SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1409-15T2

LATOYA THOMPSON,

Appellant,

v.

BOARD OF REVIEW, DEPARTMENT OF LABOR, AND BERAT CORPORATION,

Respondents.

Argued May 10, 2017 – Decided June 12, 2017

Before Judges Hoffman and Whipple.

On appeal from Board of Review, Department of Labor, Docket No. 065,756.

Latoya Thompson, appellant, argued the cause pro se.

Aimee Blenner, Deputy Attorney General, argued the cause for respondent Board of Review, Department of Labor (Christopher S. Porrino, Attorney General, attorney; Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Lauren J. Zarrillo, Deputy Attorney General, on the brief).

Amy B. Goldstein argued the cause for respondent Berat Corporation (Kaufman Dolowich & Voluck, L.L.P., attorneys; Gregory

S. Hyman and Katharine W. Fogarty, on the brief).

PER CURIAM

Appellant appeals from an October 21, 2015 decision by the Board of Review for the New Jersey Department of Labor affirming the denial of appellant's request for unemployment benefits. We affirm.

Respondent Berat Corporation (Berat) hired appellant as a part-time cashier at its Glassboro ShopRite on June 30, 2014. Berat terminated appellant's employment on June 28, 2015, after a customer complained she used foul language in the register line. Appellant claims she only used profanity in response to customers and coworkers yelling at her. When confronted, appellant admitted she used profanity, but she asserted she was responding to obscenities directed at her by other people in the store. She argued she faced a hostile work environment from the time she was hired and had filed multiple complaints with the company regarding work conditions throughout her employment. During her employment, her allegations of harassment were investigated and determined to be unfounded. The store's review of surveillance footage regarding the incident showed no one interacting with appellant. Appellant was counseled and suspended pending termination in order for her

to exercise the option of grieving the termination through the union.

Appellant filed for unemployment compensation benefits on June 28, 2015. Following the suspension, a union meeting was scheduled, but appellant refused to participate. On July 4, 2015, appellant submitted a letter wherein she requested her employer "to proceed with the termination process," and "I have been forced to resign and no-longer feel safe based on the practices that company has subjected me to."

In a determination mailed August 5, 2015, appellant was informed she was disqualified for unemployment benefits because she was terminated for "severe misconduct connected with the work." Appellant appealed, and a hearing was held on September 11, 2015. At the hearing, appellant admitted she used profanity in front of a customer but said it was in response to harassment from coworkers and customers in the store. Appellant also admitted she had not looked for work because she was undergoing treatment, but she said she was able to work and would "always be willing to work."

On September 14, 2015, an Appeals Tribunal mailed its decision, finding appellant was discharged for using profanity in front of a store customer in direct violation of company policy. The Tribunal determined appellant was not eligible for benefits because her actions constituted simple misconduct, N.J.S.A. 43:21-

5(b), and she had not actively sought work, N.J.S.A. 43:21-4(c). This appeal followed.

On appeal, appellant argues she was wrongfully terminated due to a hostile work environment, was subject to unfair practices, and should have been determined eligible. She argues, but for her employer's mistreatment, she would still be employed. She asserts she did not actively seek employment because she is undergoing medical treatment.

We maintain a limited capacity when reviewing administrative agency decisions. Brady v. Bd. of Review, 152 N.J. 197, 210 (1997) (citing Pub. Serv. Elec. v. N.J. Dep't of Envtl. Prot., 101 N.J. 95, 103 (1985)). We will not upset the ultimate determination of an agency unless shown that it was arbitrary, capricious or unreasonable, it violated legislative policies expressed or implied in the act governing the agency, or the evidence does not support the findings on which the decision is based. Ibid.

We begin by noting our recent pronouncement invalidating the Department of Labor and Workforce Development's definition of "simple misconduct" as arbitrary and capricious without prejudice to the agency's adoption of a substitute regulation in conformance with the regulatory scheme. See In re N.J.A.C. 12:17-2.1, A-4636-14T3 (App. Div. May 1, 2017). We review the agency's finding of simple misconduct in light of that decision.

Here, it was determined appellant was terminated for simple misconduct for using profanity in the presence of a customer.[1] Berat argues appellant's conduct violated appropriate courses of customer service, as well as the store's "zero tolerance policy," and constituted severe misconduct, notwithstanding appellant's assertion she was responding to harassment. Appellant argues she was subjected to a hostile work environment but provides no evidential support for her assertions. The record demonstrates her employer investigated such charges and found no evidence. The Appeals Tribunal found appellant had pursued the proper channels to address any harassment, and while her use of inappropriate language was unjustified, the behavior constituted simple misconduct rather than severe misconduct. Because we have determined the agency's definition of simple misconduct is under review for corrective action, we decline consideration of that premise and affirm on a different basis.[2]

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[1] An Appeals Tribunal concluded appellant was terminated notwithstanding the assertion of Berat she resigned from her position by a letter dated July 2, 2015.

[2] In In re N.J.A.C. 12:17-2.1, we stayed our decision for a 180-day period to enable the Department of Labor and Workforce Development to take appropriate corrective action or pursue further review in the Supreme Court. A-4636-14T3 (App. Div. May 1, 2017).

We turn to the alternate basis for denying appellant's unemployment benefits, appellant's failure to actively seek work pursuant to N.J.S.A. 43:21-4(c)(1). We affirm the Board of Review's determination. This statute provides that an individual is not eligible for unemployment compensation unless the individual "is able to work, and is available for work, and has demonstrated to be actively seeking work." Ford v. Bd. of Review, 287 N.J. Super. 281, 284 (App. Div. 1996) (quoting N.J.S.A. 43:21-4(c)(1)).

During the administrative hearing, appellant testified she was able to work, was available to work but was not actively seeking work because she was in a three-day-per week intensive outpatient program for medication management. When asked by the examiner if treatment precluded her from working, she testified her doctor told her "[she] could still pursue [her] . . . endeavors and [her] educational goals, and stuff like that." She testified her doctor never told her she could not work, and she was "not turning down any . . . jobs." Based on the substantial credible evidence in the record that appellant was not seeking work pursuant to N.J.S.A. 43:21-4(c)(1), and such a determination was not arbitrary, capricious nor an abuse of discretion, we affirm the decision appellant was ineligible for benefits from June 28, 2015 through September 5, 2015.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION