IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Reeb Millwork Corporation, Petitioner	:	
v.	:	
Unemployment Compensation Board of Review, Respondent	:	No. 1370 C.D. 2009
	:	Submitted: November 20, 2009

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: January 6, 2010

Reeb Millwork Corporation (Employer) petitions for review of the July 2, 2009 order of the Unemployment Compensation Board of Review (UCBR) reversing the Referee's decision denying benefits to Daniel C. Marcks (Claimant) under Section 402(e) of the Unemployment Compensation Law (Law).[1] The issue in this case is whether there was sufficient evidence to support the UCBR's determination that Claimant was not under the influence of alcohol when he reported to work on the date in question. For the reasons that follow, we affirm the decision of the UCBR.

Claimant was employed as a machine operator for Employer from August of 1981 through December 29, 2008, when he was terminated for reporting to

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

work under the influence of alcohol. On December 29, 2008, both Claimant's supervisor and his manager informed Employer's director of human resources, Richard Dicus (Dicus), that they smelled alcohol on Claimant's breath when they spoke with him. Claimant was sent to Health Works for a breathalyzer test in accordance with company policy. Claimant did not object to the test. The results for the two breath samples, taken at approximately 9:30 a.m., indicated that Claimant had a blood alcohol level of .056 percent and .057 percent. Claimant told Dicus that he had been drinking with friends the previous day for approximately 10 to 11 hours. Employer has a written policy stating that reporting to work under the influence of alcohol is unacceptable behavior and grounds for termination. Claimant was initially suspended, and ultimately terminated for violating Employer's policy.

Claimant filed for unemployment compensation (UC) benefits, which were denied by the Allentown UC Service Center. Claimant filed a timely appeal, and a hearing was held at which Claimant and Dicus, as a witness for Employer, testified. The Referee affirmed the denial of benefits, and Claimant appealed to the UCBR. The UCBR issued an order on July 2, 2009, reversing the decision of the Referee and granting benefits, stating that Employer's policy does not cover the mere consumption of alcohol, and that Employer did not prove that Claimant was under the influence of alcohol. The UCBR based its decision on the fact that Employer did not provide any firsthand testimony establishing that Claimant's ability to perform his job duties was in some way impaired, that Dicus did not smell alcohol on Claimant, and that Claimant's blood alcohol level was under the legal limit of .08 percent for driving in Pennsylvania. Employer appealed to this Court.[2]

[2] "Our scope of review in unemployment compensation cases is limited to determining whether constitutional rights were violated, whether errors of law were committed or whether

Under Section 402(e) of the Law, an employee is not eligible for benefits if "his unemployment is due to his discharge . . . for willful misconduct connected with his work . . . ."

> Willful misconduct has been defined as (1) the wanton and willful disregard of the employer's interest; (2) the deliberate violation of rules; (3) the disregard of standards of behavior which an employer can rightfully expect from his employee; or (4) negligence which manifests culpability, wrongful intent, evil design or intentional and substantial disregard for the employer's interests or the employee's duties and obligations.

Elser v. Unemployment Comp. Bd. of Review, 967 A.2d 1064, 1069 n.7 (Pa. Cmwlth. 2009).

> [A]n employer has the burden of proving that an employee has engaged in willful misconduct. In the case of a work rule violation, the employer must establish the existence of the rule, the reasonableness of the rule and its violation. Furthermore, whether or not an employee's actions rise to the level of 'willful misconduct' is a question of law that is fully reviewable by this Court.

Lindsay v. Unemployment Comp. Bd. of Review, 789 A.2d 385, 389-90 (Pa. Cmwlth. 2001) (citation omitted). There is no question here that Employer has a rule concerning alcohol. It states:

> Bringing narcotics, drugs, intoxicants, and alcohol on Company property, or work place, or consuming them on Company property or work place or reporting for duty under the influence is not allowed unless a medical doctor prescribes use and prior notice has been given to management.

Reproduced Record (R.R.) at 30a. In addition, neither party has challenged the reasonableness of Employer's rule. Therefore, the only remaining question is

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findings of fact are supported by substantial evidence." *Lindsay v. Unemployment Comp. Bd. of Review*, 789 A.2d 385, 389 n.4 (Pa. Cmwlth. 2001).

whether Claimant violated the rule by reporting to duty "under the influence" of alcohol.

It has been established that reporting to work in an intoxicated condition can constitute willful misconduct. *See Lindsay; Kirkpatrick v. Unemployment Comp. Bd. of Review*, 450 A.2d 289 (Pa. Cmwlth. 1982); *Durst Buster Brown v. Unemployment Comp. Bd. of Review*, 424 A.2d 580 (Pa. Cmwlth. 1981); *Klink v. Unemployment Comp. Bd. of Review*, 289 A.2d 494 (Pa. Cmwlth. 1972). However, unless otherwise specifically stated in an employer's work rules, more than mere consumption is required. *See Keay v. Unemployment Comp. Bd. of Review*, 551 A.2d 391 (Pa. Cmwlth. 1988); *Hammond v Unemployment Comp. Bd. of Review*, 465 A.2d 79 (Pa. Cmwlth. 1983).

The UCBR based its decision in this case on the fact that Claimant's blood alcohol content was less than the legal limit of .08 percent for driving under the influence, and that there was not substantial evidence to prove that Claimant's ability to perform his duties was impaired. *See Keay, Hammond*. The UCBR correctly determined that there was not substantial evidence to find that Claimant committed willful misconduct by violating Employer's work rule for reporting to work "under the influence."

We emphasize that although being "under the influence" is more than mere consumption, and blood alcohol content may indeed be a relevant factor in the determination, it is not required that an employer show a blood alcohol content at or above .08 percent in order to establish that an employee violated a work rule prohibiting reporting under the influence of alcohol. We also note that, in *Brunson v. Unemployment Comp. Bd. of Review*, 570 A.2d 1096 (Pa. Cmwlth. 1990), this Court effectively overruled *Keay* to the extent that *Keay* requires that employers prove

impairment in the ability to do one's job. Evidence of alcohol consumption along with evidence of physical impairment, such as inability to perform, slurred speech, and/or glassy eyes, is relevant in showing that an employee was "under the influence." Although relevant, however, proof of impairment in a claimant's ability to do his job is no longer required.

In the present case, while Claimant admitted to drinking the previous day, he did not admit being under the influence on the date in question. R.R. at 20a. He had reported to work and was doing his job when he was asked to report to the director of human resources because his supervisor and his manager reported that he smelled of alcohol. R.R. at 18a. Claimant was then sent for a breathalyzer test, on which he registered a .056 percent and a .057 percent rating. R.R. at 18a, 28a-29a. The only witness Employer presented before the UCBR testified that he did not smell alcohol on Claimant, nor did he notice any other signs of intoxication, such as glassy eyes or slurred speech, when he spoke with Claimant. R.R. at 16a. The results of Claimant's breathalyzer tests alone were not sufficient to prove that he was "under the influence."

For these reasons, the UCBR's order is affirmed.

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JOHNNY J. BUTLER, Judge

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O R D E R

AND NOW, this 6th day of January, 2010, the July 2, 2009 order of the Unemployment Compensation Review Board is affirmed.

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JOHNNY J. BUTLER, Judge