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Pennsylvania Unemployment Compensation Newsletter

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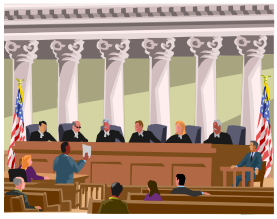
RECENT APPELLATE DECISIONS



PrimePay, LLC v. Unemployment Compensation Board of Review, No. 2124 C.D. 2007, Filed November 25, 2008 ♦ Claimant, who was having childcare issues, was discharged for excessive absenteeism. The UCBR found that claimant had good cause for not returning to work and found her to be eligible for benefits. During the litigation, employer learned that claimant embezzled over $4,500 from employer. Employer thus sought a remand to the referee from the UCBR for consideration of the after-discovered evidence of claimant's criminal conduct. Employer alleged that if the evidence had been discovered prior to claimant's discharge, claimant would have been discharged for willful misconduct. The UCBR denied employer's request for a remand; the Commonwealth Court reversed. While it is generally true that an employer must show that the claimant's willful misconduct was the "actual reason" or "cause" for the claimant's discharge, there is a narrow exception to that rule: When employer could not have known of the criminal conduct prior to claimant's termination, employer may meet its burden of proof by "after discovered evidence" that the willful misconduct was concealed and, had employer been aware of the conduct, it would have terminated claimant.

Resource Staffing, Inc. v. Unemployment Compensation Board of Review, No. 779 C.D. 2008, Filed November 25, 2008 ♦ RSI operated an information technology consulting agency. Claimant was an experienced Microsoft systems engineer and administrator. RSI and claimant entered into a 6-month Contractor Agreement under which claimant performed work at one of RSI's client's facility through September 20, 2007. The UC Service Center approved claimant's application for benefits, concluding that claimant was not free from RSI's direction and control in the performance of his work and was thus not self-employed. The UCBR affirmed. The Commonwealth Court remanded the case for additional findings of fact as to: (1) whether claimant was free from control and direction in the performance of his work, and (2) whether, in the performance of his services, claimant was customarily engaged in an independently established business or occupation. Unless both of these showings are made, the presumption will stand that one who performs services for wages is an employee.

Jan J. Patla v. Unemployment Compensation Board of Review, No. 823 C.D. 2008, Filed December 18, 2008 ♦ Claimant was employed as a supervisor at a home for delinquent children and was responsible for assigning staff members to classrooms. Employer's protocol required a staff member to be present in each classroom while classes are being conducted. On November 20, 2007, a residential operations director observed at least one classroom without a staff member when claimant and other staff members were talking and reading magazines. The residential operations director directed claimant to assign staff members to the classrooms. Four hours later when the residential operations director returned, no staff members were in either classroom. Claimant offered no explanation and was terminated. Claimant applied for benefits. Because claimant did not admit to the incident and because employer did not submit information to sustain its burden of proof, benefits were granted by the UC Service Center. After a hearing before a Referee, the grant of benefits was reversed. The UCBR affirmed the Referee's denial of benefits. Claimant filed a Petition for Review with the Commonwealth Court alleging that the UCBR's decision was "not supported by the record" and "that there is no legal basis for the UCBR's denial of benefits." The UCBR filed a Motion to Strike claimant's appeal which was granted due to the claimant's failure to identify in his Petition for Re-

view the specific findings that were allegedly unsupported by substantial evidence.

Slippery Rock Area School District v. Unemployment Compensation Board of Review, No. 2054 C.D. 2007, Filed December 22, 2008 ♦ School District appealed grant of benefits to long-term substitute school teacher who was offered work in the fall as a day-to-day substitute teacher. The UCBR concluded that benefits were allowed despite the offer of work because claimant did not have a "reasonable assurance" of returning to work as defined by 34 Pa. Code §65.161. That section requires an "economic equivalency." The School District argued that §65.161 was invalid given the intent of the Legislature to eliminate payment of benefits to school employees during the summer months and other regularly scheduled vacations. The Commonwealth Court agreed and held the economic equivalency provision of 34 Pa. Code §65.161 invalid and unenforceable.

Bret Wagner v. Unemployment Compensation Board of Review, No. 1023 C.D. 2008, Filed January 12, 2009 ♦ Claimant was working in Iraq as a technical inspector for ITT Corporation. On November 23, 2007, he took 28-days leave in order to lend support to his fiancé, who was dealing with a contentious custody battle with an abusive ex-boyfriend, and a child who suffered serious health conditions. After returning to Iraq, claimant found that he could not handle the issues in his home life from that distance. He requested a transfer stateside, but was refused. Claimant then resigned and returned home. His application for unemployment compensation benefits was initially denied on the grounds that he did not have necessitous and compelling reasons to quit his job. The Commonwealth Court disagreed, noting that family obligations can be sufficiently necessitous and compelling to entitle a claimant to benefits. Here, claimant made reasonable efforts to preserve his employment, but employer could not offer him a job stateside. Claimant's domestic circumstances produced pressure for him to terminate his employment that was both real and substantial, and would compel a reasonable person under similar circumstances to act in the same manner.

Geisinger Health Plan v. Unemployment Compensation Board of Review, No. 2029 C.D. 2007, Filed February 5, 2009 ♦ Claimant was discharged for violating employer's electronic communication policy. Claimant sent 25 pornographic emails, some of which had been forwarded to him by two of his co-workers. While claimant was discharged, his co-workers were not. The Referee and UCBR determined that claimant was eligible for benefits because employer did not uniformly enforce its electronic communications policy. Employer appealed to the Commonwealth Court, which reversed the grant of benefits. The Court noted that "disparate treatment" is an affirmative defense by which a claimant may still receive benefits if he can show that: (1) employer discharged claimant but not others who engaged in similar conduct; (2) claimant was similarly situated to other employees who were not discharged; and (3) employer discharged claimant based upon improper criteria. Here, claimant was not similarly situated to his co-workers who each sent one offensive email inasmuch as he sent 25 emails. Because claimant failed to carry his burden of proof that he was similarly situated, the affirmative defense of disparate treatment was not available to him. Benefits were denied.

Deborah Alston v. Unemployment Compensation Board of Review, No. 1769 C.D. 2007, Filed February 19, 2009 ♦ Claimant, a liquor store clerk, was discharged for willful misconduct. Claimant appealed alleging that the store manager prevented her from doing her work and chose to single her out, disciplining her for conduct that others engaged in without receiving any form of discipline. Claimant attempted to obtain subpoenas for two assistant store managers whose testimony would have allegedly supported her allegations of unfair treatment by her supervisor. The Referee denied claimant's request for the subpoenas. Following a hearing, the Referee found that employer offered testimony and documentary evidence proving that claimant had engaged in willful misconduct. Benefits were accordingly denied. Claimant appealed to the UCBR, which affirmed. The Commonwealth Court vacated the UCBR's decision and remanded the case to the Referee to issue subpoenas for and to hear testimony from the two assistant store managers. The Court noted that, because the assistant store managers' testimony would have been relevant and probative to show that she was treated differently than other similarly situated employees, claimant's subpoena request was improperly denied.

Sheryl Smith v. Unemployment Compensation Board of Review, No. 1760 C.D. 2008, Filed February 27, 2009 ♦ Claimant was charged by the District Attorney with criminal conspiracy theft by deception from employer involving an amount in excess of $2,000. Claimant pled *nolo contendere* to the charges. The next day, employer requested claimant's resignation. Claimant refused, and employer advised her that she

was discharged. Claimant filed for unemployment compensation benefits. Although claimant initially received benefits, a determination denying benefits was subsequently issued by the local job center. Claimant appealed, contending that she was not dismissed because she misappropriated funds and that she would not have pled *nolo contendere* had she been able to afford legal counsel. The Referee found that employer had no evidence to support a charge of willful misconduct and could not base a termination on a plea of *nolo contendere* alone. The UCBR reversed noting that claimant had an opportunity to refute the implication of her guilt, but chose only to offer a self-serving denial of wrongdoing. The Commonwealth Court agreed. Claimant's plea of *nolo contendere* constituted an admission of the facts charged in the underlying criminal proceeding. The order denying benefits was affirmed.

Eat'n Park Hospitality Group, Inc. v. Unemployment Compensation Board of Review, No. 1155 C.D. 2008, Filed December 19, 2008, Reported March 3, 2009 ♦ Employer requested and was granted permission to participate at the hearing before the Referee by telephone. A Notice of Hearing was issued confirming the date and time of the hearing, as well as the telephone number at which employer's witness could be reached. When the Referee attempted to contact employer's witness, the call was immediately transferred to the witness' voicemail, whereby callers were asked to press "zero" for assistance. The Referee did not press "zero," but proceeded with the hearing and, based on claimant's unopposed testimony, benefits were granted. Employer appealed to the UCBR and the Commonwealth Court arguing that it had been denied due process in that it was not given an opportunity to be heard because the Referee failed to press "zero" as requested by the voicemail system. The UCBR and the Court disagreed. The Court noted that employer should have provided the Referee's office with instructions prior to the hearing if pressing "zero" was required. The Court stated that the Referee is not required to experiment with employer's voicemail system.

Robert L. Elser v. Unemployment Compensation Board of Review, No. 1692 C.D. 2008, Filed March 12, 2009 ♦ Commonwealth Court upheld Board's decision of ineligibility for benefits because claimant was discharged for willful misconduct. Claimant was an employee of a residential treatment facility for at-risk youth. Claimant was required to abide by employer's policy of responsible public behavior and conduct. Claimant attended a party where he made comments about marijuana and slanderous comments about coworkers. Claimant was terminated by employer for unprofessional conduct violative of its policy. Claimant was initially denied benefits since he acted willfully in making the statements and did not show good cause for his actions. Claimant appealed to Referee who upheld denial of benefits since employer had specific policy in place regarding public behavior and because there was an ongoing problem with Claimant's on- and off-duty behavior. Claimant appealed, but the Referee's denial of benefits was ultimately affirmed because employer maintained a specific policy regarding public conduct, Claimant was aware of the policy, and because Claimant's misbehavior was an on-going problem for employer.

Edward Moran v. Unemployment Compensation Board of Review, No. 1659 C.D. 2008, Filed April 27, 2009 ♦ Commonwealth Court upheld UCBR's decision to deny claimant benefits due to his willful misconduct. Initially, claimant was granted benefits, and employer Bartlett Tree Expert Company appealed, but waited until the last possible day to send notice of its appeal which it then sent to the wrong office. Despite this procedural error, Referee found in favor of employer and denied benefits. The Commonwealth Court affirmed noting that a private postage meter mark is sufficient to establish the date upon which an appeal is filed (even when sent to the wrong address), and substantively, that employer established the existence and reasonableness of its safety policy and that claimant knew he violated the policy. The denial of benefits was proper since claimant violated safety policies when he failed to secure tree limbs during trimming and failed to use an emergency brake on a truck that then rolled and caused property damage. Benefits denied.

Alla Melomed v. Unemployment Compensation Board of Review, No. 1900 C.D. 2008, Filed April 28, 2009 ♦ Commonwealth Court upheld denial of benefits due to willful misconduct. Claimant was employed as an account executive where one of her duties included coordinating notarized signatures on paperwork. On one occasion, she failed to involve a notary, falsified a signature, and then lied to her manager about it. Claimant was discharged for violating employer's policy regarding notarization as found in the employee handbook. Commonwealth Court affirmed the UCBR's finding that claimant was ineligible for benefits because employer established existence and reasonableness of its company policy, and that claimant was aware of her violation of the policy when she lied to her district manager about her wrongdoing. Benefits denied.

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ATTENTION READERS, the editors of Thomson, Rhodes & Cowie Pennsylvania Unemployment Compensation Newsletter invite you to submit questions you may have dealing with unemployment compensation issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified unemployment compensation attorney.

Send questions to: Margaret M. Hock, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219.

Copies are available on our web site at http://www.trc-law.com or upon request. Please direct inquiries to Margaret M. Hock, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, Pennsylvania 15219, (412) 232-3400.

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