

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

County of Allegheny Office of	:	
Medical Examiner,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1340 C.D. 2010
	:	
Unemployment Compensation	:	Submitted: January 7, 2011
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE COHN JUBELIRER**

**FILED: March 17, 2011**

The County of Allegheny (County) Office of Medical Examiner (Employer) petitions for review of the Order of the Unemployment Compensation Board of Review (Board) reversing the decision of the Unemployment Compensation Referee (Referee). The Board found that Robert Askew (Claimant) is not ineligible for unemployment compensation benefits pursuant to Section 402(e) of the Pennsylvania Unemployment Compensation Law<sup>1</sup> due to willful misconduct

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

connected with his work. Employer argues that Claimant's actions violated a work rule and, therefore, constituted willful misconduct. For the reasons that follow, we affirm the Board's order.

Claimant applied for unemployment compensation benefits on January 31, 2010. The Unemployment Compensation Service Center initially granted benefits to Claimant on February 24, 2010. Employer appealed and the Referee reversed on April 2, 2010, denying benefits to Claimant. Claimant filed an appeal of the Referee's determination. The Board reversed the Referee's decision on June 18, 2010, and found that Claimant is not ineligible for benefits. The Board made the following findings of fact:

1. The claimant was last employed as a supervisor for the Allegheny County Office of Medical Examiner Forensic Biology Section from December 29, 1996 to January 28, 2010.
2. In 2007, the claimant worked with others to develop software useful in processing cases such as those addressed by the Medical Examiner's office.
3. In August 2009, the claimant and his wife established their own business, STREAMline Innovations, to develop products and several other programs similar to the one developed in 2007.
4. The claimant is President of STREAMline Innovations, and his wife is secretary and co-developer.
5. The claimant's wife also previously worked for the Medical Examiner's office.
6. In September 2009, the claimant advised his manager of his software projects, and the manager agreed to use the claimant's software in various DNA analysis cases.

7. The employer's Laboratory Director was unaware that the software had been implemented.
8. The claimant's manager is responsible for approving all software and documentation used for DNA casework.
9. The claimant believed that, by obtaining his manager's consent, he had followed the employer's guidelines for software approval and implementation.
10. The claimant loaded the software onto the County's server and began using the software as part of his work.
11. The claimant did not use County equipment or resources to create his software, and he did not seek or receive compensation from the County for use of the software.
12. The claimant and all members of the County's Forensic Biology DNA Section used the software between October 1, 2009 and December 16, 2009.
13. The claimant subsequently generated a new agreement with the [C]ounty, which would become effective after December 16, 2009.
14. The claimant's manager presented the software agreement to the Laboratory Director, who forwarded the matter to the County's legal department for advice.
15. The Laboratory Director was informed that the County would not sign the software agreement and that all existing software on the County server belonged to the County.
16. The Laboratory Director subsequently met with the claimant and his manager to explain the advice that he received from the legal department.
17. Upon conducting further investigation, the Laboratory Director discovered that several worksheet reports had been generated for County business which contained the STREAMline Innovations copyright logo.
18. These documents were County records, but were affiliated with the claimant's business through the copyright stamp and had not been

reviewed for quality assurance under the County's document control process.

19. The quality of the County's document control process is a key factor in maintaining laboratory accreditation within the County.

20. The claimant's software was removed from the County server.

21. The claimant was discharged on January 28, 20[10<sup>2</sup>] for engaging in improper use of company equipment, violating the County code of conduct, accepting items of value outside the limits of the [C]ounty ethics code, and making personal use of company property.

(Board Decision and Order, Findings of Fact (FOF) ¶¶ 1-21.) The Board credited Claimant's testimony that, by obtaining his manager's consent, he had followed the employer's guidelines for software approval and implementation. Therefore, the Board found that Claimant is not ineligible for benefits because Employer failed to present credible evidence that Claimant knew, or should have known, that the laboratory director must approve all software installations, i.e., that Claimant violated Employer's work rule. (Board Decision and Order at 3-4.) Employer now petitions this Court for review of the order of the Board.<sup>3</sup>

Employer argues that: (1) the Board erred in finding that Claimant's actions did not constitute willful misconduct under Section 402(e); (2) the Board committed an error of law by stating that it did not question Employer's decision to

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<sup>2</sup> The Board's Finding of Fact ¶ 21 states that Claimant was discharged on January 28, 2009; however, this appears to be a typographical error because it is clear from Finding of Fact ¶ 1 and the record that Claimant was discharged on January 28, 2010.

<sup>3</sup> This Court's review "is limited to determining whether an error of law was committed, constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence." Charles v. Unemployment Compensation Board of Review, 764 A.2d 708, 710 n.3 (Pa. Cmwlth. 2000).

discharge Claimant while at the same time determining that Claimant's conduct was not willful misconduct; and (3) the Board erred by disregarding the Referee's finding of willful misconduct.<sup>4</sup>

We first address Employer's argument that, by installing software on Employer's network, Claimant exhibited a wanton or willful disregard for Employer's interests and also deliberately violated Employer's work rules, which constitutes willful misconduct under Section 402(e). Pursuant to Section 402(e), an employee is ineligible for unemployment compensation for any week "[i]n which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work." 43 P.S. § 802(e). Courts have defined "willful misconduct" as:

- 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 terminated for violation of a work rule, the employer has the burden of showing the existence of the work rule, that the claimant was aware the work rule existed, and that the claimant violated the work rule. Williams v. Unemployment Compensation Board of Review, 926

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<sup>4</sup> While Employer lists three questions in its Statement of Questions Involved, Employer's brief does not contain a separate argument section for each question and is, thus, not in compliance with the Pennsylvania Rules of Appellate Procedure. Pa. R.A.P. 2119(a). However, because we can distinguish Employer's arguments, Employer's failure to follow this procedure does not hinder appellate review.

A.2d 568, 571 (Pa. Cmwlth. 2007). If the employer meets this initial burden, the burden then shifts to the claimant to prove that the rule was unreasonable or that the claimant had good cause for violating the rule. Gillins v. Unemployment Compensation Board of Review, 534 Pa. 590, 600, 633 A.2d 1150, 1155 (1993). Additionally, whether a claimant's actions constitute willful misconduct is a question of law subject to this Court's review. Tongel v. Unemployment Compensation Board of Review, 501 A.2d 716, 717 (Pa. Cmwlth. 1985).

The Board found that Claimant was terminated from his employment for violation of a work rule.<sup>5</sup> (Board Decision and Order at 3-4, FOF ¶ 21; Hr'g Tr. at 9-10, Apr. 1, 2010, R.R. at 10-11.) Claimant's laboratory director testified before the Referee that Claimant was terminated for "[i]mproper use of [c]ounty equipment." (Hr'g Tr. at 9, R.R. at 10.) The laboratory director explained that the reasons for terminating Claimant included: (a) acceptance of compensation from vendors, customers, or the public, outside the limits of the Allegheny County Ethics Code;<sup>6</sup> (b) personal use of County property;<sup>7</sup> and (c) breaching Employer's

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<sup>5</sup> While the Board's Findings of Fact do not explicitly state that Employer terminated Claimant for violation of a work rule, both the Board Decision and Order and the parties' briefs characterize the reason for Claimant's termination as violation of a work rule.

<sup>6</sup> The Allegheny County Employee Handbook states, in part, "[t]he following list [of work rules] is not all inclusive but illustrates some of the types of behavior which ordinarily warrant disciplinary action up to and including discharge . . . [a]ccepting gifts, tips or other compensation from vendors, customers, or the public outside [the] limits in the Allegheny County Ethics Code." (Referee Hr'g Tr. Ex 4.)

<sup>7</sup> The Allegheny County Employee Handbook states, in part, "[a]ll computer hardware, software, network access, information and data provided to employees are the property of Allegheny County and should be used for official business purposes only." (Referee Hr'g Tr. Ex 4.)

document control procedures.<sup>8</sup> (Hr’g Tr. at 9-10, R.R. at 10-11.) The Board did not address Employer’s argument that Claimant accepted items of value outside the limits of the County Ethics Code, although the Board acknowledged it as a reason for Claimant’s discharge. (FOF ¶ 21.)<sup>9</sup> Secondly, Employer stated it discharged Claimant for engaging in personal use of County property. Claimant testified that the creation of the software was “performed . . . on [his] laptop wherever [he] was, . . . at home . . . [or] at a café” and that Claimant never utilized any of the County’s software or equipment to create the software. (Hr’g Tr. at 22-23, R.R. at 23-24.) The Board credited Claimant’s testimony that he did not use County equipment or resources to create his software. (Board Decision and Order at 3-4.) Because the Board’s credibility determination is supported by substantial evidence and is within the Board’s role as the ultimate finder of fact, the credibility determination

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<sup>8</sup> Employer’s Quality Manual states:

All documents approved for use in the Laboratory will be uniquely identified by the title and placed in the appropriate manual. In addition, each document will include the date of issue, and/or revision date, page numbering . . . and document control number. The approving/issuing authorities will be documented on the Document Review and Approval Form . . . and/or Manual Authorization . . . and maintained by the Quality Manager . . . . *The Laboratory shall establish and maintain procedures to control all documents that form part of its management system* (internally generated or from external sources), such as regulations, standards, other normative documents test and/or calibration methods, as well as drawings, software, specifications, instructions and manuals.

(Referee Hr’g Tr. Ex 3 (emphasis added).)

<sup>9</sup> Employer does not develop any argument in its brief that Claimant was discharged for violating the County’s Ethics Code.

is not subject to appellate review. Loc, Inc. v. Workers' Compensation Appeal Board (Graham), 936 A.2d 1213, 1216 (Pa. Cmwlth. 2007).

Concerning the alleged breach of Employer's document control procedures, Employer failed to present evidence that Claimant knew, or should have known, of Employer's software approval and implementation procedures.<sup>10</sup> (Board Decision and Order at 3-4.) Furthermore, the Board found that Claimant, by obtaining his manager's approval to install and use the software, believed that he had followed Employer's guidelines for software approval and implementation. (FOF ¶ 9; Hr'g Tr. at 19, R.R. at 20.) Claimant stated:

[My manager] agreed to use the software for DNA case work. As part of his review as technical leader, he approves all software and documentation that is utilized for DNA case work, as well as the distributor by the QC [quality control] coordinator for the Forensic Biology Section . . . . So, it was my understanding from [my manager] that the appropriate channels had been followed, and that Streamline [sic] was able to be used by the County for processing of the DNA case work.

(Hr'g Tr. at 19, R.R. at 20.) Claimant's credible testimony is substantial evidence which supports the Board's factual findings. Furthermore, Claimant's laboratory manager testified before the Referee that Claimant's manager and quality manager both utilized the software to issue reports, without ever reporting their use of the

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<sup>10</sup> Employer does not appear to dispute this point in its brief. Instead, Employer relies on evidence that Claimant installed his software package on the County server without showing evidence that Claimant knew, or should have known, of Employer's software implementation and approval procedures. However, the portion of Employer's Quality Control Manual admitted into evidence neither describes the required implementation or approval procedures, nor states who is required to give authorization before software may be installed on the County server.



software to the laboratory manager. (Hr’g Tr. at 17, R.R. at 18.) Therefore, the Board is correct that Employer failed to present evidence that Claimant knew, or should have known, of Employer’s software approval and implementation procedures. Because Employer failed to present evidence that Claimant knew, or should have known, of Employer’s software approval and implementation procedures, Employer failed to show that Claimant violated a known work rule, thereby committing willful misconduct. Likewise, Employer did not prove that Claimant’s actions exhibited a wanton or willful disregard of Employer’s interests. Claimant credibly testified that he received his manager’s approval before installing the software, he did not create or develop the software using Employer’s equipment or while working for Employer, and he did not charge Employer for the use of that software.<sup>11</sup> Accordingly, Employer did not satisfy its burden of showing that Claimant committed willful misconduct.

Next, we address Employer’s argument that the Board committed an error of law by not questioning Employer’s decision to discharge Claimant while at the same time determining that Claimant’s conduct was not willful misconduct. Pennsylvania is an at-will employment state and, where there is not a contract, an

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<sup>11</sup> We would also note, however, that to deny unemployment compensation benefits to a claimant, the employer must prove not only that the conduct in question constituted willful misconduct, but also that the conduct was the reason for which the employer discharged the claimant. Coleman v. Unemployment Compensation Board of Review, 406 A.2d 259, 296 (Pa. Cmwlth. 1979). Here, Employer argues that Claimant acted in wanton or willful disregard for the interest of Employer when Claimant loaded software onto the County’s server and began using that software as part of his private business. The Board, however, found that Employer discharged Claimant for violation of a work rule. (Board Decision and Order at 3-4, FOF ¶ 21; Hr’g Tr. at 9-10, R.R. at 10-11.) Because the Board found that Employer discharged Claimant for violation of a work rule, whether Claimant acted in wanton or willful disregard of Employer’s interests was not the proximate cause of Claimant’s discharge.

employer may discharge an at-will employee at any time. Conlon v. Retirement Board of Allegheny County, 715 A.2d 528, 529 n.2 (Pa. Cmwlth. 1998). Importantly, however, the issue of whether an employer can rightfully discharge an employee is separate from the issue of whether that employee is eligible for unemployment compensation. Port Authority of Allegheny County v. Unemployment Compensation Board of Review, 955 A.2d 1070, 1075 (Pa. Cmwlth. 2008). Thus, while Pennsylvania is an at-will employment state and Employer could choose to discharge Claimant at any time, the right to discharge is separate from, and not relevant to, the issue of whether Claimant is eligible for unemployment benefits. Therefore, the Board did not commit an error of law by not questioning Employer's decision to discharge Claimant while at the same time determining that Claimant's conduct was not willful misconduct.

Third, we address Employer's argument that the Board erred by disregarding the Referee's findings. We note that the Board, not the Referee, is the ultimate finder of fact and is "empowered to resolve conflicts in the evidence, to determine the credibility of witnesses, and to determine the weight to be accorded to the evidence." Stop-N-Go of Western Pennsylvania, Inc. v. Unemployment Compensation Board of Review, 707 A.2d 560, 562 (Pa. Cmwlth. 1998). Because the Board is the ultimate finder of fact, the Board is not bound by the Referee's determinations. Therefore, the Board did not err in making different findings of fact than those found by the Referee.

Accordingly, because the Board's findings are supported by substantial evidence and Employer did not satisfy its burden of showing that Claimant

committed willful misconduct, this Court affirms the Board's order that Claimant is not ineligible for benefits.

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**RENÉE COHN JUBELIRER, Judge**

Judge McCullough did not participate in the decision in this case.

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

County of Allegheny Office of	:	
Medical Examiner,	:	
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Petitioner	:	
	:	
v.	:	No. 1340 C.D. 2010
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

**ORDER**

**NOW**, March 17, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

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**RENÉE COHN JUBELIRER, Judge**