

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Bethanne L. Morgan,	:	
Petitioner	:	
	:	
v.	:	No. 1842 C.D. 2013
	:	Submitted: February 14, 2014
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY SENIOR JUDGE COLINS**

FILED: March 26, 2014

Bethanne L. Morgan (Claimant) petitions this Court for review of an order of the Unemployment Compensation Board of Review (Board) that held that she is ineligible to receive unemployment compensation benefits under Section 402(e) of the Unemployment Compensation Law.¹ Because the limited tardiness and absenteeism found by the Board does not rise to the level of willful misconduct, we reverse.

Claimant was employed by Gallaway Safety and Supply (Employer) from May 10, 2012 until March 14, 2013 as a part-time customer service person

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, § 402(e), *as amended*, 43 P.S. § 802(e). Section 402(e) provides that an employee shall be ineligible for compensation for any week “[i]n which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work” 43 P.S. § 802(e).

working 32 hours per week. (Record Item (R. Item) 20, Board Decision and Order, Findings of Fact (F.F.) ¶¶1-2, 9-10; R. Item 19, Hearing Transcript (H.T.) at 3-4 & Board Employer Ex. 1.) Employer's Employee Manual provided with regard to attendance:

Regular attendance and coming to work on time is necessary so that your department can depend on your availability to consult with vendors, customers, and fellow employees, and to facilitate a productive schedule.

If you are not able to report to work as assigned, you must notify your manager as early as possible. If he/she is unavailable, you must (1) leave a detailed message on your manager's voicemail and e-mail (2) place a call and e-mail to notify your manager's supervisor,

(R. Item 8, Employer Ex. 1; R. Item 20, F.F. ¶3.) Employer's Employee Manual listed "[e]xcessive absence or tardiness" and "[a]bsence without notification" as infractions of its rules of conduct that could be grounds for disciplinary action, including termination of employment. (R. Item 8, Employer Ex. 1; R. Item 20, F.F. ¶4.)

Claimant failed to report for work on March 6, 2013 and did not notify Employer that she would be absent. (R. Item 19, H.T. at 6; R. Item 3, Employer's Separation Information Ex. 6.) On March 7, 2013, she received and signed a written warning for that absence and failure to notify. (R. Item 20, F.F. ¶¶6-7; R. Item 19, H.T. at 6, 8, 11; R. Item 3, Employer's Separation Information Ex. 6.) Although it advised that further attendance policy violations could result in termination of employment, this warning was marked as a "First Warning" and did not refer to any tardiness or absences other than the March 6, 2013 incident. (R. Item 3, Employer's Separation Information Ex. 6.) On March 13, 2013, Claimant was absent from work, but notified Employer of her absence. (R. Item 20, F.F. ¶8; R. Item 19, H.T. at 5, 11.) On March 14, 2013, the following day, Claimant

arrived at work five minutes late and was discharged by Employer for tardiness and absenteeism. (R. Item 20, F.F. ¶¶9-10; R. Item 19, H.T. at 11-13.)

Claimant filed for unemployment benefits and the Unemployment Compensation Service Center found Claimant ineligible due to willful misconduct. Claimant timely appealed that determination, and following a hearing, the Referee issued a Decision and Order on May 8, 2013, affirming the Service Center determination and denying benefits. Claimant filed an appeal to the Board on May 14, 2013. Because the Referee's hearing could not be transcribed due to mechanical malfunction, the matter was remanded by the Board to the Referee to hold another hearing to establish the record for the Board. Thereafter, the Referee conducted an evidentiary hearing at which Claimant, Employer's president and Employer's human resources manager testified. The Board, on August 21, 2013, affirmed the Referee's decision denying benefits. Claimant appealed the Board's order to this Court.²

In unemployment compensation cases, the burden of proving willful misconduct is on the employer. *Caterpillar, Inc. v. Unemployment Compensation Board of Review*, 550 Pa. 115, 123, 703 A.2d 452, 456 (1997); *Grand Sport Auto Body v. Unemployment Compensation Board of Review*, 55 A.3d 186, 190 (Pa. Cmwlth. 2012) (*en banc*). Willful misconduct is conduct by an employee that evidences wanton or willful disregard of the employer's interests, deliberate violation of the employer's rules, disregard of standards of behavior that an

² Our scope of review of the Board's decision is limited to determining whether errors of law were committed, constitutional rights or agency procedures were violated, and necessary findings of fact were supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704; *Temple University v. Unemployment Compensation Board of Review*, 565 Pa. 178, 182 n.1, 772 A.2d 416, 418 n.1 (2001).

employer can rightfully expect from an employee, or negligence that indicates an intentional disregard for the employer's interests or the employee's duties or obligations. *Temple University v. Unemployment Compensation Board of Review*, 565 Pa. 178, 182, 772 A.2d 416, 418 (2001); *Caterpillar, Inc.*, 550 Pa. at 123, 703 A.2d at 456; *Grand Sport Auto Body*, 55 A.3d at 190. Whether a claimant's actions constitute willful misconduct is a question of law subject to our *de novo* review. *Temple University*, 565 Pa. at 182 n.1, 772 A.2d at 418 n.1; *Caterpillar, Inc.*, 550 Pa. at 123, 703 A.2d at 456; *Grand Sport Auto Body*, 55 A.3d at 190.

It is well established that excessive absenteeism or tardiness can constitute willful misconduct. *Ellis v. Unemployment Compensation Board of Review*, 59 A.3d 1159, 1163 (Pa. Cmwlth. 2013); *Grand Sport Auto Body*, 55 A.3d at 190; *Fritz v. Unemployment Compensation Board of Review*, 446 A.2d 330, 333 (Pa. Cmwlth. 1982). "Employers have 'the right to expect that ... employees will attend work when they are scheduled, that they will be on time, and that they will not leave work early without permission.'" *Grand Sport Auto Body*, 55 A.3d at 190 (quoting *Fritz*). Thus, we have held that willful misconduct was shown where the claimant had a pattern of repeated tardiness or absences without good cause and the claimant had received warnings concerning his or her tardiness or absences. *See Ellis*, 59 A.3d at 1161, 1163-64 (claimant was late six times in a two and one-half week period, five of which were latenesses of 30 minutes, before she was discharged for arriving at work 45 minutes late); *Grand Sport Auto Body*, 55 A.3d at 190-92 (claimant was late 16 times in six months and was absent three days without excuse in the final month that he worked); *Fritz*, 446 A.2d at 331, 333 (in approximately two-month period, claimant was late six times, five times by 45 minutes or more, was absent once and left work early once).

Here, however, the Board did not find any pattern of habitual or chronic tardiness or absences. Rather, the Board found only that Claimant had two absences and a single incident of being five minutes late for work. (R. Item 20, F.F. ¶¶6-9.) This does not rise to the level of excessive absences and tardiness that constitutes willful misconduct. Nor can the conduct for which Claimant was discharged be properly characterized as willful misconduct on the ground that she violated Employer's rules requiring notification of absences and lateness. While Claimant did not comply with Employer's requirement that she call in the case of the first absence, she received a warning and was not discharged for that conduct. (R. Item 3, Employer's Separation Information Ex. 6.) Claimant complied with Employer's attendance policy with respect to the second absence. (R. Item 20, F.F. ¶8.) In the final incident, Claimant did not call Employer to notify that she would be five minutes late for work. (*Id.* ¶9.) The mere failure to notify of such a brief lateness on a single occasion does not by itself show the deliberate or intentional violation of Employer's rules or disregard of standards of conduct that is required to support a finding of willful misconduct. *See Philadelphia Parking Authority v. Unemployment Compensation Board of Review*, 1 A.3d 965, 968-69 (Pa. Cmwlth. 2010) (violation of employer rule that was not shown to be intentional or deliberate does not constitute willful misconduct and does not shift burden to claimant to show good cause for rule violation).

We recognize that Employer contended that Claimant had a history of other absences and incidents of tardiness, in addition to the two absences and one five-minute lateness that preceded her discharge. (*See* R. Item 8, Employer Ex. 2.) Employer's witnesses, however, had no knowledge of those alleged absences and latenesses, and Employer's documentation consisted solely of a list for the

unemployment compensation proceedings with no evidence as to how it was prepared or on what it was based, not time or attendance records kept in the ordinary course of business. (R. Item 19, H.T. at 4-7; R. Item 8, Employer Ex. 2.)

Hearsay evidence, even if admitted without objection, cannot support a finding of fact unless it is corroborated by other competent evidence in the record. *Vann v. Unemployment Compensation Board of Review*, 508 Pa. 139, 150, 494 A.2d 1081, 1086 (1985); *Johnson v. Unemployment Compensation Board of Review*, 869 A.2d 1095, 1113 (Pa. Cmwlth. 2005), *abrogated in part on other issue*, *Diehl v. Unemployment Compensation Board of Review*, ___ Pa. ___, 57 A.3d 1209 (2012); *Thompson v. Unemployment Compensation Board of Review*, 723 A.2d 743, 745 (Pa. Cmwlth. 1999); *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976). There was no evidence that corroborated Employer's list of prior absences and tardiness; Claimant disputed Employer's contentions that she had a history of unexcused absences and lateness, and the written warning that Claimant received and signed did not indicate that Claimant had any history of tardiness or any unexcused absences other than the March 6, 2013 incident. (R. Item 19, H.T. at 5, 8; R. Item 3, Employer's Separation Information Ex. 6.) Accordingly, the Board did not find that Claimant had any history of absences or lateness before the three incidents of March 6, 2013, March 13, 2013, and March 14, 2013.

Because the two absences and single incident of tardiness found by the Board are insufficient to constitute willful misconduct, we reverse the order of the Board.

JAMES GARDNER COLINS, Senior Judge

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Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 26th day of March, 2014, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby REVERSED.

JAMES GARDNER COLINS, Senior Judge