

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2016 CA 0835

RITA JIMENEZ

VERSUS

STATE OF LOUISIANA
DEPARTMENT OF LABOR

Judgment Rendered: FEB 17 2017

Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2014-13514

Honorable Allison H. Penzato, Judge

Rita Jimenez
Pearl River, Louisiana

Pro Se, Appellant
Plaintiff – Rita Jimenez

J. Jerome Burden
Danelle L. Gilkes
Claudeidra M. Minor
Cynthia T. Batiste
Baton Rouge, Louisiana

Attorneys for Appellee
Defendant – Louisiana Workforce
Commission

BEFORE: WELCH, CRAIN, AND HOLDRIDGE, JJ.

WELCH, J.

The plaintiff, Rita Jimenez, appeals the district court's judgment affirming the decision of the Office of the Board of Review ("Board of Review") finding that she was not entitled to receive unemployment compensation benefits because her termination was based on misconduct under La. R.S. 23:1601(2). For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

The plaintiff was employed as the supervisor of phlebotomy by Slidell Memorial Hospital ("SMH") from September 5, 2006 to April 1, 2014. The plaintiff's duties included scheduling employees for work. At times relevant herein, SMH's policy dictated that all employees receive CPR training within 90 days of commencing employment. The plaintiff was terminated on April 1, 2014, on the grounds that she repeatedly scheduled a certain employee to work, who had not completed the CPR training within the 90-day probationary period. The plaintiff's application for unemployment insurance benefits was denied by the Louisiana Workforce Commission ("LWC") on May 21, 2014, on the grounds of misconduct for failing to abide by known company policies. On June 2, 2014, the plaintiff appealed the denial by the LWC to the Appeals Tribunal for the Louisiana Workforce Commission ("Appeals Tribunal").

Representatives from the hospital and the plaintiff, in proper person, participated in a hearing via telephone conference with the Administrative Law Judge ("ALJ") of the Appeals Tribunal on June 27, 2014. That same day, the Appeals Tribunal issued a decision affirming the LWC's determination that the plaintiff was disqualified from receiving benefits for misconduct under the provisions of La. R.S. 23:1601(2). The plaintiff timely sought review of the Appeals Tribunal's decision with the Board of Review, which affirmed the Appeals Tribunal's decision on July 21, 2014.

The plaintiff sought judicial review of the Board of Review's decision in the 22nd Judicial District Court in August of 2014. In compliance with La. R.S. 23:1634(A), LWC, as defendant, filed an answer and attached a copy of the administrative record. Further, at the LWC's request, a formal hearing was set for January 23, 2015. The plaintiff failed to appear at the January 23, 2015 hearing. Upon the LWC's application in open court and prior to presentation of the merits of the action, the district court dismissed the plaintiff's petition for judicial review with prejudice due to the plaintiff's failure to appear. The plaintiff timely appealed the involuntary dismissal to this court, and this court reversed the decision of the district court and remanded the matter for further proceedings. See Jimenez v. State, Department of Labor, 2015-0630 (La. App. 1st Cir. 11/6/15). Following remand and a hearing, the district court in a judgment signed March 8, 2016, affirmed the decision of the Board of Review. The plaintiff filed the instant appeal.

LAW AND DISCUSSION

The scope of appellate review in this matter is limited to determining whether the facts are supported by sufficient and competent evidence and, in the absence of fraud, whether the facts, as a matter of law, justify the action taken. La. R.S. 23:1634(B); **Fontenet v. Cypress Bayou Casino**, 2006-0300 (La. App. 1st Cir. 6/8/07), 964 So.2d 1035, 1038. Judicial review of the findings of the Board of Review does not permit the weighing of evidence, drawing of inferences, reevaluation of evidence, or substituting the views of the court for that of the Board of Review as to the correctness of the facts presented. **Gonzales Home Health Care, L.L.C. v. Felder**, 2008-0798 (La. App. 1st Cir. 9/26/08), 994 So.2d 687, 691.

Where the employer seeks to deny unemployment benefits because of employee misconduct, the burden of proof is on the employer. **Fontenet**, 964

So.2d at 1037. Proof must be by a preponderance of the evidence. *Id.* An individual shall be disqualified for benefits if it is found that the individual was discharged by the employer for misconduct connected with his employment. La. R.S. 23:1601(2)(a). Misconduct is defined as “mismanagement of a position of employment by action or inaction, neglect that places in jeopardy the lives or property of others, dishonesty, wrongdoing, violation of a law, or violation of a policy or rule adopted to insure orderly work or the safety of others.” La. R.S. 23:1601(2)(a). Repeated violations in the face of warnings amount to misconduct. **Jackson v. Administrator, Dept. of Employment Sec. of State**, 511 So.2d 1309, 1312 (La. App. 2nd Cir. 1987).

The ALJ, whose findings of fact and conclusions of law were adopted by the Board of Review, found in pertinent part:

In this case, the claimant repeatedly violated company policies of which she was aware. It must be noted that warnings were given, yet not heeded by the claimant; and because of this nonconformity, the claimant was discharged. The evidence further shows that the violations were not due to the inability or incapacity of the claimant to respond to reasonable instructions. On the contrary, the preponderance of the competent evidence presented by the employer is sufficient to establish a finding of the claimant being discharged for legal misconduct. In the case of *Jackson v. Administrator*, the court found that repeated policy violations in the face of warnings amounted to misconduct. Here, the evidence is sufficient to support a finding of misconduct connected with the employment. Accordingly, benefits should be denied. (Citations omitted.)

On appeal, the plaintiff appears to challenge the factual finding that her actions amounted to a violation of SMH policies. In particular, the plaintiff asserts that pursuant to a “Gulf Coast EAP Formal Referral” (“EAP”) dated November 11, 2013, her supervisor, Michelle Bond, assumed the plaintiff’s duties of scheduling and training phlebotomy team members. Further, the plaintiff argues that although she could request that employees assigned to her obtain the required training and certification, it was the responsibility of Ms. Bond, not the plaintiff, to terminate or

suspend an employee who had failed to comply with the certification and training requirements.

We must first determine whether the facts are supported by competent evidence, and second, whether the facts, as a matter of law, justify the action taken. **Gonzales Home Health Care, L.L.C.** 994 So.2d at 690-691. In essence, the plaintiff contends that there was no competent evidence in the record of disqualifying misconduct due to the assumption of responsibility for training and scheduling by Ms. Bond in the EAP dated November 11, 2013.

Evidence presented at the hearing, established that the plaintiff had been counseled twice previously for violating a similar SMH policy prohibiting the scheduling of employees to work in patient care areas of the hospital prior to ensuring that the employees had completed certain departmental competencies. Ms. Bond testified that the plaintiff was required to and failed to observe employees perform certain duties specified on a checklist compiled for certain patient areas of the hospital before allowing the employee to work unsupervised in that area.

The record contains two employee coaching summaries demonstrating that the plaintiff was coached for two incidents occurring in October 2013, wherein she scheduled employees who had not completed the required competency checklist and related training. In both instances, the plaintiff was informed by Ms. Bond that such actions placed the institution at risk, as well as had the potential to place patient safety at risk.

The record also demonstrates that on November 11, 2013, the plaintiff received the aforementioned EAP due to the repeated failure to perform essential functions of her job description, including the failure to ensure completion of specimens, the failure to ensure adequate staffing, and the above-referenced instances of allowing untrained employees to work in patient areas. According to

the EAP, Ms. Bond took over the responsibility for checking the list of specimens daily, “checking the schedule daily and preparing the schedule timely,” and “oversight of ensuring the completion and training of new phlebotomy personnel.”

At the hearing before the ALJ, Ms. Bond testified that the precipitating event leading to the plaintiff’s termination was her March 2013 violation of employer policy prohibiting the scheduling of employees who had not obtained the required CPR certification before the expiration of a 90-day probationary period applicable to new hires. Specifically, the plaintiff had scheduled an employee, without CPR certification, after the employee 90-day probationary period had expired on December 9, 2013. The employee, a PRN, was allowed to work on December 13, 15, 26, 29, 31, 2013 and February 9, 2014. Further, the employee was scheduled to work on December 27, 2013, January 1, February 23, and March 7, 8, 2014, but did not report for work as scheduled. The employee was also placed on call on January 24, 25, and 26, 2014.

Ms. Bond testified that while it was the employee’s responsibility to schedule and attend the CPR certification classes, it was the plaintiff’s responsibility to “make sure it was done.” When asked by the ALJ what the plaintiff should have done instead of scheduling the employee in question, Ms. Bond responded, “She should have removed her [the uncertified employee] from the schedule until certification was complete.” Ms. Bond testified that the plaintiff knew it was part of her job responsibilities as the supervisor of phlebotomy to make sure that employees completed necessary training and certification, to wit:

It’s part of her job description and we had a monthly meeting to discuss this particular item every single month to ensure that people were checked off and to make sure that all the training was complete. [The plaintiff] and I had a one on one conversation on a monthly basis about employee competencies.

Regarding the November 11, 2013 EAP, Ms. Bond testified as follows:

The E.A.P. is the employee assistance program and it is a means to offer the employee outside private counseling in order to deal with perhaps reasons that they're not able to do their job. And at that time there [were] a number of items that she was failing to perform as part of her job and we used that as a means to try to coach her back into compliance with her job duties.

Ms. Bond testified that the violation leading to termination was similar to the type of scheduling violation that the plaintiff had been counseled on two occasions previously by the employer, as well as by an outside counselor. Ms. Bond testified that the plaintiff showed signs of improvement for three or four months following the EAP counseling, but when the scheduling of the uncertified employee in March of 2013 was discovered, the plaintiff was terminated. Finally, Ms. Bond testified that the plaintiff knew that she could lose her job if she continued to violate hospital policy.

The plaintiff acknowledged in her testimony that she did *place* the employee lacking CPR certification on the schedule, but denied any wrongdoing by asserting that it was Ms. Bond who allowed the employee to continue to work after the 90-day probationary period. The plaintiff testified that at the employee's 90-day review in December of 2013, Ms. Bond knew that the employee had not completed the required CPR certification and asked the employee to complete it, but did not fire her. When asked by the ALJ why she placed the employee back on the schedule, after witnessing the employee being told by Ms. Bond to complete her training, the plaintiff responded, "Because Ms. Bond was in charge of approving the schedule every time it was turned out. She signed off on it, she knew [the employee] was on the schedule. She continued to sign off on it." The plaintiff further testified that she could not comment on the prior October 2013 incidents of non-compliance she was counseled on because she could not "remember who the employees were, what, what was the, what has been presented or whatever."

After review of the record, we find that the employer established that the plaintiff was aware of the policy requiring an employee without CPR certification to obtain such within 90 days of hire. The employer also established that the plaintiff violated a similar policy prohibiting the scheduling of employees who had failed to obtain certain training or competencies on two prior occasions, and had been counseled in connection with those events. Contrary to the plaintiff's assertions in this appeal, the evidence in the record demonstrates that while the plaintiff did not have the authority to hire and fire employees, she was tasked with placing qualified employees on the schedule and was aware of policies that required employees placed on the schedule to have completed necessary training or competencies, as well as CPR certification. The plaintiff did not contradict this evidence. Additionally, the plaintiff did not refute Ms. Bond's testimony that the need for up-to-date competencies and certifications was discussed with the plaintiff in monthly meetings. Finally, the plaintiff admitted that she performed the action that led to her termination – i.e. scheduling an employee she knew had failed to obtain CPR certification within the 90-day probationary period.

Accordingly, based on our careful review of the record, we find that the factual findings of the ALJ and the Board of Review are supported by sufficient and competent evidence. Moreover, as a matter of law, those findings justify the Board of Review's decision that the plaintiff was discharged for misconduct within the meaning of La. R.S. 23:1601(2), and was therefore, ineligible for unemployment benefits. The district court properly affirmed the Board of Review's decision.

CONCLUSION

For the reasons assigned herein, we affirm the judgment of the district court. The costs of this appeal will not be assessed against the plaintiff, Rita Jimenez, under the facts of this case. See La. R.S. 23:1692.

AFFIRMED.