Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-009

MAY TERM, 2017

Gail Manning	}	APPEALED FROM:
	}	
	}	Employment Security Board
v.	}	
	}	
Department of Labor	}	DOCKET NO. 07-16-058-13
(TLC Nursing Associates, LLC)	}	

In the above-entitled cause, the Clerk will enter:

Claimant appeals from the denial of her claim for unemployment benefits. She argues that several of the Employment Security Board's findings are not supported by the evidence, and that the findings do not support the Board's conclusion. We affirm.

Claimant worked for employer as a personal caregiver for approximately three years. Employer terminated her employment in June 2016 and claimant sought unemployment benefits. A claims adjudicator granted her request, finding that, although claimant had been discharged, it was not for work-related misconduct. Employer appealed and, following a hearing before an administrative law judge (ALJ), the ALJ upheld the claims adjudicator's decision. The ALJ found that employer gave several reasons for claimant's discharge, including her incompatibility with clients, her physical inabilities, sharing her religion, wanting to do things her way, and calling a client after inappropriately asking that client to purchase food for her. The ALJ reasoned that claimant's incompatibility with clients and her inability to perform the job were not matters within claimant's control. The ALJ also found that, after being warned about sharing her religious beliefs, claimant had not recited a Bible verse to a client again. Additionally, the ALJ found no evidence to show that claimant violated clients' case plans once she was informed that she must follow such plans. The ALJ thus determined that a discharge for these reasons did not amount to misconduct. With respect to the food-purchasing incident, the ALJ credited claimant's testimony that she had called the client to apologize, and the ALJ did not consider this to be misconduct.

Employer appealed to the Board, which reversed the ALJ's decision. The Board found that in May 2015, employer spoke to claimant about staying within the scope of her work and about reading the Bible to a client against the wishes of the client's family. In February 2016, employer received a complaint from claimant's new client that claimant was quoting Bible verses against the client's wishes. The client did not want the claimant to return. And, as is more developed below, the Board found that in June 2016, claimant asked her client's assistant to get her a pack of cheese from the grocery store.

In June 2016, when her client's assistant called to get a grocery list of what the client needed, claimant asked the assistant to buy claimant a package of cheese. The client was

diabetic and did not eat cheese so he would not have requested this purchase. After being put on speaker phone to hear directly from the client who confirmed that he did not want cheese, the assistant declined claimant's request. According to a caregiver's note admitted into evidence, claimant became argumentative with the assistant. The client became upset and said to purchase the cheese for claimant. The client's assistant refused. This all occurred only days after claimant had been reminded that it was not the client's responsibility to provide her with food during her shift. Claimant subsequently attempted to call the client, according to her testimony, to apologize.

Before the Board, the employer reiterated that the documentary evidence showed prior written warnings and previous counselling and education of claimant on the employer's policies and that no improvement occurred, which led to the termination. He pointed to the fact that claimant had been removed from nine assignments in three years for various reasons.

The Board explained that an individual is disqualified for unemployment benefits if "he or she has been discharged by his or her last employing unit for misconduct connected with his or her work." 21 V.S.A. § 1344(a)(1)(A). The Board found the employer had met its burden of demonstrating the actions of claimant showed a substantial disregard of employer's interests amounting to misconduct.

The Board rejected the ALJ's conclusion that that because claimant had called her last client to apologize, her discharge was not for misconduct. Although the Board acknowledged claimant's apology, it believed that claimant's continued effort to get her client to buy her food, despite knowing that the client could not eat it and knowing that it was against company policy, rose to the level of employment-related misconduct. The Board thus reversed the ALJ's decision. This appeal followed.

On appeal, claimant focuses on the food-purchasing incident. She cites the ALJ's finding that her testimony on this issue was credible and that the request for cheese occurred on only one occasion. Claimant argues that the Board committed clear error in finding that she engaged in a "continued effort to get her client to buy her food." She further complains that the Board's finding is not supported by the findings of the ALJ, who had the opportunity to judge the credibility of the witnesses. Claimant also points to her own testimony that she called a supervisor to clarify the company policy on food after the assistant told her that her food request contravened company policy. Claimant thus maintains that the Board's finding that she knew her actions were against company policy was clearly erroneous and not supported by the record. Claimant also challenges the Board's conclusion that her behavior constituted misconduct. She asserts that her behavior was less egregious than in other cases where misconduct has been found. She argues that she was confused about employer's policy regarding food, and that she made an honest mistake for which she tried to apologize. Claimant also argues that the misconduct did not relate to her care of the client.

We defer to the Board's decision on review. "Absent a clear showing to the contrary, any decisions within [the Board's] expertise are presumed to be correct, valid, and reasonable." Bouchard v. Dep't of Emp't & Training, 174 Vt. 588, 589 (2002). We "will uphold the Board's factual findings unless clearly erroneous, and its conclusions of law if fairly and reasonably supported by those findings of fact." Id. (citation omitted). We find no basis to disturb the Board's decision here.

At the outset, we reject claimant's suggestion that the Board owed deference to the ALJ's findings and conclusions. The Board is specifically authorized to "affirm, modify, or

reverse the findings and conclusions of the referee," based on "evidence previously submitted in the case and such additional evidence as the Board may take or direct to be taken." 21 V.S.A. § 1332. The Board was the factfinder here for purposes of our review, and we will not disturb the Board's assessments of credibility or the weight of the evidence. Ellis v. Dept of Emp't Sec., 133 Vt. 533, 536 (1975).

We thus turn to claimant's challenges to the Board's findings that she engaged in a "continued effort to get her client to buy her food" and that she knew her actions were against company policy. Both findings are supported by the record. Before the ALJ, claimant's supervisor testified that the company has a clear policy that clients are not in any way expected to provide food to live-in caregivers. With respect to this particular incident, he stated that it was made very clear to claimant that the client was not going to provide cheese to her because the client himself was prohibited from eating cheese. The supervisor explained that employer was very concerned by the way that claimant pursued the matter—after being told that that it was not allowed and was not going to be provided to her—she attempted to call the client directly to discuss the incident, which was a direct violation of one of the company's policies regarding communication on any matter of discord between caregivers and clients. The supervisor added that the food policy had been made clear to claimant shortly before the cheese incident occurred, and the policy had been reiterated to claimant by the client's assistant. Employer submitted documentary evidence to support this testimony, which provided greater detail about the incident. We also note that, at the hearing, claimant acknowledged that she knew she was not allowed to ask a client for specialized food. There is ample evidence to support the Board's findings regarding client's knowledge of the food policy and her continued attempts to have the client purchase cheese for her.

The Board's findings support its conclusion that claimant was discharged for employment-related misconduct. To support a discharge for misconduct, the employer must show that the claimant's actions represent "a substantial disregard of the employer's interest, either willful or culpably negligent." Johnson v. Dep't of Emp't Sec., 138 Vt. 554, 555 (1980) (quotation omitted); see also Strong v. Dep't of Emp't & Training, 144 Vt. 128, 130 (1984) ("When misconduct is asserted as the basis for an employee's discharge, the burden of proof is on the employer."). The conduct at issue here appears willful rather than negligent. Even if it was negligent, it involved more than a mere mistake or an error in judgment. See Favreau v. Dep't of Emp't & Training, 151 Vt. 170, 172 (1989) ("To be substantial enough to trigger disqualification from benefits, culpable negligence must involve more than mere mistakes, errors in judgment, unintentional carelessness or negligence." (quotation omitted)). The facts show that claimant knew the food policy and intentionally violated this policy by asking the client to purchase food specifically for her needs. When the assistant refused, reminding claimant again of the company policy, claimant became argumentative in the client's presence. Claimant then attempted to contact the client directly after her shift in direct contravention of company policy. These facts show a willful and substantial disregard of employer's interest.

Claimant's disregard of employer's policies had a negative effect on employer's interest. The facts are sufficient to support the Board's conclusion here.

Affirmed.

BY THE COURT:

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Marilyn S. Skoglund, Associate Justice

_____
Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice