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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-347

JANUARY TERM, 2004

Linda M. Shimansky	} APPEALED FROM:
	}
v.	} Employment Security Board
	}
Department of Employment & Training	}
	} DOCKET NO. 03-03-173-01
	}
	}
	}
	}

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

Claimant Linda M. Shimansky appeals from a decision of the Employment Security Board disqualifying her from unemployment benefits for a period of six weeks following her discharge from employment. She contends the evidence fails to support the Board= s findings and conclusion that she was discharged for misconduct connected with her work. We affirm.

Claimant was employed for about one year with the Dollar Tree Stores in the Town of Berlin until she was discharged from her position as store manager on February 3, 2003. A claims adjudicator denied her claim for unemployment benefits based on a finding that she had been discharged for misconduct, and disqualified her from receiving benefits for a period of nine weeks. See 21 V.S.A. ' 1344(a)(1)(A) (individual discharged from employing unit Afor misconduct connected with his or her work@ shall be disqualified for benefits for period of not more than twelve nor less than six weeks).

Claimant appealed the determination of the claims adjudicator. Following an evidentiary hearing, the hearing referee found that claimant had committed misconduct within the meaning of the statute by allowing a store employee to work a couple of hours Aoff the clock@ (i.e., without compensation and outside regularly paid hours), knowing that it was a violation of federal law and could subject the employer to liability under the Fair Labor Standards Act. The referee reduced the period of disqualification to six weeks, however, based on her finding that claimant had initially attempted to persuade the employee not to work, and had not asked other employees to work off the clock.

Claimant then appealed to the Employment Security Board, which B following a hearing on the record below B sustained the decision of the referee based on additional findings that claimant had directed two additional employees to work off the clock. This appeal followed.

Claimant contends the Board=s finding that she had directed two employees to work off the clock was not supported by credible evidence. This Court will affirm the Board= s findings Aif supported by credible evidence, even in the presence of substantial evidence to the contrary.@ Trombley v. Dep=t of Employ. & Training, 146 Vt. 332, 334 (1985) (citations omitted). Here, the record contains both letters and testimony from the two employees in question (Choquette and Campbell) stating unequivocally that claimant directed them to work off the clock for a considerable number of hours. Nevertheless, claimant maintains that Choquette=s testimony was unreliable because her testimony that she was required to work off the clock through January 2003 contradicted an earlier letter in which she stated that she had Aput a stop@ to the practice in the fall of 2002. The Choquette letter states, however, that she worked off the clock A mostly up until the fall,@ and thus does not contradict her later testimony that she was required to work some off the clock

hours in January 2003.

Claimant also maintains that Campbell= s testimony was undermined when she was unable to produce a calendar in which she claimed to have documented her off the clock hours. The Board could, however, believe Campbell even if she could not produce the calendar. Claimant also asserts that the credibility of Campbell and Choquette was damaged by the testimony of other employees who had not been ordered to work off the clock, but again the credibility of Choquette and Campbell did not necessarily turn on evidence of what other employees had been told. Claimant further argues that Choquette and Campbell were biased because the company had promised to compensate them for any off the clock hours they claimed to have worked. The presence of a motive to fabricate or inflate the number of non-paid hours does not, however, undermine the findings of the Board, which was entitled to weigh the witness= s credibility and balance any conflicting evidence. See Kasnowski v. Dep= t of Employ. Sec., 137 Vt. 380, 381 (1979) (weight, credibility, and persuasive effect of evidence was for Board to determine, and findings will not be disturbed even if contradicted by other evidence). Lastly, claimant notes that she denied asking the employees to work off the clock, and the referee found her testimony to be credible. The Board, however, was authorized to A affirm, modify or reverse@ the referee=s decision Aon the basis of evidence in the record transferred to it.@ 21 V.S.A. ' 1349; see Frye v. Dep=t of Employ. Sec., 134 Vt. 131, 134 (1976) (Board must make its own findings de novo based on evidence before the referee and any additional evidence taken by the Board).

We thus conclude that there is ample credible evidence to support the Board= s findings, and therefore no basis to disturb its decision. See Favreau v. Dept. of Employ. & Training, 156 Vt. 572, 577 (1991) (if Board=s findings are supported by credible evidence they cannot be disturbed).

Claimant also contends the Board erred in sustaining the referee=s conclusion that her failure to prevent a third employee, Bethany Gauthier, from working off the clock constituted misconduct under 21 V.S.A. ' 1344(a)(1)(A). The referee and the Board acknowledged Gauthier= s explanation that she had volunteered to work several hours off the clock because claimant was Astressed out and desperate,@ and claimant=s testimony that Gauthier continued to work despite claimant=s objection that it was not allowed. The referee and the Board could reasonably conclude, however, that claimant= s response was inadequate, that more was required to ensure that federal law was not violated by Gauthier= s continuing to work, and that claimant=s conduct constituted misconduct under the statute. Accordingly, we discern no basis to disturb the decision.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Paul L. Reiber, Associate Justice