pa. Cmwlth. 2008).

v. Unemployment Compensation Board of Review, 397 A.2d 875, 876 (Pa. Cmwlth. 1979)).

The Board did not base its finding that Claimant was ineligible for benefits on Employer's mere dissatisfaction with her work. Rather, it found the testimony of Employer's witnesses credibly established that for several months Claimant successfully completed her job duties, and this proved she was capable of performing these duties and functions at a certain level. At some point in May or June 2009, Claimant's job performance fell significantly and she was given two verbal and one written warning. Claimant agreed with the information provided in her written warning that she had been careless in her work and failed to follow instructions, and she had no reason for why she stopped completing the necessary paperwork – she simply stopped filling out the forms. Despite these warnings, Claimant's performance continued to deteriorate, she failed to complete the tasks assigned to her, and this failure could result in adverse financial consequences for Employer. This amounts to substantial evidence in support of the Board's finding that Claimant was not working up to her proven abilities and that her conduct amounted to an intentional disregard of Employer's interest – to willful misconduct.

Claimant also argues that she provided good cause for her unsatisfactory work performance, her decrease in work, and that her actions were justified and reasonable under the circumstances. However, the Board did not find Claimant's testimony credible. Rather, it credited the testimony of Employer's witnesses and stated that Claimant “failed to offer sufficient credible testimony and evidence establishing her decrease in work.” (Board Decision of December 21, 2009 at 1). The Board is the ultimate fact-finder, empowered to determine the

credibility of witnesses and resolve conflicts in evidence. *Metropolitan Edison Co. v. Unemployment Compensation Board of Review*, 606 A.2d 955, 957 (Pa. Cmwlth. 1992). Because the Board did not find her testimony to be credible, Claimant cannot prevail on this argument.

Accordingly, the order of the Board is affirmed.

DAN PELLEGRINI, Judge

