IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Melissa Poboy, Petitioner	:	
v.	:	
Unemployment Compensation Board of Review, Respondent	:	No. 2042 C.D. 2012
	:	Submitted: March 22, 2013

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: April 17, 2013

Melissa Poboy (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 by Harrisburg Area YMCA as a lifeguard/private swim instructor/child care provider working fulltime and earning between $8.50 per hour to $20 per hour depending on her job duties from October 1, 2007, through her last day of work on May 7, 2012.

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

2. The Employer received a report that the Claimant picked up a child which was part of the Claimant's child care unit outside of the workplace.

3. The Employer confronted the Claimant about the allegations, and the Claimant admitted that she was aware of the Employer's policy and that she knew she should not have and questioned herself whether to bring it to the supervisor's attention or not.

4. The Claimant also indicated that the family offered an amount that she 'could not pass on.'

5. The Employer notified the Claimant on January 30, 2012, that she was placed on a 90-day probation and that along with the probation the following conditions must be maintained by the Claimant from this point forward: contact with kids-in-motion classroom should only occur during her scheduled work hours 11:00 a.m. to 1:00 p.m. within the childcare program and that contact is prohibited including visits to the classroom, discussions with children and staff during program hours, continually walking past the classroom doors or any other form of interaction not mentioned.

6. The Claimant signed the agreement on January 30, 2012.

7. The Employer subsequently received a second report from other employees on May 5, 2012, where the Claimant was observed with the same child from the January incident along with the child's sibling at a frozen yogurt establishment, under the Claimant's sole supervision.

8. The Employer again confronted the Claimant on May 7, 2012, and the Claimant admitted that she had clidren [sic] under her supervision outside of the YMCA program, in violation of the January 30, 2012 agreement.

9. The Employer established the policy as part of their [sic] child molestation prevention procedures.

> 10. The Employer discharged the Claimant for violating the specific provisions of the January 30, 2012 agreement which indicated that the Claimant could have no contact with a child that is currently enrolled in the childcare program outside of the YMCA program.

Referee's Decision, July 16, 2012, (Decision), Findings of Fact Nos. 1-10 at 1-2.

The referee determined:

> In the present case, the Employer's credible testimony establishes that the Claimant was specifically directed on January 30, 2012, and forward, to have no further contact with students who were currently enrolled in her childcare program outside of the YMCA program. In addition, the last chance agreement indicated that any further contact with children under her supervision outside of the YMCA program could result in her termination. The Employer's credible testimony also establishes that the Claimant violated the agreement again on May 5, 2012, when she had at least one child who was enrolled in her childcare program at the YMCA outside of the YMCA program when she admitted to having one of the children with her at a frozen yogurt establishment. This was also the same child that was part of the January 30, 2012 agreement.
>
> The Claimant argued that she was not aware of the policy, and also that she did not believe the policy was reasonable because she was good friends with the mother and children outside of the employment relationship. The Employer credibly testified that the policy was in place to prevent child molestation and also to protect a teacher from accusations of child molestation outside of the workplace. The Referee finds that the Employer's policy was reasonable to protect the child and the teacher in their own best interests. In addition, the Referee notes that the Claimant admitted she willingly violated the Employer's policy because she thought it was unreasonable. The mother's permission does not excuse her from deliberately violating the Employer's specific instructions. The Employer gave the Claimant a choice

> of whether she wanted to continue employment with the Employer or wish to have contact with the children. The Claimant chose to remain in contact and supervise the children alone outside of the workplace. The Claimant was able to have contact with the children outside of school, but she could not be the sole adult supervising the children. The Referee does not find the Claimant's response was reasonable as she was placed on specific notice that unsupervised contact with the children outside of the workplace was against company policy, especially considering it was the same student she was warned to have no further contact with outside of the workplace on January 30, 2012. The Claimant was fully informed that permission from the mother did not exempt her from the Employer's policy. The Employer has established the Claimant committed willful misconduct in connection with her work. Therefore, the Claimant is ineligible for benefits under Section 402(e) of the Law.

Decision at 2-3.

The Board affirmed and adopted and incorporated the referee's findings and conclusions.

Claimant contends that the Board erred when it determined that the YMCA's [Employer] application of its rule to Claimant was reasonable where Claimant's relationship with the program participants' family predated their enrollment in Employer's programs, that the Board erred when it did not find that Employer's rule did not apply to Claimant because parental consent was provided, and that the Board erred because its findings were not supported by substantial evidence.[2]

[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 **(Footnote continued on next page…)**

Initially, Claimant contends that the Board erred when it determined that Claimant committed willful misconduct because Employer's rule that employees were not allowed to have contact with children who attended Employer's programs outside of the YMCA was misapplied to Claimant. She argues that she qualified for an exception to the rule because she had a prior relationship with the children in the program with whom she violated the rule.

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

(continued…)

essential findings of fact were not supported by substantial evidence. Lee Hospital v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994).

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).

At the hearing before the referee, Brad Mattern (Mattern), childcare director for Employer, testified that Employer had a policy that its employees "should not have contact that would lead to babysitting or transportation of the children in our program in their personal vehicles." Notes of Testimony, July 13, 2012, (N.T.) at 12. Mattern explained that the policy was designed for the safety of the children and for the protection of the employees against child abuse allegations. N.T. at 12. Although the policy was not expressed in writing until February 3, 2012, Mattern testified that the policy was in place prior to that. N.T. at 13. Mattern also testified that Claimant was issued a written warning on January 30, 2012, after she picked up a child in the classroom the prior evening and apparently transported the child in her vehicle. Mattern referred to the written disciplinary report which stated that Claimant was placed on ninety days' probation on January 30, 2012, and during that time "[c]ontact with the Kids-in-Motion classroom should only occur during your scheduled work hours, 11am-1pm, within the Child Care program. Contact that is prohibited includes visits to the classroom, discussions with the children and staff during program hours, continually walking past the classroom doors, or any other form of interaction not mentioned." Violation of Policy, January 30, 2012. The disciplinary report also stated that any violation of the policy during the probation period would result in Claimant's termination. Claimant signed the disciplinary report.

Mattern explained that he subsequently received a phone call from another employee who saw Claimant and two children, at least one of whom was from Employer's program, at a frozen yogurt establishment without the presence of any parents. After this incident Employer terminated Claimant's employment. N.T. at 18-19.

On cross-examination, Mattern explained that there was an exception to Employer's policy if an employee had a prior relationship with a family before a child or children of that family entered a YMCA program. N.T. at 23. Mattern testified that Claimant and the family did not have a relationship prior to the children entering Employer's program. N.T. at 24.

Claimant testified that she became acquainted with the family "through a mutual friend, Patty Schwinger . . . whose mother lives right next door to me and she's best friends with Michelle [Michelle Nestor, the mother of the children in the program]. And that's how . . . [Claimant] met Michelle was through Patty." N.T. at 27. Claimant was unsure when she met Michelle Nestor (Nestor). N.T. at 28.

Nestor testified that she met Claimant in 2009, prior to her first child entering the program. N.T. at 32-33.

Claimant argues that this testimony established that she had a prior relationship with the children and met the exception to Employer's rule.

Claimant's reasoning is flawed. Claimant was not terminated for violating Employer's rule. The referee found, and the Board adopted the finding, that Claimant was terminated for violating the specific provisions of the January 30, 2012, disciplinary report which stated that Claimant could not have any contact with a child that is currently enrolled in the childcare program outside of the YMCA program. The disciplinary report specifically stated:

> Contact with the Kids-in-Motion classroom should only occur during your scheduled work hours, 11am -1pm, within the Child Care program. Contact that is prohibited includes visits to the classroom, discussions with the children and staff during program hours, continually walking past the classroom doors, or any other form of interaction not mentioned.

Violation of Policy, January 30, 2012, at 1. When Claimant took the children to the frozen yogurt establishment, she clearly violated the terms of the disciplinary report.

Employer established that it had the disciplinary report in place following Claimant's violation of its policy. Claimant's signature on the disciplinary report established her knowledge of it. Claimant violated the terms of the disciplinary report when she took the children for yogurt. The exception to the policy concerning a prior relationship was not in play.

Claimant next contends that Employer's rule was not reasonable in that it did not factor in parental consent as an exception. Although Nestor consented to Claimant's contact with her children, Employer did not consider this factor an exception or a mitigating circumstance.

Claimant bears the burden of proving that a rule is unreasonable. City of Williamsport v. Unemployment Compensation Board of Review, 560 A.2d 312 (Pa. Cmwlth. 1989). Mattern testified that the policy was in place "[f]or the safety of the children, to make sure that we are protecting our employees as well from any type of abuse allegations. . . ." N.T. at 12. It did not matter if parents gave permission for an employee to care for a child outside of the program. N.T. at 35. The Referee concluded that Employer's witness credibly testified "that the policy was in place to prevent child molestation and also to protect a teacher from accusations of child molestation outside of the workplace. The Referee finds that the Employer's policy was reasonable to protect the child and teacher in their own best interests." Decision at 2. The Board adopted this conclusion.

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). This Court is satisfied that Claimant, although she expressed her disagreement with Employer's policy regarding parental consent, failed to prove that the policy was unreasonable.[3]

[3] Claimant also contends that the Board erred because it failed to make findings of fact supported by competent evidence. Specifically, Claimant alleges that the Board failed to make any findings of fact concerning Employer's exception for a prior relationship. Because
(Footnote continued on next page…)

Accordingly, this Court affirms.

BERNARD L. McGINLEY, Judge

(continued…)

this Court concluded that the exception did not apply due to the agreement, this Court need not address this issue.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Melissa Poboy, Petitioner	:	
v.	:	
Unemployment Compensation Board of Review, Respondent	:	No. 2042 C.D. 2012

O R D E R

AND NOW, this 17th day of April, 2013, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

_____

BERNARD L. McGINLEY, Judge