IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Budget Maintenance, Inc., Petitioner	:	
v.	:	No. 1873 C.D. 2009
	:	Submitted: January 29, 2010
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: March 22, 2010

Budget Maintenance, Inc. (Employer) petitions for review of the September 3, 2009, order of the Unemployment Compensation Board of Review (Board), affirming the decision of a referee that John T. Madiro (Claimant) was not ineligible for 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) of the Law provides that an employee shall be ineligible for compensation for any week in which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work. The employer bears the burden to prove that a discharged employee was guilty of willful misconduct. Gillins v. Unemployment Compensation Board of Review, 534 Pa. 590, 633 A.2d 1150 (1993). Although the Law does not define willful misconduct, it has been construed as (1) the wanton or willful disregard of the employer's interests; (2) the deliberate violation of the employer's rules/directives; (3) the disregard of the standards of behavior which an employer can rightfully

(Footnote continued on next page…)

Claimant worked for Employer as a skilled laborer from June 17, 2008, until April 24, 2009. Employer's company policy states that an employee who removes customer property from a jobsite without permission will be immediately terminated. (Finding of Fact No. 2.) Claimant was aware of this policy. (Finding of Fact No. 3.) In the four months preceding his separation, Claimant worked at a site owned by Johnson & Johnson, one of Employer's customers. (Finding of Fact No. 4.) Claimant's job duties included gathering and sorting equipment to be stored, disposed of, and redeployed within a building that was being closed down. (Finding of Fact No. 5.)

Claimant found several buckets of gas valves that had been placed in the trash. (Finding of Fact No. 6.) Claimant placed the gas valves in his car after allegedly receiving the permission of the facility manager at the site. (Findings of Fact Nos. 7-8.) Claimant stored the gas valves in a shed at his home for a week before taking the same to a local recycling center. (Findings of Fact Nos. 9-10.) After receiving cash in the amount of $105.00 for the gas valves and a washer and dryer, Claimant attempted to provide the cash to a senior financial advisor at Johnson & Johnson. (Findings of Fact Nos. 11-12.) This advisor requested a check, but the local recycling center only paid in cash. (Findings of Fact Nos. 13-14.)

(continued…)

expect from an employee; and (4) negligence demonstrating an intentional disregard of the employer's interest or the employee's duties and obligations to the employer. Kelly v. Unemployment Compensation Board of Review, 747 A.2d 436 (Pa. Cmwlth. 2000). Whether or not an employee's actions amount to willful misconduct is a question of law subject to review by this Court. Noland v. Unemployment Compensation Board of Review, 425 A.2d 1203 (Pa. Cmwlth. 1981).

After speaking with his immediate supervisor, Claimant provided Employer with a letter and personal check in the amount of $105.00 to be forwarded to Johnson & Johnson. (Findings of Fact Nos. 15-16.) Employer apparently refused to accept the check. Claimant later met with Employer's owner and attempted to present the check to him, but the owner advised him to keep it. (Findings of Fact Nos. 17-18.) Claimant subsequently was discharged for violating company policy by removing customer property from the worksite. (Finding of Fact No. 19.)

Claimant filed a claim for benefits with the Allentown Unemployment Compensation Service Center (Service Center), which determined that Claimant was not ineligible for benefits under section 402(e) of the Law. Employer appealed, and the case was assigned to the referee for a hearing.

Claimant testified at the June 16, 2009, hearing concerning the facts recited above. While Claimant acknowledged that he removed gas valves from a Johnson & Johnson facility, he indicated that Todd Yeager, a facility manager at Johnson & Johnson, advised him that the valves could not be reused and that he should simply "[s]crap them." (R.R. at 47a.) Claimant stated that, after taking the items to a local recycling center, he immediately attempted to turn over a receipt and $105.00 cash to a financial manager at Johnson & Johnson. (R.R. at 49a.) Claimant testified that he later learned that he was only supposed to scrap through an authorized vendor. Id. Claimant said he subsequently attempted to provide Employer with a personal check for $105.00, but Employer rejected the same. (R.R. at 52a-53a.)

Steven McFadden, a project manager for Employer, reiterated that Claimant was discharged on April 24, 2009, for violating Employer's policy prohibiting removal of customer property from a job site without permission.

McFadden also testified that Employer lost its account with Johnson & Johnson as a result of this incident.

The referee affirmed the Service Center's determination that Claimant was not ineligible for benefits under section 402(e) of the Law. The referee noted Claimant's credible testimony that he had received permission from the facility manager at Johnson & Johnson to scrap the gas valves and that he offered the cash to Johnson & Johnson. Hence, the referee concluded that Claimant's actions were not in violation of Employer's company policy and did not justify a denial of benefits under Section 402(e). Employer appealed to the Board, which affirmed the referee's decision and adopted and incorporated the referee's findings and conclusions. Employer then filed a petition for review with this Court.

On appeal,[2] Employer argues that the Board's Findings of Fact Nos. 8, 13, and 14 are not supported by substantial evidence.[3] Specifically, Employer

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[2] Our scope of review is limited to determining whether constitutional rights were violated, whether an error of law was committed or whether necessary findings of fact are supported by substantial evidence. Shrum v. Unemployment Compensation Board of Review, 690 A.2d 796 (Pa. Cmwlth.), appeal denied, 548 Pa. 663, 698 A.2d 69 (1997).

[3] These findings state as follows:

> 8. The claimant was told by the facility manager at the site that he could scrap these items, and placed the two buckets of gas valves in the back of his car.
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> …
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> 13. The senior financial advisor asked the claimant to provide a check for the amount of cash he was paid.
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> 14. Beartown Recycling does not provide checks for recycled items.

(R.R. at 89a-90a.)

argues that these findings are based solely on Claimant's uncorroborated hearsay testimony. We disagree.

Employer relies on what is commonly known as the "Walker rule," which provides, in part, that "[h]earsay evidence, *admitted without objection*, will be given its natural probative effect and may support a finding of the Board, *if it is corroborated by any competent evidence in the record*, but a finding of fact based *solely* on hearsay will not stand." Walker v. Unemployment Compensation Board of Review, 367 A.2d 366, 370 (Pa. Cmwlth. 1976) (citations omitted) (emphasis in original).

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Northern Health Facilities v. Unemployment Compensation Board of Review, 663 A.2d 276 (Pa. Cmwlth.), appeal denied, 543 Pa. 698, 670 A.2d 145 (1995). However, "[t]he hearsay rule has no application where the question is whether certain things were said or written by a third person and not whether they are true." Northern Health Facilities, 663 A.2d at 279 (citing Commonwealth v. Jacobs, 445 Pa. 364, 367, 284 A.2d 717, 719 (1971), cert. denied, 409 U.S. 856 (1972)). Statements offered to explain a course of conduct also are not hearsay because they are "not being offered for the truth of [their] content, but to show that this is what the witness understood, what was in his mind where he acted as he did."[4] Girard Giant Eagle v. Unemployment Compensation Board of Review, 659 A.2d 60, 62 (Pa. Cmwlth. 1995).

Here, Claimant testified that a supervisor at Johnson & Johnson advised him to scrap the gas valves and that he took the valves to a local recycling

[4] This situation is often referred to as a witness' state of mind and the witness "can be cross-examined at length to test the credibility of whether this was his state of mind." Girard Giant Eagle, 659 A.2d at 62.

center believing he had permission to do so. Claimant further testified that when he tried to return the cash he received for the valves to a financial manager at Johnson & Johnson, he was asked to provide a check. Claimant explained that he attempted to provide Employer with a personal check because the local recycling center informed him they did not issue checks. In each of these instances, Claimant's testimony was offered to explain his course of conduct/state of mind and, therefore, was not hearsay. Moreover, McFadden, Employer's representative, had ample opportunity to question Claimant regarding his actions. The Board found Claimant's testimony to be credible, and that testimony constitutes substantial evidence to support the Board's Findings of Fact Nos. 8, 13, and 14.

Next, Employer argues that the Board erred in failing to conclude that Employer presented sufficient evidence establishing that Claimant engaged in willful misconduct. Again, we disagree.

Willful misconduct has been described as a "deliberate violation of an employer's rules." Moran v. Unemployment Compensation Board of Review, 973 A.2d 1024, 1029 (Pa. Cmwlth. 2009). Additionally, willful misconduct has been described as "an intentional, substantial disregard of an employer's interests or a conscious indifference to a duty owed to an employer." Simonds v. Unemployment Compensation Board of Review, 535 A.2d 742, 744 (Pa. Cmwlth. 1988) (citation omitted). Furthermore, where the claimant is discharged for a work rule violation**,** the employer has the burden to show that the claimant was aware of the work rule and that the claimant violated the rule. Bishop Carroll High School v. Unemployment Compensation Board of Review, 557 A.2d 1141 (Pa. Cmwlth. 1989), appeal denied, 525 Pa. 604, 575 A.2d 569 (1990). Once the employer establishes those elements, the burden shifts to the claimant to show that he had good cause to violate the rule or that the rule was unreasonable. Id.

Claimant does not dispute that he was aware of Employer's company policy prohibiting removal of customer property from a jobsite without permission. However, the Board accepted Claimant's testimony that he believed he had permission from a supervisor at Johnson & Johnson to personally scrap the gas valves. As the referee noted, Employer offered no competent testimony or evidence to contradict Claimant's belief. (R.R. at 90a.) Moreover, the Board found that Claimant attempted to return the cash and two receipts received from the scrapped gas valves to the financial manager at Johnson & Johnson, but was asked to provide a check instead. Indeed, Claimant testified that he was simply following his normal protocol for scrapping items, i.e., Claimant testified that after scrapping items with an online vendor or another third-party vendor, he would provide the financial manager with a check from the vendor. (R.R. at 46a, 49a.)

The Board's findings support its conclusion that Claimant's actions were not a willful or deliberate violation of Employer's policy and/or were not indicative of an intentional, substantial disregard or a conscious indifference of the duty Claimant owed to Employer.

Accordingly, we affirm.

PATRICIA A. McCULLOUGH, Judge

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ORDER

AND NOW, this 22nd day of March, 2010, the order of the Unemployment Compensation Board of Review, dated September 3, 2009, is hereby affirmed.

PATRICIA A. McCULLOUGH, Judge