

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph Lambert, :
Petitioner :
 :
v. : No. 1753 C.D. 2010
 : Submitted: April 1, 2011
Unemployment Compensation :
Board of Review, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: May 3, 2011

Joseph Lambert (Claimant) has filed a *pro se* petition for review from an order of the Unemployment Compensation Board of Review (Board) affirming the decision of the Referee denying him unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law)¹ for

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937), 2897, *as amended*, 43 P.S. §802. That section provides, in relevant 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 with his work, irrespective of whether or not such work is “employment” as defined in this act.

(Footnote continued on next page...)

willful misconduct because he failed to follow a directive by his Employer, Idearc Media Sales East/Super Media Sales, to work overtime hours.

Claimant worked as a media consultant for Employer, an advertising company, from July 6, 2009, through his last day, April 1, 2010. Because Claimant did not meet his sales goals, Employer directed him to work an additional three hours of overtime beyond his normal scheduled work hours. When Claimant refused because of other appointments, he was discharged for insubordination for refusing to follow a management directive.

Claimant filed for unemployment compensation benefits with the Department of Labor and Industry, Office of UC Benefits, which granted him benefits because Employer did not sustain its burden of providing information to show that Claimant refused to work overtime. Employer appealed that decision, and a hearing was held before the Referee.

Anthony J. Giampietro (Giampietro), Employer's Sales Manager and Claimant's immediate supervisor, testified on behalf of Employer. He stated that

(continued...)

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. *Sheetz, Inc. v. Unemployment Compensation Board of Review*, 578 A.2d 621 (Pa. Cmwlth. 1990).

he sent Claimant, along with six other people on his team, a “call initiative” to work additional after-hours to make sales calls because they were all struggling with sales numbers. Claimant was emailed on March 23, 2010, and told to come in on March 25, 2010, to work from 5 p.m. to 8 p.m. after his normal work day, which was usually 8 a.m. to 5 p.m. Giampietro stated that on March 25, 2010, at 3:30 p.m., Claimant told him that he would not be able to work the required hours due to a “doctor’s” appointment. When Claimant did not produce a doctor’s note that was requested, Giampietro withdrew that request and sent Claimant home. Giampietro stated that Claimant still had the obligation to make up the three overtime hours and gave him the option of working on March 31st or April 1st. He also gave Claimant the option of splitting up the hours and working 1.5 hours each day from 5:00 p.m. to 6:30 p.m. or picking one of the days and working the full three hours from 5:00 p.m. to 8:00 p.m.

Giampietro testified that he specified in his March 29, 2010 email to Claimant that he was required to let him know which option he chose by March 31, 2010, at 4:00 p.m., and his failure to follow his directive would be considered insubordination and he would be subject to severe disciplinary action. Claimant sent him an email on March 31, 2010, at 11:45 a.m. indicating that he could not work on either of those dates because he had “appointments” scheduled for both of those evenings, but he would be happy to make up the calls during the day if necessary. Claimant did not tell him that the appointments were to see a doctor. As a result, Giampietro stated that he terminated Claimant on April 1, 2010, and after Claimant was terminated, Claimant then offered to work on the evening of

April 1, 2010, but it was too late because he had already been terminated due to insubordination.

Claimant testified that he had not met his sales goals as of March 25, 2010, but did not think the overtime request was reasonable. However, he had an appointment with his acupuncturist on March 25, 2010. When he was told he still had to make up the three hours either on March 31, 2010, or April 1, 2010, Claimant stated that he told Giampietro that he was unable to work those days because he had doctors' appointments with his acupuncturist and chiropractor. Claimant admitted that he did not have any documentation to admit as evidence to prove that he had these appointments because he did not think his health would be a relevant factor at the hearing. Claimant also admitted that he did not think that he had to indicate on every email that he specifically had a doctor's appointment. He also stated that had he not had the appointments on March 31st and April 1st, he would have worked the overtime.

Concluding that Giampietro was more persuasive than Claimant, the Referee found Employer's directive a reasonable request and found Giampietro credible that Claimant did not provide any explanation as to why he could not work the overtime hours other than stating he had "appointments" on March 31, 2010, or April 1, 2010. Because the Referee did not find Claimant credible that he informed Giampietro that he had two doctors' appointments on the days in question, the Referee reversed the decision of the Office of UC Benefits, determined that Claimant's conduct amounted to insubordination and that he failed to provide a necessitous and compelling reason for his insubordination, and denied

him benefits due to willful misconduct. Claimant filed a petition for reconsideration which was denied, and this appeal by Claimant followed.²

Claimant contends that the Board erred when it determined that his behavior constituted willful misconduct. He specifies that he never exhibited a wanton and willful disregard of Employer's interests because he cited doctors' appointments as reasons for missing the required overtime hours, and he offered to work prior to the deadline set by Employer.³

Claimant fails to acknowledge that he never informed Employer that he was unable to work overtime because he had previously scheduled *doctors'* appointments on March 25, 2010, and March 31, 2010. The email that was offered

² Our scope of review of the Board's decision is limited to determining whether an error of law was committed, constitutional rights were violated or findings of fact were supported by substantial evidence. *Frazier v. Unemployment Compensation Board of Review*, 833 A.2d 1181 (Pa. Cmwlth. 2003). We note that this Court issued an order dated February 23, 2011, allowing Claimant to supplement the record with "page 3 of 7" of a series of emails dated March 25, 2010, but denying Claimant's request to supplement the record with communications from Philadelphia Community Acupuncture dated May 24, 2010, and June 2, 2010, which were not introduced at the Referee's hearing.

³ Claimant also argues that 1) he never deliberately violated any work rule because he was never presented with any rules; and 2) he never acted in a manner disregarding the standards of behavior an employer had the right to expect. As to the first argument, while no testimony was elicited regarding work rule policies, Claimant was responsible for following reasonable directives from his Employer. He also disregarded Employer's interests when he failed to follow the directive which was to aide in Employer's efforts to increase sales. Similarly, Claimant disregarded the standards of behavior his Employer had the right to expect from an employee when he refused to work the overtime hours. Although Claimant argues that the circumstances involved his need to seek treatment for an illness he suffered as a veteran of the United States Navy, he failed to inform Employer that he was attending medical appointments.

into evidence dated March 31, 2010, from Claimant to Giampietro states the following:

As I mentioned during this conversation, I am unable to work during this time on Wednesday and Thursday, I have appointments scheduled in the evenings. I would be more than willing to make extra calls during the day, if necessary, but I will not be able to make it today or tomorrow.

Nowhere in this email is there any mention of any doctors' appointments. Moreover, Claimant testified that he did not think he had to use the word "doctor" every time he sent Employer an email regarding an appointment, even if the appointment might have been for another reason. "If I said it once, then anytime after that I would think that that would be sufficient to say these appointments mean doctor's appointments." (May 19, 2010 Notes of Testimony at 41.) He also did not provide any evidence of doctors' appointments scheduled for those two dates.⁴ While Claimant wants us to believe that Employer had an understanding that *all* appointments he had were *doctors'* appointments, including the appointments on March 31, 2010, and April 1, 2010, the Board did not find Claimant credible. Because the Board is the ultimate factfinder and determiner of credibility in unemployment cases, *McCarthy v. Unemployment Compensation Board of Review*, 829 A.2d 1266 (Pa. Cmwlth. 2003), we will not disturb that determination on appeal. Consequently, because Claimant clearly only told his supervisor that he had "appointments" and never indicated that they were doctors'

⁴ It is questionable whether an acupuncturist is even a doctor. At the hearing, Claimant could not provide the last name of the individual who was his acupuncturist. He also provided no name for his chiropractor.

appointments, the Board properly determined that his failure to work the overtime hours amounted to insubordination and willful misconduct.

As for offering to work the overtime hours on April 1, 2010, Claimant only offered to work them after the time for letting Employer know which date or dates he would work had expired on March 31, 2010, at 4:00 p.m. The testimony at the hearing from Giampietro indicated that he met with Claimant and Claimant's shop steward on April 1, 2010. At the start of the meeting, Claimant was terminated. After Claimant was terminated, the shop steward then asked if Claimant could work the three hours of overtime on April 1, 2010, from 5:00 p.m. to 8:00 p.m., but Employer declined that request because the deadline had passed for informing Employer as to when Claimant would work the overtime. The disregard for Employer's interests had already taken place the previous day. Because Claimant's conduct had already constituted willful misconduct, his offer to work the overtime after the fact did not remediate the willful misconduct.

Accordingly, the order of the Board is affirmed.

DAN PELLEGRINI, JUDGE

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ORDER

AND NOW, this 3rd day of May, 2011, the order of the Unemployment Compensation Board of Review, dated July 27, 2010, at No. B-503501, is affirmed.

DAN PELLEGRINI, JUDGE