IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Washington Penn Plastic Co., Inc., Petitioner	:	
v.	:	No. 1570 C.D. 2009
Unemployment Compensation Board of Review, Respondent	:	Submitted: December 11, 2009

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: January 15, 2010

Washington Penn Plastic Co., Inc. (Employer) petitions for review of an order of the Unemployment Compensation Board of Review (Board) reversing the Referee's decision and granting Kristopher R. Bockstoce (Claimant) unemployment compensation benefits pursuant to 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) provides in pertinent part:

> An employe shall be ineligible for compensation for any week---
>
> (e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected

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Claimant was employed as a full-time line operator by employer for two and one half years. His last day of work was January 29, 2009.

Claimant filed an internet claim for unemployment compensation benefits on February 4, 2009. By notice of determination mailed March 20, 2009, the Duquesne UC Service Center determined that Claimant was ineligible for benefits pursuant to Section 402(e) of the Law. The Service Center found that Claimant violated Employer's zero tolerance policy without good cause.

Claimant appealed and a hearing before a Referee ensued. Claimant was represented at the hearing by Mark Cummings, President of the United Steel Workers Local 14693 (Union). Claimant testified on his own behalf and presented the testimony of Kevin McFarland, who is employed by Employer as a small arm operator and is also the Union's unit chair person. Employer presented the testimony of: (1) Thomas Camps, Shift Supervisor; (2) Karyn Hilden, Director of Human Resources; (3) Angela Boytek, Production Manager; (4) Joseph Spolnick, Plant Manager; and (5) Jason Megysey, Claimant's former co-worker.

The Referee affirmed the Service Center's determination and Claimant appealed to the Board. The Board made the following findings of fact.

Employer has a zero tolerance policy for threats of violence.[2] Prohibited behavior includes offensive comments condoning or inciting violent

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> with his work, irrespective of whether or not such work is "employment" as defined in the act.

[2] Employer's Zero Tolerance Policy Statement provides, as follows:

> [Employer] is striving to maintain a productive work environment free from the threat of any violence. We are committed to the safety and health of our employees, customers, and visitors.
>
> The threat of violence is defined as: "any comment or behavior that would be interpreted by a reasonable person as indicating the

(Continued....)

events or behavior. Pursuant to the Union contract, violation of the zero tolerance policy could lead to suspension or termination of employment. Claimant was aware of Employer's policy and the Union contract.

On January 29, 2009, Claimant was assigned to work with a relatively new employee, Jason Megysey. At one point, Megysey made a mistake with the machine and Claimant began yelling at Megysey. Claimant stated that Megysey was "f***ing stupid" and did not know "f***ing s***." Claimant told Megysey to "get the h*ll away" and "get the f*** out of here." Profanity on the work floor was common.

> potential of physical violence toward people or property." Some examples of workplace violence are, but not limited to:
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> - physical assault, threat to assault, or stalking an employee or customer,
> - possessing or threatening with a lethal weapon, vandalism or arson,
> - racial epithets or other derogatory remarks associated with hate crimes,
> - bizarre or offensive comments condoning or inciting, violent events or behaviors,
> - harassing phone calls, voice mails, e-mails, faxes or written messages
>
> Any employee who observes or has knowledge of any violations of the Zero Tolerance Policy should immediately contact their Supervisor, Manager, or the Human Resource Department. Any employee in violation of this policy will be subject to discipline, up to and including termination. Any violation of this policy, even a first offense, can result in termination.
>
> All employees are responsible for safety and helping to ensure a workplace free of danger, threatening remarks and/or gestures.

Reproduced Record (R.R.) at 40a.

Megysey called over a supervisor and told him that there was a problem. The supervisor instructed Megysey to go to the production manager's office. Instead of going to the production manager's office, Megysey went to get his coffee, which was near Claimant. Claimant and Megysey began yelling at each other again, until the supervisor came back and ordered Megysey to leave.

Claimant did not threaten Megysey. After speaking to both Claimant and Megysey, Employer issued Claimant a written warning, which was agreed to by Claimant and his Union representative. The plant manager assured Claimant that he would not be terminated.

After reviewing the incident, by letter dated February 2, 2009, Human Resources decided to terminate Claimant's employment for violation of the zero tolerance policy. Megysey was also terminated. No further incidents took place between the written warning and Claimant's termination.

The Board resolved the conflicts in the testimony in favor of Claimant and found the testimony of Claimant and his witness, Kevin McFarland, credible. The Board concluded that Employer established that it has a zero tolerance policy for threats of violence, including offensive comments condoning or inciting violent events or behavior, and that Claimant was aware of the policy. However, the Board further concluded, based on the inconsistent testimony of Megysey that Employer failed to prove that Claimant had violated its zero tolerance policy. The Board determined that at most, Employer proved that Claimant used foul language on January 29, 2009, when he became upset. The Board pointed out, however, that both Claimant and McFarland credibly testified that foul language was common on the work floor. The Board found that foul language does not violate Employer's zero tolerance policy for threats of violence.

The Board also rejected the testimony regarding Claimant's use of derogatory language as not credible and determined that even if Claimant had used derogatory language, it did not lead to his termination from employment. Finally, the Board determined that Employer failed to prove that it followed its own policies by first suspending Claimant and then later changing its mind and terminating Claimant's employment.

Accordingly, the Board reversed the Referee's decision and granted Claimant unemployment compensation benefits. Employer now appeals from the Board's order.

Initially, we note that this Court's review of the Board's decision is set forth in Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704, which provides that the Court shall affirm unless it determines that the adjudication is in violation of the claimant's constitutional rights, that it is not in accordance with law, that provisions relating to practice and procedure of the Board have been violated, or that any necessary findings of fact are not supported by substantial evidence. See Porco v. Unemployment Compensation Board of Review, 828 A.2d 426 (Pa. Cmwlth. 2003). Findings of fact are conclusive upon review provided that the record, taken as a whole, contains substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977). Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. Hercules v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992). The Board is the ultimate fact finder and is, therefore, entitled to make its own determinations as to witness credibility and evidentiary weight. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985).

The burden of proving willful misconduct rests with the employer. Brant v. Unemployment Compensation Board of Review, 477 A.2d 596 (Pa. Cmwlth. 1984). Whether an employee's conduct constituted willful misconduct is a matter of law subject to this Court's review. Miller v. Unemployment Compensation Board of Review, 405 A.2d 1034 (Pa. Cmwlth. 1979).

Willful misconduct has been judicially defined as that misconduct which must evidence the wanton and willful disregard of employer's interest, the deliberate violation of rules, the disregard of standards of behavior which an employer can rightfully expect from his employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional substantial disregard for the employer's interest, or the employee's duties and obligations. Frumento v. Unemployment Compensation Board of Review, 466 Pa. 81, 351 A.2d 631 (1976). In order to prove willful misconduct by showing a violation of employer rules or policies, the employer must prove the existence of the rule or policy and that it was violated. Caterpiller, Inc. v. Unemployment Compensation Board of Review, 654 A.2d 199 (Pa. Cmwlth. 1995); Duquesne Light Company v. Unemployment Compensation Board of Review, 648 A.2d 1318 (Pa. Cmwlth. 1994).

Herein, Employer raises two issues for this Court’s review: (1) Whether the Board’s findings are supported by substantial evidence in the record, and whether, based on the unsupported findings, the Board erred by finding that Claimant did not violate Employer’s zero tolerance policy and did not engage in willful misconduct; and (2) Whether the substantial evidence demonstrates that Claimant’s actions were well beneath the standards of behavior which an employer has a right to expect from an employee.

In support of its appeal, Employer initially argues that the record contains substantial evidence that demonstrates that Claimant violated the zero

tolerance policy; therefore, it met its burden of proving that Claimant committed willful misconduct. Employer contends that the Board's findings are not supported by substantial evidence.[3] Employer argues that the Board inaccurately interpreted the facts and its policy against physical confrontation. Employer contends that the record unequivocally indicates that Claimant intentionally and aggressively verbally threatened another co-worker even if the Human Resources Director was not aware of his derogatory language. Employer contends further that Claimant's use of derogatory language, which Employer learned about after Claimant's termination, supports a finding that Claimant violated its zero tolerance policy. In support of this contention, Employer cites this Court's decision in Primepay v. Unemployment Compensation Board of Review, 962 A.2d 684 (Pa. Cmwlth. 2008), for the principle that an employer may substitute after-discovered misconduct for whatever the "actual reason" was for the employee's separation, so long as the employer proves that the employee concealed the misconduct while employed.

It is irrelevant whether the record contains evidence to support findings other than those made by the fact-finder; the critical inquiry is whether there is evidence to support the findings actually made. Ductmate Industries, Inc., Petitioner v. Unemployment Compensation Board of Review, 949 A.2d 338 (Pa. Cmwlth. 2008) (citing Minicozzi v. Workers' Compensation Appeal Board (Industrial Metal Plating, Inc.), 873 A.2d 25 (Pa. Cmwlth. 2005)). The record in this matter shows that Claimant was informed by letter dated February 2, 2009, that he was terminated for serious violation of the zero tolerance policy. Certified Record (C.R.) at Exhibit 6. The termination letter further stated that Claimant "engaged in a verbal altercation

[3] Employer argues that the Board made several findings which disregard undisputed findings by the Referee. However, it is axiomatic that the Board, not the Referee, is the ultimate

(Continued....)

with another employee which became so volatile that it almost led to a physical altercation between the two of you." Id. The Board determined, based on Megysey's testimony, that Employer did not prove that Claimant violated Employer's zero tolerance policy. In so finding, the Board recognized that Megysey did testify that he felt threatened by Claimant. R.R. at 24a. However, when Megysey was specifically asked on direct examination whether Claimant threatened him, Megysey responded "no." R.R. at 26a. Megysey also responded "no" when asked on direct examination whether it appeared that Claimant was coming to have a fight with him. Id. As such, the Board rejected Megysey's inconsistent testimony as not credible, which was well within the Board's province. The Board determined that Employer, at most, established that foul language was common on the work floor.

As stated previously herein, the Board rejected the testimony of Employer's witnesses and accepted that of Claimant and his witness. Since the Board is entitled to make its own determinations as to witness credibility and evidentiary weight, we cannot disturb those determinations on appeal. Peak. Accordingly, we reject Employer's contention that the Board's findings are not based upon the substantial record evidence.

We also reject Employer's contention, based on Primepay, that it had the right to fire Claimant when it learned after Claimant was terminated, that Claimant had used derogatory language. Primepay involves after discovered criminal conduct that the claimant had concealed. There is no allegation by Employer that it terminated Claimant due to its discovery of criminal conduct on the part of Claimant. In addition, even though Employer's Director of Human

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fact finder in unemployment compensation cases. Peak.

Resources may have been unaware of the use of derogatory language by Claimant, the testimony shows that Claimant allegedly used such language on a regular basis towards co-workers and that other employees also used such language. R.R. at 20a-22a. Thus, there is no evidence of concealment on the part of Claimant.

Next, Employer argues that it had every right to fire Claimant because the record shows that his conduct on January 29, 2009 was deemed the type of behavior that an employer rightfully characterizes as insubordination because Claimant used abusive, profane, and derogatory language. Employer contends further that, notwithstanding its zero tolerance policy, Claimant's intentional and deliberate threatening of a co-worker justifies termination for willful misconduct pursuant to Section 402(e) of the Law as the conduct falls below a standard of conduct that it can rightfully expect of an employee.

As pointed out by the Board and as the record shows, Claimant was terminated for violating Employer's zero tolerance policy by engaging in a potentially volatile verbal altercation with another employee. C.R. at Exhibit 8. Claimant was not terminated for insubordination or for using abusive, profane or derogatory language. The Board specifically rejected Employer's evidence that Claimant had used derogatory language as not credible and found, based on the credible testimony of Claimant's witness, that profanity on the work floor was common.

Moreover, Employer's Director of Human Resources did not testify that Claimant was terminated for using profane or derogatory language. The Director testified that she made the decision to terminate Claimant based on the portion of the zero tolerance policy which defines a threat of violence as "any comment or behavior that would be interpreted by a reasonable person as indicating the potential of physical violence toward people or property." R.R. at 17a. Again, the

Board, however, found that Claimant did not violate Employer's policy. The Director testified further that she did not know of Claimant's alleged use of derogatory language until after Claimant had been terminated. Id. at 19a.

Thus, we reject Employer's contention that Claimant's use of abusive, profane, and derogatory language justified its termination of Claimant for willful misconduct. We further reject Employer's contention that even if Claimant did not violate its zero tolerance policy, his conduct of threatening a co-worker rose to the level of willful misconduct under Section 402(e) of the Law. The Board specifically rejected Megysey's testimony as not credible that he was threatened by Claimant.

Finally, Employer argues that the Board erred by concluding that Employer could not change its discipline under its zero tolerance policy from a suspension to a termination. Employer contends that the initial written warning issued to Claimant was not a final discipline and that as a matter of practice, the Director of Human Resources has the final say on all discipline. Employer contends further that Claimant was informed that the initial discipline would be further reviewed by Human Resources; therefore, Employer was clearly adhering to its policy that no discipline is considered formal or final until issued by way of a letter from Human Resources. Employer contends further that it presented undisputed evidence that it consistently adhered to this policy.

On this point, the Board rejected Employer's testimony that it can change discipline upon further review as not credible. Therefore, whether the Employer presented undisputed testimony that it consistently adhered to a policy that no discipline is considered final until reviewed further by Human Resources, is

of no moment.[4] Accordingly, we reject Employer's contention that the Board erred by concluding that Employer could not change its discipline upon further review as credibility determinations are well within the Board's function. Peak.

The Board's order is affirmed.

JAMES R. KELLEY, Senior Judge

[4] Ductmate Industries, Inc..

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O R D E R

AND NOW, this 15th day of January, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

JAMES R. KELLEY, Senior Judge