

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Reading, :
 :
 Petitioner :
 :
 v. : No. 182 C.D. 2010
 :
 Unemployment Compensation : Submitted: July 2, 2010
 Board of Review, :
 :
 Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: August 12, 2010

The City of Reading (Employer) petitions for review of an order of the Unemployment Compensation Board of Review (Board) granting Mark S. Groff (Claimant) unemployment compensation benefits pursuant to Sections 3 and 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. §§ 752; 802(e). Section 3 of the Law, 43 P.S. §752, provides the declared public policy of the Commonwealth that a claimant can only receive benefits if he is unemployed through no fault of his own. Specifically, Section 3 states as follows:

Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of the Commonwealth. Involuntary unemployment and its resulting burden of indigency falls with crushing force upon the unemployed worker, and ultimately upon the Commonwealth and its political subdivisions in the form of poor relief assistance. Security against

(Continued....)

Claimant was last employed as full-time police officer by Employer from January 17, 2005, until his last day of work on June 16, 2009. Claimant applied via the internet for unemployment compensation benefits and by determination mailed July 16, 2009, the Allentown UC Service Center (Service Center) awarded Claimant benefits pursuant to Section 402(e) of the Law. Employer appealed and a hearing before a Referee ensued at which both Claimant and Employer appeared. Claimant, *pro se*, testified on his own behalf. Employer presented the testimony of three fact witnesses: (1) William Heim, Chief of Police; (2) Stephen Powell, Lieutenant; and (3) Scott Weidner, Lieutenant.

By decision mailed September 29, 2009, the Referee reversed the Service Center's determination and denied Claimant benefits pursuant to Section

unemployment and the spread of indigency can best be provided by the systematic setting aside of financial reserves to be used as compensation for loss of wages by employes during periods when they become unemployed through no fault of their own. The principle of the accumulation of financial reserves, the sharing of risks, and the payment of compensation with respect to unemployment meets the need of protection against the hazards of unemployment and indigency. The Legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this Commonwealth require the exercise of the police powers of the Commonwealth in the enactment of this act for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

Section 402(e) of the Law, 43 P.S. §802(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 with his work, irrespective of whether or not such work is "employment" as defined in the act.

402(e) of the Law. Claimant appealed to the Board, which made the following findings of fact.

Employer has a Standard of Conduct Disciplinary System and Schedule Policy (Policy) which includes a disciplinary process for dealing with each infraction of the policy. Claimant acknowledged receiving the Policy.

Included under the conduct section of the Policy are three categories: (1) Violation of Rules; (2) Unbecoming Conduct; and (3) Associations. Each of these categories carry distinct penalties for first, second and third violations within a four year reckoning period.

The Violation of Rules section of the Policy states:

Officers shall neither commit any acts nor omit acts which constitute a violation of the rules, regulations, directives, orders or policies of the Department.

The Unbecoming Conduct section of the Policy states:

Officers shall conduct themselves at all times, both on and off duty, in such a manner as to reflect favorable on the Department. Conduct unbecoming an officer shall include that which tends to bring the Department into disrepute or bring discredit upon the Officer or the Department and which affects the efficiency of the Department or the Officer.

The Associations section of the Policy states:

Officers shall neither associate with, be employed by, nor conduct business with persons who they know, or should know, are racketeers, sexual offenders, gamblers, suspected felons, persons under criminal investigation or indictment, or who have a reputation in the community for present involvement in felonious or criminal behavior, except as necessary to the performance of official duties or where unavoidable because that individual is a relative of the officer.

Claimant owns a motorcycle and belongs to the Leathernecks, a motorcycle club comprised of Marine Corp veterans. A motorcycle gang known as the Pagans Motorcycle Club (Pagans) is an organization with a chapter in Reading, Pennsylvania. The Pagans is a recognized criminal organization prone to intimidate and commit violence. Employer believed that Claimant was an “associate” of the Pagans. Claimant only had contact with the Pagans because members of the Pagans had assaulted a member of Claimant’s motorcycle club, and he wanted to prevent further injuries to the members of his motorcycle club.

Employer shares sensitive law enforcement information with its officers, which includes information regarding criminals and ongoing operations to arrest. Claimant did not reveal any intelligence or security of Employer to the Pagans. Employer testified that it had no proof that Claimant provided the Pagans with any information regarding the intelligence or security of Employer.

Employer based its decision that Claimant was an “associate” of the Pagans and that his behavior was unbecoming due to three incidents involving Claimant. The first incident occurred on March 17, 2009, when Claimant and another trooper were off-duty and socializing at a local bar. Claimant drank beer at the local bar during a St. Patrick’s Day celebration. Claimant could not operate his motorcycle because it needed to be “jumped” and because he had been drinking. Claimant did not want to leave his motorcycle behind because it was worth \$20,000. Claimant tried to contact his friends to retrieve his motorcycle.

Claimant was not able to contact anyone who could help him. Claimant’s wife called the president of the Pagans who was a childhood friend of hers and asked him if he could return the motorcycle to Claimant’s home. The president of the Pagans was Claimant’s “last resort” to return the motorcycle to his home. The president of the Pagans has a felony record.

The second incident occurred on April 15, 2009, when Employer's Vice Unit posted surveillance at the Gargoyle Lounge in the 300 block of North 8th Street in the City of Reading. A local motorcycle gang was hosting an event for motorcycle riders at the location. The Pagans were not invited to the event; however, members of the Pagans attended the event.

Employer's Vice Unit observed Claimant arrive at the Gargoyle Lounge and greet the president of the Pagans with a handshake and hug. Claimant and the president had a conversation lasting approximately ten (10) minutes. The president of the Pagans informed Claimant that members of the Hell's Angels motorcycle gang were in the area and had assaulted one of the Pagan's members. Claimant reported the conversation to Employer.

The third incident occurred when Claimant was observed riding his motorcycle side-by-side with a member of the Pagans. Employer believed that Claimant had been kidnapped by the Pagans. However, Claimant was not kidnapped by the Pagans; members of the Pagans merely wanted to talk to Claimant.

On June 10, 2009, Claimant was informed of alleged violations of Employer's Policy. On June 16, 2009, Claimant attended a pre-disciplinary conference. Upon recommendation of Employer's chief of police, Claimant was terminated for having an alleged association with the Pagans and for engaging in conduct that was unbecoming an officer.

Based on the foregoing findings, the Board concluded that while the Referee ruled under Section 402(e), it was more appropriate to rule under both Sections 402(e) and 3 of the Law. Upon review, the Board concluded that it could not determine that any contact that Claimant had with the Pagans constituted an association with the Pagans. The Board determined that the evidence of record established that after 2008, Claimant had three incidental contacts with members of

the Pagans, including contact with the president of the Pagans. The Board concluded that Claimant credibly testified that he only initiated contact with the Pagans because he wanted to prevent further injuries to his motorcycle club, the Leathernecks. Therefore, the Board concluded that Claimant's contacts with the Pagans were minimal at best and the Board could not find that Claimant had violated any of Employer's policies. The Board concluded further that Employer failed to establish that the alleged violations allowed Employer to terminate Claimant under its progressive disciplinary policy.

Finally, the Board concluded that the evidence of record did not establish that those incidental contacts had any detrimental effect on the operation of the police force of Employer or that Claimant's behavior affected his ability to perform his job duties, or that his incidental contacts with the Pagans diminished his status or reputation. Accordingly, the Board determined that Claimant was not ineligible for benefits pursuant to Sections 402(e) and 3 of the Law. This appeal followed.²

Herein, Employer raises the following issues for our review: (1) whether Claimant committed willful misconduct by failing to obey Employer's Policy when he associated with members of the Pagans and acted in a manner unbecoming of an officer, and by so doing, disregarded Employer's interest and the standards of behavior for which an employer can expect from an employee; and (2) whether Claimant's actions in associating with members of the Pagans is

² 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).

unacceptable to public standards of behavior and whether this behavior directly affects his ability to perform his job.

The Board determined that Claimant was not ineligible for benefits under Section 402(e) and Section 3 of the Law. Each provision provides that an employee's misconduct may render him ineligible for benefits; however, the employer bears the burden of establishing the grounds for ineligibility. Navickas v. Unemployment Compensation Review Board, 567 Pa. 298, 303, 787 A.2d 284, 288 (2001).

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. Caterpillar, 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).

Section 3 of the Law does not use the term "willful misconduct;" however, it limits eligibility for benefits to unemployment caused by "no fault" of the claimant. The distinction between Section 402(e) and Section 3 of the Law has been explained by our Supreme Court, as follows:

Section 402(e) is used to disqualify claimant for work-related misconduct. Section 3 is used to disqualify claimants for non-work-related misconduct which is

inconsistent with acceptable standards of behavior and which directly affects the claimant's ability to perform his assigned duties.

Burger v. Unemployment Compensation Board of Review, 569 Pa. 139, 144, 801 A.2d 487, 491 (2002). It further noted that:

Off-duty misconduct will not support a finding of willful misconduct under [Section] 402(e) unless it extends to performance on the job; in such case, the misconduct becomes work-related. For example, had Claimant appeared at work under the influence of marijuana ingested off-duty, [Section] 402(e) would apply. . . . Behavior that may be unacceptable to an employer does not necessarily equate to [Section] 402(e) willful misconduct.

Id. at 144-45, 801 A.2d at 491 (citation omitted). Where an employer seeks to have benefits denied under Section 3 of the Law, the employer bears the burden of proving that the claimant's conduct is unacceptable to public standards of behavior and that the unacceptable behavior directly affects the claimant's ability to perform his or her duties. Phoebus v. Unemployment Compensation Board of Review, 573 A.2d 649 (Pa. Cmwlth. 1990).

Herein, Employer contends that Claimant's conduct was directly related to his work and constituted willful misconduct pursuant to Section 402(e) of the Law. Employer argues that Claimant committed willful misconduct when he blatantly ignored Employer's Policy and associated with the Pagans.

Employer contends that Claimant was aware of its Policy and had acknowledged receipt of the same. Employer argues that in finding that Claimant's conduct in violating Employer's Policy was not willful misconduct, the Board failed to consider all of the circumstances. Employer contends that the Board's reasoning is problematic for three reasons. First, since the Pagans is not a

legal organization but actually part of organized crime, all of Claimant's associations, contacts, etc. with members of the Pagans were inappropriate due to Claimant's employment as a police officer. Second, because of the nature of the associations, Claimant's behavior was more than incidental or minimal. Third, Claimant's reasoning for associating with the Pagans is unbelievable because, as a police officer, Claimant should not have to befriend a gang in order to assure peace on the streets.

Employer argues further that Claimant's behavior was a wanton or willful disregard of Employer's interest and a disregard of the standards of behavior which Employer has a right to expect of an employee. Employer contends that its function is to protect and serve and its function cannot be accomplished if its police officers permit members of a criminal gang to intimidate them. As such, Employer argues that the Board should have denied Claimant unemployment benefits pursuant to Section 402(e) of the Law.

Finally, Employer contends that the Board erred in considering this case under Section 3. Employer points out that Claimant was terminated for violating a work rule of which he was aware, not for off-duty conduct unrelated to his employment. In the alternative, Employer argues that Claimant's associations with members of the Pagans were unacceptable to public standards of behavior and directly affected his ability to perform his job. Claimant's contacts with the Pagans had a detrimental effect on the operation of the police force and diminished Claimant's status or reputation as a police officer. Employer argues that other officers were or would be concerned for their safety because of not knowing where Claimant's allegiance would lie or whether confidential information or intelligence was shared with the Pagans. Therefore, Employer contends that the Board should have denied Claimant benefits pursuant to Section 3 of the Law.

Upon review, we believe that the Board properly determined that Claimant was not ineligible for benefits pursuant to either Section 402(e) or Section 3 of the Law. With respect to Employer's argument that Claimant violated a work rule, we point out that the Board found that Claimant did not violate Employer's Policy. The Board determined that Claimant's contacts with the Pagans did not constitute an "association."

Based on the evidence presented, the Board found that any contact that Claimant had with the Pagans was incidental. The Board stated that given Claimant's contacts with the Pagans, including its president, were minimal at best, it could not find that Claimant violated any of Employer's policies. The Board accepted Claimant's testimony as credible that he only initiated contact with the Pagans because he wanted to prevent further injuries to members of his motorcycle club. Despite Employer's assertions that Claimant's testimony was unbelievable, it is axiomatic that 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). We simply cannot disturb the Board's credibility findings. Moreover, 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., 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)). Herein, Claimant's credible testimony supports the Board's findings that Claimant did not violate Employer's policy.

Moreover, the Board found that Employer failed to establish that the alleged violations of its Policy by Claimant permitted Employer to terminate

Claimant under its progressive disciplinary policy.³ It is well established that an employee's conduct cannot be considered willful misconduct for unemployment compensation purposes when the employer has not adhered to its own progressive disciplinary system in discharging the employee. Looney v. Unemployment Compensation Board of Review, 529 A.2d 612 (Pa. Cmwlth. 1987).

With regard to Section 3 of the Law, the Board found that the evidence did not establish that the incidental contacts had any detrimental effect on the operation of Employer's police force or diminished Claimant's status or reputation or that Claimant's behavior affected his ability to perform his job duties. The Board specifically found that Claimant did not reveal any intelligence or security of Employer to the Pagans and Employer testified that it had no proof to the contrary. As such, Employer failed to meet its burden pursuant to Section 3 of the Act.

Accordingly, the Board's order is affirmed.

JAMES R. KELLEY, Senior Judge

President Judge Leadbetter dissents.

³ The progressive discipline for violating the Association section of Employer's policy is 5-10 days suspension for 1st offense, 11-30 days for 2nd offense, and termination for the 3rd offense. Reproduced Record (R.R.) at 75. With respect to the Unbecoming Conduct section of the Policy, the progressive discipline provides for a written reprimand-termination for a 1st offense, 3 days suspension-termination for 2nd offense, and 11 days suspension-termination for the 3rd offense. Id. at 74. The Violation of Rules section of the Policy provides for a written reprimand-2 days suspension for a 1st offense, a 3-10 day suspension for a 2nd offense and 11 days suspension-termination for a 3rd offense. Id.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Reading,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 182 C.D. 2010
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 12th day of August, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

JAMES R. KELLEY, Senior Judge