IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Erik Finnegan, Petitioner	:	
v.	:	No. 2051 C.D. 2009
	:	Submitted: February 26, 2010
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** April 23, 2010

Erik Finnegan (Claimant) petitions *pro se* for review of an order of the Unemployment Compensation Board of Review (Board), which affirmed a Referee's decision that Claimant was ineligible for benefits under Section 402(e) of the Unemployment Compensation Law (Law)[1] for reasons of willful misconduct. For the reasons set forth below, we affirm.

Claimant applied for unemployment compensation benefits after being discharged from his employment with Alexander's Fine Food and Spirits

[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, in pertinent part, that an employee shall be ineligible for compensation for any week in which unemployment is due to a discharge or temporary suspension from work for willful misconduct connected with work.

(Employer). The Altoona UC Service Center (Service Center) issued a determination, finding Claimant was not ineligible for benefits under Section 402(e) of the Law. Employer appealed the Service Center's determination, and a hearing was held before the Referee. Following the hearing, the Referee issued a decision, in which she made the following relevant findings:

> 1. The claimant was last employed with Alexander's Fine Food (Kitchen Bar) as a full-time Server at a pay rate of $2.83 per hour plus tips. The claimant was employed from April 15, 2008 and his last day of work was May 24, 2009.
>
> 2. The employer maintains a policy that everything has a price, you don't give anything without charging, and only a Manager or Owner can "give away" food.
>
> 3. The employer gave the claimant a verbal warning that he was not to give a dessert for free.
>
> 4. The claimant was or should have been aware of the employer's policy.
>
> 5. The employer became aware that the claimant gave dessert to a table and did not charge the table for the dessert.
>
> 6. The employer reviewed the claimant's checks and then looked at video surveillance after he saw the claimant give a dessert to the table but not charge the table for dessert.
>
> 7. The employer discharged the claimant for giving three desserts away without charging the tables for the desserts.
>
> 8. The claimant violated the employer's policy.

(Certified Record (C.R.), Item no. 9.)

Based on the findings of fact, the Referee concluded that Claimant violated Employer's policy when he gave away free dessert without permission. The Referee found Employer's testimony credible when Employer testified that

Employer had previously warned Claimant about not charging for food. The Referee found that, under the circumstances, Claimant's actions rose to the level of willful misconduct in connection with his work, and he was, therefore, ineligible to receive benefits under Section 402(e) of the Law.

Claimant appealed to the Board, which affirmed the Referee's decision. In its order, the Board adopted and incorporated the Referee's findings of fact and conclusions of law. Claimant now petitions this Court for review of the Board's order.

On appeal,[2] Claimant argues that: (1) the Board erred in concluding that his conduct rose to the level of willful misconduct under Section 402(e) of the Law; (2) the Board's findings of fact, adopted from the Referee's findings of fact, are not supported by substantial evidence; (3) the Board erred when it accepted Employer's testimony as credible; and (4) the Board erred when it denied Claimant's request that the record be remanded for additional testimony and/or evidence.

Section 402(e) of the Law provides, in part, 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." 43 P.S. § 802(e). The employer bears the burden of proving that the claimant's unemployment is due to the claimant's willful misconduct. *Walsh v. Unemployment Comp. Bd. of Review*, 943 A.2d 363 (Pa. Cmwlth. 2008). The term

[2] This Court's standard 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. 2 Pa. C.S. § 704. Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. *Hercules, Inc. v. Unemployment Comp. Bd. of Review*, 604 A.2d 1159 (Pa. Cmwlth. 1992).

"willful misconduct" is not defined by statute. The courts, however, have defined "willful misconduct" as:

> (a) wanton or willful disregard of employer's interests, (b) deliberate violation of the employer's rules, (c) disregard of standards of behavior which an employer can rightfully expect of an employee, or (d) negligence indicating an intentional disregard of the employer's interest or an employee's duties and obligations.

Grieb v. Unemployment Comp. Bd. of Review, 573 Pa. 594, 600, 827 A.2d 422, 425 (2003). An employer, seeking to prove willful misconduct by showing that the claimant violated the employer's rules or policies, must prove the existence of the rule or policy and that the claimant violated it. *Walsh*, 943 A.2d at 369. If, however, the claimant can show good cause for the violation—*i.e.*, "that the actions which resulted in the discharge were justifiable and reasonable under the circumstances," then there should be no finding of willful misconduct. *Id.* at 370. Whether an employee's conduct constituted willful misconduct is a matter of law subject to this Court's review. *Id.* at 369.

First, we must determine whether Employer sustained its burden and established a prima facie case of willful misconduct. In doing so, Employer must initially establish the existence of a policy or rule. Here, Employer testified that there was an unwritten policy, prohibiting employees from giving anything to a customer without charging. (C.R., Item no. 8. at 6-7.) Employer testified that the employees know that they have to charge for everything because they are informed during meetings and when they are hired. (*Id.* at 7.) Employer acknowledged that he has on occasion authorized free desserts under the right circumstances. (*Id.* at 8.) Employer testified that employees are not permitted to give anything away without the approval of a manager or an owner. (*Id.* at 17.) In a previous incident,

Claimant received a verbal warning from a manager after Claimant gave away a free dessert. (*Id.* at 13.) The Board accepted Employer's testimony on these issues as credible. Based upon this testimony, Employer sustained its burden to establish that it maintains a policy that everything has a price and that only a manager or owner may authorize a server to "give away" food or drink to a customer.

The second requirement of Employer's prima facie case is to show that Claimant was or should have been aware of the policy. Based upon the testimony discussed above, the Board found that Claimant previously had received a verbal warning that he was not to give dessert to customers without charge. Employer, therefore, met its burden to establish that Claimant was or should have been aware of Employer's policy.

Additionally, Employer must establish the third requirement of its prima facie case by showing that Claimant violated Employer's policy. Employer testified that he saw Claimant give desserts to the customers. (C.R., Item no. 8. at 10.) Employer reviewed the customers' checks, and they did not include desserts. (*Id.*) Employer testified that he then reviewed video surveillance of the customers receiving desserts at their tables to confirm the customers received desserts. (*Id.*) Additionally, Claimant himself testified that he gave one dessert to a customer the evening in question without charging the customer for it. (*Id.* at 15.) As the Board found this testimony credible, Employer satisfied its burden of proving Claimant violated the policy.

Because Employer satisfied its burden of proof, the burden then shifted to Claimant to prove that he had good cause for violating Employer's policy. *Walsh*, 943 A.2d at 370. Claimant's argument on this issue is somewhat disjointed. The record reveals that Claimant testified that he gave away one

dessert without charging the customer because he had previously been directed to "give desserts and things away upon occasion." (C.R., Item no. 8 at 15.) Employer testified that it was never possible for Claimant to determine when a customer deserved free dessert. (*Id.* at 8.) Instead, Claimant had to ask either the owner or manager on duty for permission to give anything away without charging for it. (*Id.*) Regardless, Claimant appears to argue either that he did not purposefully give away dessert or that he was never given a written warning regarding giving away free food before being terminated. The Board, however, found that Employer credibly testified that Claimant previously was warned about not charging for food.[3] (C.R., Item no. 12.) The Board also found that Claimant gave dessert to a table without charging the customer for it. (*Id.*) To the extent that Claimant may have testified that he did not purposefully give away food, the Board did not find such testimony credible. Furthermore, we note that Claimant admitted to giving away a dessert because a table was upset. (C.R., Item no. 8. at 15.) Accordingly, Claimant failed to establish that he had good cause for violating Employer's policy.

For these reasons, we conclude that the Board did not err in determining that Claimant's conduct amounted to willful misconduct under Section 402(e) of the Law.

Second, we address Claimant's assertion that the Board's findings of fact are not supported by substantial evidence. Substantial evidence is relevant evidence upon which a reasonable mind could base a conclusion. *Johnson v. Unemployment Comp. Bd. of Review*, 502 A.2d 738 (Pa. Cmwlth. 1986). In

[3] Any insinuation by Claimant that Employer was required to provide a written warning before termination is without merit.

determining whether there is substantial evidence to support the Board's findings, this Court must examine the testimony in the light most favorable to the prevailing party, giving that party the benefit of any inferences that can logically and reasonably be drawn from the evidence. *Id.* A determination as to whether substantial evidence exists to support a finding of fact can only be made upon examination of the record as a whole. *Taylor v. Unemployment Comp. Bd. of Review*, 474 Pa. 351, 378 A.2d 829 (1977). The Board's findings of fact are conclusive on appeal only so long as the record, taken as a whole, contains substantial evidence to support them. *Penflex, Inc. v. Bryson*, 506 Pa. 274, 485 A.2d 359 (1984).

Claimant asserts that the Board's finding that he was discharged "for giving three desserts away" is not supported by substantial evidence of record. Claimant also contends that the Board's reasoning contains "facts" not supported by the record, specifically that (1) a manager was on duty[4] and (2) that he argued that "he thought the tables should have gotten a dessert because they spent a lot of money." (C.R., Item no. 8 at 11.) We must disagree. Employer essentially testified that after he examined Claimant's checks and viewed surveillance tape from the evening, he determined that Claimant gave three desserts to customers without charging the customers. (*Id.* at 10.) Employer also testified that when questioned about the free desserts, Claimant responded that he forgot and he thought that one table should have gotten it because they spent a lot of money. (*Id.* at 11.) Claimant even testified regarding the events of his last day of employment, as follows:

[4] As to this "fact," Claimant improperly attempts to introduce facts outside the record to undermine the determination that a manager was on duty.

R Okay. All right. Mr. Finnegan, why was May 24th the last day you worked? What happened?

C Like Bobby had said I had given three desserts away to a table. . .

R And that's Mr. Robert Makris?

C Robert Makris, yes.

R Okay. All right. So what happened?

C At the -- earlier in that shift during the whole ruckus, I had a big section I was outside and I also had a table inside at the bar. And I slipped and fell and it took me a little while to get to the table outside. And when I got there, the table was upset and things like that. And I said I apologize and it was this one table, and I said the best I can do, what I can't charge you for a dessert unless if you want to talk to a manager. Where there was no manager there that night.

R Okay.

C And I did give one dessert away. At the time I thought I was acting in the right way and I didn't know I wasn't supposed to -- allowed to give them away because I've been giving desserts -- been directed by everybody to give desserts and things away upon other occasion.

(*Id.* at 15.) As to a manager being on duty, Employer disagreed with Claimant that no manager was on duty. Employer testified that there was a manager on duty that saw Claimant give desserts away to three different customers without charging for them. (*Id.* at 10.) In fact, Robert Makris himself testified that he was the manager on duty that noticed Claimant gave away three desserts. (*Id.*) Based upon the Employer's and Claimant's testimony, there is substantial evidence in the record to

support the Board's finding that Claimant was discharged for giving three desserts away while a manager was on duty.

Third, Claimant argues that the Board erred when it accepted Employer's testimony as credible. Claimant contends that there were some inconsistencies in Employer's testimony, specifically as to which managers were involved with prior warnings, and the Board erred by not rejecting Employer's testimony on that basis.

In an unemployment compensation case, the Board is the ultimate factfinder and is empowered to make credibility determinations. *Peak v. Unemployment Comp. Bd. of Review*, 509 Pa. 267, 501 A.2d 1383 (1985). In making the credibility determinations, the Board may accept or reject the testimony of any witness in whole or in part. *Greif v. Unemployment Comp. Bd. of Review*, 450 A.2d 229 (Pa. Cmwlth. 1982). The appellate court's duty is to examine the testimony in the light most favorable to the party in whose favor the Board has found, giving that party the benefit of all inferences that can logically and reasonably be drawn from the testimony. *Taylor*, 474 Pa. at 355, 378 A.2d at 851.

Claimant's argument essentially asks the Court to overturn the factfinder's credibility determination and reweigh the evidence. Here, the Board chose to accept the testimony of Employer as credible when it adopted and incorporated the Referee's findings and conclusions. (C.R., Item no. 12.) We decline Claimant's invitation to revisit the Board's credibility determinations and reweigh the evidence on appeal.

Finally, Claimant argues that the Board erred when it denied Claimant's request that the record be remanded for additional testimony and/or

evidence because such a remand is appropriate to offer new evidence not considered during the hearing. In support of that argument, Claimant explains that he wished to add new evidence to show a pattern of deceit by Employer. Claimant argues that he should have been permitted to introduce two earlier warnings given to him by Employer and testimony of another individual regarding delay caused by a fall that Claimant experienced earlier that evening while waiting on customers. Claimant had sought to introduce the warnings and testimony of delay before the Referee, but he was not permitted to do so based upon relevancy. Claimant also now seeks to introduce the surveillance tape, which was not introduced at the hearing.

An aggrieved party may request the Board to reconsider its decision within fifteen days after the issuance of a decision by the Board. 34 Pa. Code § 101.111. The law is clear that the Board has discretionary power to remand a case to the referee for the taking of additional evidence if the Board determines that the record before it is inadequate for a proper resolution of the issues presented. *Primecare Med., Inc. v. Unemployment Comp. Bd. of Review*, 760 A.2d 483 (Pa. Cmwlth. 2000). With regard to the denial of a remand, this Court will reverse a decision to grant or to deny remand only for an abuse of discretion. *Fisher v. Unemployment. Comp. Bd. of Review*, 696 A.2d 895 (Pa. Cmwth. 1997).

Our review of the record concludes that the Board did not abuse its discretion when it refused to remand or take additional evidence. Claimant's contentions are without merit because a remand for further testimony would neither render Employer's testimony less credible nor help to satisfy Claimant's burden. (C.R., Item no. 12.) Employer's testimony established the fact that Claimant gave free dessert away. Claimant's own testimony admitted the fact that

he gave away free dessert and was aware of Employer's policy. Given these circumstances, the Board properly exercised its discretion when it determined that the record was sufficiently developed for it to make a determination.

We conclude, therefore, that the Board did not err in affirming the Referee's decision. Accordingly, we affirm the order of the Board.

P. KEVIN BROBSON, Judge

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O R D E R

AND NOW, this 23rd day of April, 2010, the order of the Unemployment Compensation Board of Review is hereby affirmed.

P. KEVIN BROBSON, Judge