IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Angelo Scott,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1307 C.D. 2009
	:	
Unemployment Compensation Board of Review,	:	Submitted: December 11, 2009
	:	
Respondent	:	

OPINION NOT REPORTED

MEMORANDUM OPINION
PER CURIAM **FILED: February 16, 2010**

Angelo Scott (Claimant), pro se, petitions for review of an order of the Unemployment Compensation Board of Review (Board), which affirmed the Unemployment Compensation Referee's (Referee) decision denying him benefits under Section 402(e) of the Unemployment Compensation Law (Law).[1] The Board found Claimant ineligible for benefits because he violated Samuels & Sons Seafood Company's (Employer) policy prohibiting insubordination and failed to establish good cause for his actions.

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 802(e).

Claimant applied for unemployment compensation benefits after becoming separated from his employment with Employer. The Unemployment Compensation Service Center (Service Center) issued a determination finding Claimant ineligible for benefits under Section 402(e). Claimant appealed the Service Center's determination, and an evidentiary hearing was held before the Referee. During the hearing, Claimant testified on his own behalf. Employer's General Manager Mark Falcone, and Employer's Operations Manager Robert LaRocca testified on behalf of Employer. Following the hearing, the Referee affirmed the Service Center's determination and Claimant appealed to the Board. After conducting a review of the record, the Board issued an opinion in which it made the following findings of fact:

1. [C]laimant was last employed as a dock worker by [Employer] from August 5, 1997, at a final rate of $17.97 per hour and his last day of work was December 24, 2008.
2. [E]mployer has a policy prohibiting insubordination or refusal to follow management instructions on legitimate job-related matters.
3. [C]laimant was aware of the policy.
4. Between 2006 and 2008, [C]laimant received multiple warnings for a variety of infractions.
5. On October 30, 2008, [C]laimant was suspended for three days due to policy violations, and was warned that any further infraction would result in his discharge.
6. On December 24, 2008, [E]mployer's operations manager directed [C]laimant to go outside and start doing driver returns.
7. [C]laimant went outside, but returned one minute later and asked whether another employee would also be doing driver returns.
8. The operations manager responded that he needed the claimant to do the returns.
9. [C]laimant asked again whether another employe[e] would also be doing the returns; and the operations manager advised [C]laimant not to worry about what the other employee would be doing, but that [C]laimant needed to do the returns.
10. [C]laimant started to ask the same question a third time, but the operations manager cut him off and stated that he did not expect to

hear the question again and that [C]laimant needed to do what he was told.

11. [C]laimant went back outside. Approximately one minute later, the operations manager observed [C]laimant not doing the job he was directed to do, but instead complaining about [E]mployer to another employee.
12. The operations manager told [C]laimant that he was not working as directed, but was instead talking negatively about [E]mployer.
13. [C]laimant responded: "I don't have to listen to you."
14. The operations manager sent [C]laimant home.
15. [C]laimant was subsequently discharged for insubordination.

(Board Findings of Fact (FOF) ¶¶ 1-15.) Based on these findings, the Board determined that Claimant committed willful misconduct by violating Employer's policy for being insubordinate to the operations manager on December 24, 2008. Claimant filed a request for reconsideration of the Board's Decision and Order, which the Board denied on July 15, 2009. Claimant now petitions this Court for review.

Before this Court, Claimant argues that the Board erred in determining that Claimant was discharged for willful misconduct. Specifically, Claimant contends in his pro se brief that the Board erred as a matter of law by failing to follow the "just cause" standard, the "clear and convincing evidence" standard, and/or "beyond a reasonable doubt" standard in determining Claimant ineligible for benefits.[2] Further,

[2] Claimant's Statement of Questions Involved consists of:

> 1. Did the [Board] have a reasonable basis and follow fair procedures with regards to its decision?
>
> Suggested answer: No. The [Board] did not follow the "just cause" standard, City of Portland, 77 LA 820, 826 (Gary L. Axon 1981) . . . which requires the punishment assessed be reasonable in light of ***all the circumstances***.
>
> 2. Did the [Board] base its decision without clear and convincing evidence, that [Claimant] committed the conduct in question and that discharge was appropriate?

(Continued…)

Claimant argues that the evidence establishes that he was not insubordinate on December 24, 2008, and that Employer retaliated against him by firing him for being a whistle blower. (Claimant's Br. at 11.)

Claimant's first argument, that the Board erred in failing to follow the standards of "just cause," "clear and convincing evidence," and/or "beyond a reasonable doubt" (Claimant's Br. at 5, 12), is without merit. "The Board in a[n unemployment] compensation proceeding is not bound by such a strict standard of proof." BMY v. Unemployment Compensation Board of Review, 504 A.2d 946, 951 (Pa. Cmwlth. 1986) (finding claimant was not required to prove good cause for his actions by clear and convincing evidence); see also Ruiz v. Unemployment Compensation Board of Review, 887 A.2d 804, 808 n.6 (Pa. Cmwlth. 2005) (rejecting claimant's argument that the employer was required to prove "beyond a reasonable doubt" that the claimant violated a work rule). Rather, it is well-settled in unemployment compensation law that the Board must use the substantial evidence standard. The Board, as the ultimate fact finder and arbiter of credibility, "need only have relied on *substantial evidence*[, which] is a lesser standard than the preponderance and clear and convincing standards." BMY, 504 A.2d at 951 n.7 (emphasis added). Substantial evidence is defined as "relevant evidence that a reasonable mind might consider adequate to support a conclusion." Walsh v.

> Suggested answer: Yes. A company can only discharge an employee if it has a reasonable basis and follows fair procedures in doing so. Beatrice Foods Co., 74 LA 1008, 1011 (John M. Gradwohl 1980). The "***beyond a reasonable doubt***" standard was not taken into consideration with regards to [Employer's] decision. [Employer] did not produce sufficient evidence to support its burden of proof for discharge.

(Claimant's Br. at 5 (emphasis in original).)

Unemployment Compensation Board of Review, 943 A.2d 363, 368 (Pa. Cmwlth. 2008). As such, on appeal, this Court's review of the Board's decision "is limited to determining whether constitutional rights were violated, whether an error of law was committed, whether a practice or procedure of the Board was not followed or whether the findings of fact are supported by substantial evidence in the record." Western & Southern Life v. Unemployment Compensation Board of Review, 913 A.2d 331, 334 n.2 (Pa. Cmwlth. 2006).

Having clarified the standard of proof used in unemployment compensation cases, we must now address whether there is substantial evidence to support the Board's determination that Claimant was ineligible for benefits under the Law. Section 402(e) of the Law provides that a claimant will not be eligible for unemployment compensation when "his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work." 43 P.S. § 802(e). Although the Law does not define the term "willful misconduct," the courts have defined it as follows:

> a) wanton or willful disregard for an employer's interests; b) deliberate violation of an employer's rules; c) disregard for standards of behavior which an employer can rightfully expect of an employee; or d) negligence indicating an intentional disregard of the employer's interest or an employee's duties or obligations.

Caterpillar, Inc. v. Unemployment Compensation Board of Review, 550 Pa. 115, 123, 703 A.2d 452, 456 (1997). Where a claimant is discharged for violation of a work rule, the burden is on the employer to prove that the claimant was made aware of the existence of the work rule and that the claimant violated the rule. Bishop Carroll v.

Unemployment Compensation Board of Review, 557 A.2d 1141, 1143 (Pa. Cmwlth. 1989). Once the employer meets its burden, the burden then shifts to the claimant to establish good cause for his actions. Id. "A claimant has good cause if his . . . actions are justifiable and reasonable under the circumstances." Docherty v. Unemployment Compensation Board of Review, 898 A.2d 1205, 1208-09 (Pa. Cmwlth. 2006). Whether certain conduct constitutes willful misconduct is a question of law subject to review by the courts. Caterpillar, 550 Pa. at 123, 703 A.2d at 456.

In this case, Claimant does not dispute that Employer has a rule prohibiting "[i]nsubordination or refusal to follow management instructions on legitimate job-related matters" and that violation of this rule "may result in disciplinary action, up to and including discharge," and that Claimant was aware of this rule. (Employee Policy and Procedure Manual at 9-10, Employer Ex. 23; see also Acknowledgment of Receipt (January 7, 2004), Employer Ex. 2.) As such, we must determine whether Claimant violated Employer's rule for being insubordinate on December 24, 2008.

Claimant argues that he was not insubordinate on December 24, 2008. Claimant argues that he was an attentive employee and "performed his duties, at all times, as directed by Mr. LaRocca." (Claimant's Br. at 10.) Claimant contends that in the early hours of December 24, 2008, Mr. LaRocca did not "communicate his expectations" to Claimant (Claimant's Br. at 12) in terms of where Claimant should have been working but, nonetheless, Claimant continued to work to keep busy. (Claimant's Br. at 12-13.) Claimant argues that when Mr. LaRocca later directed him to start doing driver returns, he "'simply ask[ed] a question' if another employee would be helping" him, which he claims does not constitute insubordination.

(Claimant's Br. at 13.) Further, Claimant argues that he "made an innocent remark to another employee when ask[ed] in crossing, [if] Mr. LaRocca was being 'mean' to him, but Mr. LaRocca took that as [Claimant] not wanting to complete the task." (Claimant's Br. at 13.) Claimant contends that Employer used Claimant's alleged misconduct on December 24th as a pretext for terminating him, but that the real reason Employer terminated Claimant was because Claimant questioned the safety of Employer's food handling and Claimant also questioned Employer's compliance with its anti-harassment policy.

Essentially, Claimant asks this Court to adopt his preferred version of the facts. While Claimant did testify in support of his contentions, the Board specifically credited Mr. LaRocca's testimony over the testimony advanced by Claimant regarding the events on December 24, 2008, and determined that Claimant was terminated for insubordination, and not for any other reason. The law is clear that the Board is the ultimate finder of fact and arbiter of witness credibility. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 269-70, 276-77, 501 A.2d 1383, 1385, 1388 (1985). Thus, as long as the Board's factual findings are supported by substantial evidence, those findings are conclusive on appeal. Geesey v. Unemployment Compensation Board of Review, 381 A.2d 1343, 1344 (Pa. Cmwlth. 1978). That Claimant may have given "a different version of the events, or . . . might view the testimony differently than the Board, is not grounds for reversal if substantial evidence supports the Board's findings." Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994).

Here, there is substantial evidence to support the Board's determination that Claimant was terminated for insubordination that took place on December 24, 2008. Mr. LaRocca credibly testified that after Claimant responded to a page put out over the intercom system for Claimant to report to Mr. LaRocca,[3] Mr. LaRocca directed Claimant to "start doing driver returns." (Hr'g Tr. at 19; FOF ¶ 6.) Mr. LaRocca testified that Claimant complied with this order and went outside to begin working on driver returns, but "after about a minute[, Claimant] came back in and [asked if] Jim McWilliams [was also] going to [do] returns." (Hr'g Tr. at 19; FOF ¶ 7.) Mr. LaRocca explained that he responded to Claimant by directing him a second time to work on the driver returns. (Hr'g Tr. at 19; FOF ¶ 8.) Mr. LaRocca testified that Claimant asked him a second time if Jim McWilliams will be working on driver returns, and Mr. LaRocca responded to Claimant by stating that he should not "worry about what Jim McWilliams [was] going to [do]" because "I need you to do returns." (Hr'g Tr. at 19; FOF ¶ 9.) Mr. LaRocca testified that Claimant then asked a third time whether Mr. McWilliams would be working on driver returns and Mr. LaRocca "stopped him in mid sentence and . . . said I don't expect to hear this again. I need

[3] We note that Claimant argues in the "Summary of Argument" section of his brief that the Board erred in "refus[ing] to add to the record an e-mail statement from a key witness (Jeff Wyatt) regarding [Claimant's] termination, even after it was sent certified mail on two (2) occasions." (Claimant's Br. at 11.) However, it appears that this request was made after the hearing took place. In addition, documents submitted by Claimant shows that Mr. Wyatt's account of what happened on December 24, 2008 is not relevant to Claimant's termination. (See R. Item 26, E-mail from Jeffrey Wyatt to Claimant, April 24, 2009; see also Hr'g Tr. at 17.) The e-mail from Mr. Wyatt suggests that he was a witness to Claimant's whereabouts **before** Claimant was paged by Mr. LaRocca and directed to work on driver returns. Claimant was not discharged for being in the cash office or some other place prior to being paged. Claimant was discharged for his defiance in not following through with Mr. LaRocca's directions on three occasions to work on driver returns, and then telling Mr. LaRocca that he didn't have to listen to Mr. LaRocca's directions. Therefore, Claimant's contention that the Board erred with regard to failing to submit Mr. Wyatt's e-mail into the record is without merit.

you to be doing what I told you to do." (Hr'g Tr. at 19; FOF ¶ 10.) Mr. LaRocca explained that Claimant went back outside and Mr. LaRocca thought Claimant was working on driver returns as directed. However, approximately one minute after Claimant went outside, Mr. LaRocca overheard "Claimant speaking negatively about the company again to a female employee who was getting ready to leave for the day," and not doing the driver returns as directed. (Hr'g Tr. at 19; FOF ¶ 11.) Mr. LaRocca explained that he went outside to "break up the conversation" between Claimant and the employee and he said to Claimant, "I thought I asked you to do returns," and instead of doing the task as directed, "[y]ou're speaking to an employee again and talking negatively about the company." (Hr'g Tr. at 19; FOF ¶ 12.) Mr. LaRocca testified that Claimant responded, "I don't have to listen to you." (Hr'g Tr. at 19; FOF ¶ 13.) Mr. LaRocca testified that after Claimant responded in that manner, he "realized there was no sense in continuing th[e] conversation" and told Claimant to go home. (Hr'g Tr. at 19-20; FOF ¶ 14.) Employer subsequently terminated Claimant's employment for insubordination. (Hr'g Tr. at 20; FOF ¶ 15.)

The Board credited the testimony of Mr. LaRocca over that of Claimant, and this Court is not empowered to overturn the Board's credibility determination. Further, as cited above, there is substantial evidence in the record to support the finding that Claimant violated Employer's rule prohibiting insubordination by refusing to follow Mr. LaRocca's instructions on December 24, 2008 to work on driver returns. Therefore, the burden shifts to Claimant to show good cause for his actions. Docherty, 898 A.2d at 1208-09. However, Claimant neither offered any testimony before the Referee, nor does he offer an argument before this Court,

showing good cause for his insubordination on December 24, 2008. Claimant simply failed to meet his burden of proof.[4]

Because Employer provided evidence necessary to establish willful misconduct, we conclude that the Board did not err in finding Claimant ineligible for benefits under Section 402(e) of the Law. Accordingly, we affirm the Board's order.

[4] Whether or not Claimant was a "whistle blower" has nothing to do with whether Claimant had good cause under the Law for his insubordination. The Board did not find that Claimant was terminated for any reason other than his insubordination that took place on December 24, 2008. Therefore, this argument fails.

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	:	
Respondent	:	

PER CURIAM

O R D E R

NOW, February 16, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.