*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2017-302

FEBRUARY TERM, 2018

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| Cheyanne Pugliese* v. Department of Labor (Fire Tower, LLC, Employer) | } | APPEALED FROM: |
| | } | Employment Security Board |
| | } | DOCKET NO. 04-17-004-14 |

In the above-entitled cause, the Clerk will enter:

Claimant Cheyanne Pugliese appeals a decision of the Employment Security Board concluding that she was discharged for misconduct connected with her work and disqualifying her for a period of time from employment benefits. On appeal, claimant argues that her actions did not amount to misconduct and the administrative law judge (ALJ) erred in denying her request to present witness testimony. We reverse and remand.

The Board found the following facts. Claimant was a server at employer Fire Tower, LLC. On February 18, 2017, she was terminated from her position. Her employer discharged her on the basis that claimant had added a twenty percent automatic gratuity to the check of two young girls. The father of the girls was extremely upset and thought claimant was deliberately trying to take advantage of his daughters. Employer has a policy stating that it reserves the right to assess an eighteen percent tip on large groups with manager permission. Claimant denied receiving a manual with this policy or receiving this instruction. She contended that servers could add an automatic gratuity at their discretion. Claimant stated that she had previously assessed an automatic gratuity on small groups without reprimand, but had not done so for a party of two. When confronted about adding the gratuity, claimant acknowledged she had done so and did not apologize. Employer was concerned that claimant's action would negatively impact business.

In March 2017, a claims adjudicator found that claimant was discharged by her employer for misconduct connected with her work. Consequently, the claims adjudicator disqualified claimant from receiving unemployment benefits for a period of time. Claimant appealed to an ALJ. The ALJ held a hearing over the phone at which claimant and employer appeared. Employer presented testimony from the owners and from another employee. Claimant testified and sought to present testimony from two witnesses. The ALJ ruled that the testimony would not assist in determination of the relevant issues and did not allow it. The ALJ concluded that claimant committed gross misconduct when she intentionally acted in contravention of employer's interest and accordingly disqualified her from receiving benefits until she had accrued sufficient earnings.

Claimant appealed this decision to the Employment Security Board. The Board accepted the findings made by the ALJ. Based on these findings, the Board concluded that claimant committed misconduct, but not gross misconduct. The Board explained that claimant's action of adding a mandatory gratuity to the bill of two patrons violated employer's policy and had the foreseeable result of creating an unhappy customer. Claimant appeals.

On appeal from the Employment Security Board, this Court will defer to the Board's findings if there is credible evidence to support them and will uphold the Board's decision "unless it can be demonstrated that the findings and conclusions were erroneous." Allen-Pentkowski v. Dep't of Labor, 2011 VT 71, ¶ 5, 190 Vt. 556 (mem.) (quotation omitted). Pursuant to statute, a person is disqualified from benefits for "not more than 15 weeks nor less than six weeks immediately following the filing of a claim for benefits" if, among other things, the person was discharged "for misconduct connected with his or her work." 21 V.S.A. § 1344(a)(1), (a)(1)(A).

The main issue in claimant's appeal is whether the evidence supports a determination that claimant committed misconduct sufficient to disqualify her from benefits. "To be disqualified from benefits, an employee's misconduct must be in substantial disregard of the employer's interest, his disregard being either willful or culpably negligent." Favreau v. Dep't of Emp't & Training, 151 Vt. 170, 172 (1989). The burden of proving misconduct "rests squarely on the employer." Johnson v. Dep't of Emp't Sec., 138 Vt. 554, 555 (1980). "Misconduct that is sufficient for discharge is not necessarily sufficient to require a disqualification from benefits under the Unemployment Compensation Act." Id. at 556. "Mere mistakes, errors in judgment, unintentional carelessness or negligence are not acts of misconduct sufficient to disqualify a claimant for unemployment benefits, though they may very well be acts of misconduct warranting discharge of the employee." Porter v. Dep't of Emp't Sec., 139 Vt. 405, 411 (1981).

The Board found that claimant's actions were misconduct because claimant acted willfully in adding the automatic tip and that this action contravened employer's interest. Claimant does not dispute that she intentionally added the automatic tip. She asserts that her actions did not rise to the level of misconduct sufficient to disqualify her for benefits because it was accepted practice to apply a gratuity at the server's discretion and prior to that evening she had not been reprimanded for including an automatic 20% gratuity on the check of a small party. At the hearing before the ALJ, the parties disputed whether claimant had notice of employer's policy that an automatic gratuity of 18% could be added only to parties of eight or more and with manager permission. The ALJ did not expressly resolve this factual dispute.

Claimant makes two main arguments as to why the decision in this case was incorrect. First, she asserts that she was precluded from demonstrating that adding an automatic gratuity was done at each server's discretion because the ALJ denied her request to subpoena testimony from another employee. Second, she argues that she could not be terminated until she had received a warning that adding a tip under these circumstances was not allowed by employer. To support this argument claimant relies on information provided on the Department of Labor website, which explains that to prove misconduct an employer must prove both "[d]eliberate disregard of the employer interests" and "[a]t least one prior warning for misconduct was

issued." See Vt. Dep't of Labor, Dismissing an Employee for Misconduct, http://labor.vermont.gov/unemployment-insurance/employers/dismissing-an-employee-for-misconduct [https://perma.cc/6KD6-U9YT].

We first address the issue of the witness testimony.[1] Prior to the hearing before the ALJ, claimant sent a written request to the Department asking that it compel the testimony of her former coworker so he could testify regarding his "knowledge of the amount used for automatic gratuities and circumstances under which servers applied automatic gratuities." At the hearing, claimant reiterated her desire to subpoena her former coworker to testify about his understanding of the automatic gratuity policy. The ALJ denied the request, explaining that another server's understanding of the gratuity policy would not assist in determination of the case because the sole relevant fact was claimant's understanding.

The proceeding before the ALJ need not conform to technical or formal rules of evidence or procedure and must be conducted "in such manner as to ascertain the substantial rights of the parties." 21 V.S.A. § 1351. The ALJ has the power to "by subpoena compel the attendance of witnesses . . . necessary and material to be used in connection with any disputed claim." Id. § 1352. On appeal, this Court reviews the denial of a subpoena for abuse of discretion. Langlois v. Dep't of Emp't & Training, 149 Vt. 498, 505 (1988). A subpoena should be granted when the matter is important to ensuring the rights are parties are met, but not be issued where "unnecessary or irrelevant." Id. at 504 (quotation omitted).

In this case, the denial of the subpoena was an abuse of discretion because the information from claimant's coworker was highly relevant to a key factual dispute between claimant and her employer regarding employer's policy and the prevailing practice concerning servers applying automatic gratuities to bills. The Board concluded that claimant's action was misconduct because it was "in clear contravention of the employer's policy of only adding automatic gratuities to parties of 8 or more." This conclusion was not, however, based on the findings as found by the ALJ. The ALJ did not resolve the evidentiary dispute between claimant and employer as to whether she had received the policy regarding automatic gratuities or whether in practice servers applied an automatic gratuity at their discretion.[2] The existence of such a policy may be central to the determination whether claimant acted willfully in a substantial disregard of employer's interest. Another worker's testimony on this point would

[1] Claimant also sought to admit testimony from a fellow server that was present on February 18, 2017. Claimant proffered that he would testify concerning their conversation going home after work that day to demonstrate that claimant did not intend to take advantage of the customers and did not know there was a problem when she went home that night. The ALJ explained that it was not necessary because claimant herself had already testified to those matters and the server's hearsay testimony would not add anything additional. We conclude that the ALJ acted within her discretion in excluding this testimony.

[2] The ALJ instead concluded that claimant's action was gross misconduct because she not only acted with a substantial willful disregard of employer's interest, but also acted out of self-interest in a manner bordering on fraud. The Board rejected the ALJ's conclusion that claimant's conduct was fraudulent.

have been relevant to the question of whether employer had established a policy regarding automatic gratuities that was known to the servers generally, and what direction employer had provided on the matter. Therefore, we reverse and remand for a new hearing.

Reversed and remanded.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice