IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| H2 Engineering, Petitioner | : | |
| | : | No. 1039 C.D. 2010 |
| v. | : | |
| | : | Submitted: November 19, 2010 |
| Unemployment Compensation Board of Review, Respondent | : | |

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

***OPINION NOT REPORTED***

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: May 25, 2011

H2 Engineering (Employer) petitions for review of the May 7, 2010, order of the Unemployment Compensation Board of Review (Board), which held that Brian Watts (Claimant) was not ineligible for benefits under section 402(e) of the Unemployment Compensation Law (Law).[1]

Claimant worked for Employer as a designer/drafter from June 8, 2009, to August 31, 2009, and Claimant's final rate of pay was $22.50 per hour. (Finding of Fact No. 1.) On June 14, 2009, Claimant received a copy of Employer's personnel manual, which contains Employer's internet/email policy. (Finding of Fact No. 2.)

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(e). Section 402(e) of the Law provides that an employee shall be ineligible for compensation for any week in which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work. The employer bears the burden to prove that a discharged employee was guilty of willful misconduct. Gillins v. Unemployment Compensation Board of Review, 534 Pa. 590, 633 A.2d 1150 (1993).

Employer's internet/email policy states, in part, that "participating in the viewing or exchange of pornographic materials" may result in an employee's discharge. (Finding of Fact No. 3.)

Employer's office has a physical layout that is generally open with employees working in cubicles. (Finding of Fact No. 4.) Each employee is assigned his own computer; however, no formal password security system exists. (Finding of Fact No. 4.) Since Employer did not assign employees a computer user name or password, any employee has the ability to access another employee's computer. (Finding of Fact No. 5.)

On or about August 30, 2009, Employer's president, Robert Hendricks (Hendricks), accessed Claimant's computer for the purpose of updating and installing new software. (Finding of Fact No. 6.) While installing the software, Hendricks viewed Claimant's internet history, which contained various pornographic websites. (Finding of Fact No. 7.) In addition, Hendricks noted that Claimant had installed a rearview mirror in his cubicle, which allowed Claimant to view anyone approaching his cubicle from behind. (Finding of Fact No. 8.) Upon arriving at work on August 31, 2009, Claimant discovered that his internet connection had been shut off. (Finding of Fact No. 10.) Although Claimant denied looking at pornography or loading pornography on his computer, Hendricks terminated Claimant for violating Employer's internet policy. (Finding of Fact No. 11.)

Claimant filed a claim for benefits with the Lancaster Unemployment Compensation Service Center (Service Center), which determined that Claimant was ineligible for benefits under section 402(e) of the Law. (R.R. at 24a.) Claimant appealed, and the case was assigned to a referee for a hearing. (R.R. at 25a-30a.)

Hendricks testified that at the time Claimant was working for Employer,

Employer had six employees, and Claimant's typical hours of employment were from 6:30 a.m. to 3:00 p.m., Monday through Friday. (R.R. at 51a-52a.) Hendricks further testified that when a new employee is hired, he or she receives a copy of Employer's employee handbook, which includes a form that the new employee is required to sign acknowledging that he or she has read and understands the same.[2] (R.R. at 52a.) Furthermore, Hendricks testified that the internet policy in the employee handbook states that participating in the viewing or exchange of pornography or obscene materials is prohibited and will result in disciplinary action, up to and including termination of employment. (R.R. at 53a.) Hendricks also stated that each employee is assigned his or her own cubicle and his or her own computer, and that, while he was on Claimant's computer for the purpose of installing software updates, he discovered that pornographic websites had been viewed from that computer from as far back as four weeks. (R.R. at 55a.) Additionally, Hendricks stated that there was a mirror in Claimant's cubicle, which allowed Claimant to see people approaching from behind. Id.

Hendricks testified that he contacted an IT professional, who instructed him on how to disconnect Claimant's computer from the internet. (R.R. at 56a.) Hendricks said that the IT professional conducted a search of Claimant's computer and discovered that the computer history containing the pornographic sites that Hendricks had previously seen had been deleted. Id. According to Hendricks, the IT professional was able to recover some of the history items, including gaming and pornographic website addresses and pornographic images. (R.R. at 56a, 58a.) Employer thereafter terminated Claimant on August 31, 2009, for violation of its internet policy. (R.R. at 56a-57a.) Hendricks testified that there were no

[2] The employee handbook and an acknowledgment form signed by Claimant were submitted into evidence without objection. (R.R. at 52a, 54a, 91a.)

pornographic images found on any other office computers and that Claimant's computer was brand new and never used when he received it. (R.R. at 59a-60a.)

On cross-examination, Hendricks acknowledged that none of the office computers are password-protected and that there was nothing to prevent one employee from accessing another employee's computer when the employee was not present. (R.R. at 61a-62a.) Hendricks also indicated that not all employees worked from 6:30 a.m. to 3:00 p.m., and that he never asked the other employees if they had ever used Claimant's computer. (R.R. at 66a.) In addition, Hendricks stated that Claimant had previously informed him that items on his desk were out of place, which Hendricks attributed to his use of Claimant's computer to install updates. (R.R. at 70a.) Finally, Hendricks testified that no one had ever witnessed Claimant looking at inappropriate images on his computer. (R.R. at 71a.)

Alan Feldman (Feldman), Employer's IT professional, testified that he found numerous pornographic files on Claimant's computer, but did not find pornographic material on any other computers in the office. (R.R. at 82a.) Feldman noted that the history on Claimant's computer had been cleared but that he was able to recover temporary internet files containing pornographic images from Claimant's computer. Id. Feldman stated that he could not tell the date or time that the images were saved to Claimant's computer system, and he admitted that it could have been after 3:00 p.m. or on weekends when Claimant was not in the office. (R.R. at 85a-86a.) Furthermore, Feldman acknowledged that a general search in a search engine could retrieve a pornographic image that could be stored in the computer's internet history without someone looking at the image and that the images saved to Claimant's computer may not have been individually viewed.[3] (R.R. at 87a-88a.)

[3] Feldman explained that a typical Google search could return twenty entries matching the search criteria, which may include a pornographic picture, and that these entries are then

Claimant testified that he regularly used the internet for his job and did not need a password or code to access his computer. (R.R. at 93a, 95a.) Claimant indicated that, normally, three to four employees remained in the office after he left work for the day, and some of the employees worked evening hours or on weekends. (R.R. at 96.) Claimant denied accessing or viewing any pornographic websites on his computer, and he stated that the mirror was in his office to prevent people from sneaking up and scaring him, as some employees liked to do. (R.R. at 98a.) Additionally, Claimant noted that none of the computers in the office were password protected, and he stated that, at least once a week, he noticed items rearranged on his desk and/or changes made to his preferences on certain computer programs. (R.R. 98a-99a.) Claimant further noted that the cubicles in the office were set up such that he and another employee could see each other's computer monitors.[4] (R.R. at 101a.)

On cross-examination, Claimant acknowledged that there were times he was the first employee in the office, and he acknowledged that he visited game sites during his lunch break, which Employer permitted. (R.R. at 102a, 104a, 106a.) Claimant also confirmed that he had received a copy of Employer's employee handbook and signed the form indicating that he had received and read the handbook. (R.R. at 106a.)

Ultimately, the referee affirmed the Service Center's determination that Claimant was ineligible for benefits under section 402(e) of the Law. (R.R. at 28a.) The referee relied on the testimony that the pornography was only found on Claimant's computer and that Claimant had a mirror in his cubicle. The referee

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automatically stored in the computer's internet cache. (R.R. at 87a.) However, Feldman noted that storage in the internet cache does not mean that each entry was individually viewed by the computer user. Id.

[4] Employer did not present any witnesses to refute Claimant's testimony.

rejected Claimant's testimony that he installed the mirror in his office to avoid being startled by anyone who was approaching him from behind. (R.R. at 28a.)

Claimant appealed to the Board, which reversed the referee's decision and concluded that Claimant was not ineligible for benefits under section 402(e). (R.R. at 31a-36a.) The Board indicated that Employer failed to establish that Claimant, in fact, violated Employer's rule. (R.R. at 36a.) In this regard, the Board credited Claimant's testimony that his computer was accessible to all of his coworkers. Id. Moreover, the Board credited Claimant's testimony regarding the purpose of the mirror in his cubicle. (R.R. at 35a.) The Board noted Employer's admissions that none of its employees were issued computer user names or passwords and that multiple people had access to Claimant's computer. Id. Thus, the Board concluded that the mere fact that pornographic material was discovered on Claimant's computer did not, in and of itself, establish that Claimant actually accessed that material. Id.

On appeal to this Court, Employer argues that the Board erred as a matter of law in concluding that it failed to establish that Claimant committed willful misconduct. Additionally, Employer argues that the Board's findings are not supported by substantial evidence. Our scope of review is limited to determining whether constitutional rights were violated, whether an error of law was committed or whether necessary findings of fact are supported by substantial evidence. Shrum v. Unemployment Compensation Board of Review, 690 A.2d 796 (Pa. Cmwlth.), appeal denied, 548 Pa. 663, 698 A.2d 69 (1997). Moreover, the Board's findings of fact are conclusive on appeal so long as the record, taken as a whole, contains substantial evidence to support those findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977).

The Law does not define the term "willful misconduct" under section 402(e); however, our Supreme Court has held that willful misconduct "includes those actions constituting a deliberate violation of the employer's rules or a disregard of the standard of behavior which the employer has a right to expect of an employee." Burchell v. Unemployment Compensation Board of Review, 848 A.2d 1082, 1084 (Pa. Cmwlth. 2004).[5] Where, as in this case, the employer seeks to establish willful misconduct based on a work rule violation, the employer is required to prove that the work rule existed and that the work rule was violated. Conemaugh Memorial Medical Center v. Unemployment Compensation Board of Review, 814 A.2d 1286 (Pa. Cmwlth. 2003). If the employer establishes that the work rule existed, that it was reasonable, and that it was violated, the burden of proof then shifts to the claimant to show that he had good cause for his conduct or action. Id.

This case is factually analogous to Conemaugh Memorial Medical Center, wherein the claimant was discharged from employment for violating the employer's internet policy by using his work computer for activities that were non-work related, including viewing pornographic websites. In Conemaugh Memorial Medical Center, this Court affirmed the Board's conclusion that the employer failed to meet its burden of proving willful misconduct. Specifically, we indicated that, although there was evidence establishing that the claimant's computer was used to view pornographic material, this evidence was rebutted by the claimant's credible testimony that he had not used his computer inappropriately and that employees were not required to enter specific log on information to access the internet. While acknowledging that a finding of fact can be based upon circumstantial evidence and

[5] Whether or not an employee's actions amount to willful misconduct is a question of law subject to review by this Court. Noland v. Unemployment Compensation Board of Review, 425 A.2d 1203 (Pa. Cmwlth. 1981).

that the employer introduced a report tracking excessive internet activity on claimant's computer, we noted that the report did not, and could not, identify the user of the computer and that the employer's witness admitted that the claimant's computer was accessible to other employees.

Employer argues that Conemaugh Memorial Medical Center is distinguishable from the present case because there is more than one piece of circumstantial evidence here that contradicts Claimant's testimony that he did not download the pornography on his computer, i.e., pornography was not found on any other computer in Employer's office and Employer never had to discipline any employees besides Claimant for accessing pornography.[6] However, Employer ignores the determinative facts in Conemaugh Memorial Medical Center, also present in this case, that the claimant's computer was not password protected and that it was accessible to other employees. Further, as in the case *sub judice*, Employer could not produce corroborating evidence that Claimant was the individual who used the personal computer to produce pornographic images.

Employer also relies on this Court's previous decision in Blicha v. Unemployment Compensation Board of Review, 876 A.2d 1077 (Pa. Cmwlth. 2005), for the proposition that "where evidence demonstrates that files containing pornographic material were found in the computer used by the claimant, such evidence may support the conclusion that the claimant was using employer's computer to download pornographic material in violation of the employer's written policy." 876 A.2d at 1082 (quoting Burchell, 848 A.2d at 1084). However, Employer again ignores an important distinguishing fact present in both Blicha and Burchell,

[6] To the extent that this statement may be read to imply that Claimant had been previously disciplined for accessing pornography, we note that the record is devoid of any prior disciplinary action taken against Claimant.

i.e., the computer used by the claimant in each case required a specific log on and/or password. In Blicha, the Employer's network administration determined the images had been downloaded using the Claimant's assigned computer and password; in addition, the images were downloaded during business hours when Claimant should have been working. Blicha, 876 A.2d at 1079.

Employer repeatedly refers to the testimony of Hendricks and Feldman as substantial evidence establishing the presence of pornography on Claimant's computer.[7] However, in accordance with this Court's precedent, the Board concluded that such testimony was not sufficient to support a finding of willful misconduct under the circumstances presented.[8] Employer admitted that the computer used by Claimant was not password-protected, that other employees had access to the computer,[9] and that Employer could not specifically identify Claimant as the person

[7] Employer also relies heavily on the fact that Claimant's computer history had been deleted after Hendricks observed the pornography. However, we fail to see the significance of this fact because there is no evidence that Claimant was aware of any issue relating to his internet usage until his last day of work on August 31, 2009. (R.R. at 61a.)

[8] The Board noted that it did not question Employer's right to discharge Claimant, but that the evidence of record simply was insufficient to support a denial of benefits under section 402(e) of the Law.

[9] We reject Employer's assertion that the Board's credibility determination as to Claimant's testimony that other people had access to his computer was not supported by substantial evidence. Employer relies heavily on this Court's previous decision in Philadelphia Gas Works v. Unemployment Compensation Board of Review, 654 A.2d 153 (Pa. Cmwlth. 1995), in support of this argument. However, Employer misunderstands our holding in Philadelphia Gas Works and, hence, its reliance is misplaced. In Philadelphia Gas Works, the claimant was discharged following his third positive drug test on August 5, 1992. The claimant's third test consisted of two samples taken approximately two hours apart, one of which tested positive and the other negative for the presence of cocaine. At the claimant's request, and in accordance with Philadelphia Gas Works' drug policy, the positive sample was re-tested by a laboratory of the claimant's choice, which also found the sample to be positive. The claimant provided a third sample later in the evening as part of his participation in a drug rehabilitation program and the sample tested negative. The referee denied benefits concluding that Philadelphia Gas Works had met its burden of establishing a rule

accessing the pornographic material. Moreover, Hendricks testified that employees worked different shifts and Feldman acknowledged that the images may never even have been viewed.

A finding of fact can be based on circumstantial evidence,[10] as evidenced by the referee's decision in this case. However, the Board reversed that decision and made new findings of fact. The Board's findings are conclusive on appeal so long as the record, taken as a whole, contains substantial evidence to support those findings. Grieb v. Unemployment Compensation Board of Review, 573 Pa. 594, 599, 827 A. 2d 422, 425 (2003); Taylor. Here, as in Conemaugh Memorial Medical Center, the record supports the Board's determination that there was insufficient credible evidence to support a denial of benefits pursuant to section 402(e) of the Law. In light of Employer's admissions and Claimant's unrefuted testimony, we find no error in the Board's conclusion that Employer failed to meet its burden of proving willful misconduct in this case.

Accordingly, the order of the Board is affirmed.

PATRICIA A. McCULLOUGH, Judge

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violation, and, consequently, willful misconduct by the claimant. The Board reversed the referee's decision finding the claimant's testimony that he had not used drugs since June 1992 to be credible. This Court reversed concluding that the Board ignored overwhelming and undisputed evidence which contradicted the claimant's testimony and clearly indicated a violation of Philadelphia Gas Works' drug policy by the claimant. Accordingly, we held that the Board's decision was not supported by substantial evidence and that its credibility determination in favor of the claimant, by itself, was insufficient to support a grant of benefits where none would otherwise be granted under the law. In the present case, Claimant testified that his computer was not password-protected and was accessible to any other employee in the office. Hendricks and Feldman, Employer's own witnesses, confirmed Claimant's testimony in this regard. Thus, the Board's decision herein was not based solely upon a credibility determination and was not contradicted by Employer's evidence.

[10] See 15 Pennsylvania Law Encyclopedia, Evidence, §444 (1959).

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***ORDER***

AND NOW, this 25th day of May, 2011, the May 7, 2010, order of the Unemployment Compensation Board of Review is hereby affirmed.

PATRICIA A. McCULLOUGH, Judge