IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jerry M. Orr, Jr.,	:	
Petitioner	:	
	:	
v.	:	No. 1125 C.D. 2010
	:	Submitted: December 23, 2010
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: February 24, 2011

Jerry M. Orr, Jr. (Claimant) petitions for review, *pro se*, of the April 16, 2010, order of the Unemployment Compensation Board of Review (UCBR), which affirmed the referee's decision to deny his claim for unemployment compensation benefits. The UCBR determined that Claimant was not entitled to benefits because his discharge was the result of willful misconduct under section 402(e) of the Unemployment Compensation Law (Law).[1] We affirm.

[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 "[i]n which his unemployment is due to his discharge . . . from work for willful misconduct connected with his work." 43 P.S. §802(e).

Claimant worked as a full-time cook for Chartwell's Food Service (Employer) for three months until his discharge on October 15, 2009. (Findings of Fact, Nos. 1-2.)[2] Employer had a zero-tolerance harassment policy, which provided that an employee's use of profanities, vulgar language, or other forms of harassment toward a co-worker was grounds for immediate termination. Claimant knew of Employer's anti-harassment policy. (Findings of Fact, No. 3.)

On October 15, 2009, Employer was informed that Claimant had told a female co-worker that he "[o]ught to punch her in her f[---]ing face." (Findings of Fact, Nos. 4-5.) Employer confronted Claimant about the incident, and, although Claimant initially denied making the statement, he later admitted it but said that he was kidding. (N.T., 2/19/10, at 6; Findings of Fact, No. 6.) Employer immediately terminated Claimant pursuant to its anti-harassment policy. (Findings of Fact, No. 7.)

Claimant filed a claim for unemployment benefits, which he received from October 31, 2009, through November 28, 2009. (Findings of Fact, No. 8.) On December 14, 2009, however, the local service center determined that Claimant was ineligible for benefits because his termination was the result of willful misconduct.

Claimant appealed to the referee, who held an evidentiary hearing. Antoinette Greiman, Claimant's on-site supervisor, testified on behalf of Employer, and Claimant testified on his own behalf. The referee ultimately concluded that

[2] The UCBR adopted and incorporated the referee's findings of fact and conclusions of law in their entirety. Thus, any citations herein to those findings and conclusions may be found in the referee's February 22, 2010, decision.

Claimant was discharged for willful misconduct and affirmed the denial of benefits, with modifications.[3]

Claimant timely appealed to the UCBR, which upheld the referee's decision and concluded that Claimant's deliberate use of vulgar, threatening language toward a co-worker constituted willful misconduct. Claimant now petitions for review of that decision, asserting that the evidence was insufficient to support the UCBR's willful misconduct determination.[4] We disagree.

"Willful misconduct" is defined as: (1) wanton and willful disregard of the employer's interests; (2) deliberate violation of the employer's rules; (3) disregard of standards of behavior that an employer rightfully can expect from its employees; or (4) negligence that manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer's interests or the employee's duties and obligations. *Andrews v. Unemployment Compensation Board of Review*, 633 A.2d 1261, 1262 (Pa. Cmwlth. 1993). When an employee is discharged for violating a work rule, the employer has the burden of proving that the employee knew of the existence of the work rule and that he or she violated the rule. *Roberts v. Unemployment Compensation Board of Review*, 977 A.2d 12, 16 (Pa. Cmwlth. 2009).

[3] Because the referee found that Claimant did not intentionally misrepresent or omit material facts in order to obtain benefits, the referee imposed a non-fault overpayment under section 804(b)(1) of the Law, 43 P.S. §874(b)(1), and struck the previously imposed penalty weeks.

[4] Our scope of review is limited to determining whether constitutional rights were violated, an error of law was committed, or findings of fact were unsupported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

The burden then shifts to the employee to establish that he or she had good cause for the violation or that the rule itself was unreasonable. *Id.*

Here, the UCBR found that Employer's policy stated that an employee's use of profanity, vulgar language, or other forms of harassment toward a co-worker was grounds for immediate termination and that Claimant knew of Employer's policy. Although Greiman had counseled Claimant about his behavior in the past, the basis for Claimant's discharge on the date in question was his vulgar remark to his co-worker, which was a terminable first offense under Employer's policy. (N.T., 2/19/10, at 6, 9.) When confronted about the incident, Claimant admitted that he made the statement but said that he was kidding. (*Id.* at 6.) The UCBR resolved the conflicts in the evidence in Employer's favor and specifically disbelieved Claimant's statement to his supervisor that he made the remark in jest. Issues of witness credibility and evidentiary weight are within the sole discretion of the UCBR, which is the ultimate factfinder. *Walsh v. Unemployment Compensation Board of Review*, 943 A.2d 363, 368 (Pa. Cmwlth. 2008). Therefore, the testimony credited by the UCBR provides substantial evidence to support the finding that Claimant deliberately violated Employer's anti-harassment policy, thereby justifying his immediate termination.

Accordingly, we affirm.

_____

ROCHELLE S. FRIEDMAN, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jerry M. Orr, Jr., Petitioner	:	
v.	:	No. 1125 C.D. 2010
Unemployment Compensation Board of Review, Respondent	:	

O R D E R

AND NOW, this 24th day of February, 2011, we hereby affirm the April 16, 2010, order of the Unemployment Compensation Board of Review.

ROCHELLE S. FRIEDMAN, Senior Judge