

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Karen M. Clifford, :
Petitioner :
v. :
Unemployment Compensation :
Board of Review, : No. 922 C.D. 2011
Respondent : Submitted: October 21, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: November 30, 2011

Karen M. Clifford (Claimant) challenges the order of the Unemployment Compensation Board of Review (Board) which affirmed the referee's denial of benefits under Section 402(e) of the Unemployment Compensation Law (Law).¹

The facts, as initially found by the referee and confirmed by the Board, are as follows:

1. The claimant was last employed as a customer service team leader by English Riding Supply Inc[.] at \$14.00 per hour from September 13, 2010 with her last day of work being November 29, 2010.
2. The employer discharged the claimant for inappropriate behavior at the work place.

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

3. The claimant spoke in a threatening manner to a consumer via the telephone on November 29, 2010 when she stated that she would slap her.

4. The claimant admitted to making the threat to slap a consumer when questioned by the employer prior to discharge.

5. The claimant had no justification for her conduct.

Referee's Decision, March 1, 2011, (Decision), Findings of Fact Nos. 1-5 at 1.

The referee determined that Claimant committed willful misconduct:

The referee wishes to emphasize that the burden rests with the employer to show that the claimant's discharge was attributable to willful misconduct in connection with her work by providing competent testimony to support such allegations. In the opinion of the referee, the employer has met that burden. The employer discharged the claimant for threatening a consumer. In the opinion of the referee, the employer provided credible testimony that the claimant threatened to slap the consumer. . . . Clearly, the employer has a reasonable expectation that employees will not escalate disagreements with a customer and the claimant's decision to threaten a customer by slapping her was contrary to the employer's best interest and discharge was a natural result. In addition, the referee concludes that the claimant had no justification for her conduct.

Decision at 2.

The Board affirmed.

Claimant contends that the Board erred and abused its discretion when it adopted and incorporated the referee's findings and conclusions even though the

transcript from the hearing clearly and unequivocally showed that the findings of fact were contrary to the evidence.²

Whether a Claimant's conduct rises to the level of willful misconduct is a question of law subject to this Court's review. Lee Hospital v. Unemployment Compensation Board of Review, 589 A.2d 297 (Pa. Cmwlth. 1991). Willful misconduct is defined as conduct that represents a wanton and willful disregard of an Employer's interest, deliberate violation of rules, disregard of standards of behavior which an Employer can rightfully expect from the employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the Employer's interest or employee's duties and obligations. Frick v. Unemployment Compensation Board of Review, 375 A.2d 879 (Pa. Cmwlth. 1977). The Employer bears the burden of proving that it discharged an employee for willful misconduct. City of Beaver Falls v. Unemployment Compensation Board of Review, 441 A.2d 510 (Pa. Cmwlth. 1982). The Employer bears the burden of proving the existence of the work rule and its violation. Once the Employer establishes that, the burden then shifts to the Claimant to prove that the violation was for good cause. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985).

Claimant challenges findings of fact numbers 2-4. She denies that she ever threatened to slap a consumer. She also asserts that English Riding Supply,

² This Court's review in an unemployment compensation case is limited to a determination of whether constitutional rights were violated, errors of law were committed, or findings of fact were not supported by substantial evidence. Lee Hospital v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994).

Inc. (Employer) never produced the consumer she allegedly threatened to slap and the witness who testified that this incident occurred was on vacation at the time. Claimant states that she never admitted to Employer's representative that she threatened to slap a customer.

At the hearing, the referee questioned Michele Yohey (Yohey), operations manager for Employer, concerning Claimant's conduct:

R: And did you have any conversation with the Claimant then afterwards?

EW1 [Yohey]: Yes, I did. . . .

. . . .

R: And was there any reference to this threatening to slap the consumer?

EW1: Yes, there was. She . . .

R: What did she say about that?

EW1: She . . . left it out so I asked her if she had threatened to slap the consumer and she said I did say it but I was hanging up on her, so I'm not sure that she actually heard it. But she did hear it because she called the owner of the company.

Notes of Testimony, February 28, 2011, (N.T.) at 5.

Regarding the incident, Claimant testified that the consumer swore at her. Claimant testified: "What I said was when I hung the phone up I said Jesus if I talked like that to somebody my mother would slap me because it was very horrible what she said." N.T. at 7.

The two accounts differed significantly. The Board credited Employer's version of the events. In unemployment compensation proceedings, the Board is the ultimate fact-finding body empowered to resolve conflicts in

evidence, to determine the credibility of witnesses, and to determine the weight to be accorded evidence. Unemployment Compensation Board of Review v. Wright, 347 A.2d 328 (Pa. Cmwlth. 1975). Findings of fact are conclusive upon review provided that the record, taken as a whole, provides substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977). Employer’s version of what occurred established that Claimant threatened to slap the consumer with whom she was speaking. Claimant testified that she did not threaten the consumer. Claimant would have this Court reweigh the evidence and accept its version of what took place. This Court will not do that.³

Accordingly, this Court affirms.

BERNARD L. MCGINLEY, Judge

³ Claimant suggests Yohey’s testimony was hearsay. Hearsay is defined in the Pennsylvania Rules of Evidence as “a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Pa.R.E. 801(c). Pa.R.E. 803(25) provides that an admission by a party-opponent is an exception to hearsay: “The statement is offered against a party and is (A) the party’s own statement in either an individual or representative capacity.” Here, the alleged hearsay statement was a statement by Claimant, a party to the action. This statement is an admission by a party-opponent and is an exception to hearsay. Claimant’s argument has no merit.

Employer also introduced affidavits from three customer service representatives which stated that Claimant threatened to slap the consumer. These statements are hearsay. Claimant did not object to their introduction. Yohey’s testimony corroborated the statements. An unobjected to hearsay statement will be given its probative effect and may support a finding of fact if corroborated by any competent evidence in the record. Walker v. Unemployment Compensation Board of Review, 367 A.2d 366 (Pa. Cmwlth. 1976).

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ORDER

AND NOW, this 30th day of November, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

BERNARD L. MCGINLEY, Judge