

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David Gilbert, :  
Petitioner :  
v. : No. 2053 C.D. 2009  
Unemployment Compensation : Submitted: February 19, 2010  
Board of Review, :  
Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE LEAVITT

FILED: June 30, 2010

David J. Gilbert (Claimant), *pro se*, petitions for review of an adjudication of the Unemployment Compensation Board of Review (Board) that denied his claim for unemployment compensation benefits. In doing so, the Board affirmed the decision of the Referee that Claimant’s willful misconduct rendered him ineligible for benefits under Section 402(e) of the Unemployment Compensation Law (Law).<sup>1</sup> In this appeal, we consider whether the Board erred in concluding that Claimant’s act of post-dating a sales contract in order to improve

---

<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(e). It provides, in relevant part, that “[a]n employe shall be ineligible for compensation for any week ... [i]n 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).

his chances to qualify for a bonus constituted willful misconduct. Finding no error, we affirm.

Claimant worked for Rest Haven Cemetery (Employer) as a burial sales supervisor for approximately nine months. He was terminated on March 27, 2009, for knowingly placing the wrong date on a burial contract, in violation of a work rule. Claimant applied for unemployment compensation benefits. The Unemployment Compensation Service Center found that Claimant was eligible for benefits because Employer had not submitted evidence of a rule violation. Employer appealed, and a hearing was conducted before the Referee.

At the hearing, Employer produced its employee handbook and Claimant's written acknowledgement that he received the handbook. The handbook contained a rule prohibiting "[b]eing dishonest, or providing false information to or withholding important information from the Company, its associates and/or its customers." Certified Record Item No. 8 (C.R. \_\_\_), Exhibit E-1. The handbook was received into evidence.

Kathy DeBaufre, the general manager, then testified for Employer. She explained that Claimant dated a sales contract March 2, 2009, even though the contract was executed on February 28, 2009. She also produced a copy of the customer's check, which was dated February 28, 2009, as well as a copy of the contract, showing a date of March 2, 2009. DeBaufre testified that she learned of Claimant's post-dating when Claimant's trainee, Deena Hill, brought it to her attention. DeBaufre testified that, in addition to the general rule in the handbook prohibiting employees from providing false information to Employer, Employer had a specific policy that "[w]henver you meet with the family and you write a contract, you date it that date you meet with them." Notes of Testimony, June 2,

2009, at 5 (N.T. \_\_\_\_). DeBaufre confirmed that Claimant had been informed of Employer's policy with respect to dating of sales contracts.

DeBaufre explained that Employer's compensation system included incentives for reaching sales quotas. She testified that Claimant was not going to reach his quota for February 2009, even with the February 28<sup>th</sup> sale. DeBaufre surmised that Claimant fraudulently dated the contract as March 2, 2009, in order to improve his chances of reaching his March 2009 sales quota.

Hill, Claimant's trainee, also testified on behalf of Employer. She stated that after the sale on Saturday, February 28<sup>th</sup>, Claimant instructed her to date the contract for Monday, March 2<sup>nd</sup>. Hill testified that Claimant told her he did not want it dated for February because "it wasn't going to make a difference in the numbers for February." N.T. 14. Hill recalled that this contradicted Claimant's previous instruction to her "that you date contracts the date that the person is signing them." N.T. 15.

Claimant testified on his own behalf. Claimant believed that post-dating the contract to Monday was an acceptable business practice because Employer's business office is closed on Saturday and Sunday. Claimant opined that the real reason DeBaufre terminated him was to retaliate for his complaint to another supervisor about DeBaufre's conduct in making sales.

Claimant submitted into evidence a written memorandum he received from Employer on March 2, 2009. C.R. 8, Exhibit C-1. The memorandum informed Claimant that he had failed to meet his sales quota for the second time in a six month period and that a third such failure could result in termination of his employment.

The Referee found that Claimant knew, or should have known, that sales contracts must be dated on the date of execution and that Employer had a work rule prohibiting dishonesty, providing false information or withholding important information. Because Claimant admitted that he had never post-dated documents before this incident, the Referee rejected his claim that it was proper to post-date a contract signed on a weekend to the next business day. The Referee concluded that Claimant post-dated the contract in order to inflate his March sales figures and that this action constituted willful misconduct.

Claimant appealed to the Board, and it affirmed on the basis of the Referee's decision. Claimant now petitions for this Court's review.<sup>2</sup>

On appeal, Claimant raises three issues. First, Claimant contends that the Board erred in finding that there was sufficient evidence that he committed willful misconduct. Second, Claimant argues that the Board erred by denying his request to subpoena a witness and a document. Finally, Claimant alleges that the Board erred in finding that he did not demonstrate good cause for his actions.

It is well-settled that in a willful misconduct case involving the alleged violation of a work rule, the employer has the burden of proving the existence of the rule and its violation. *ATM Corporation of America v. Unemployment Compensation Board of Review*, 892 A.2d 859, 865 (Pa. Cmwlth. 2006). There is no requirement that the work rule be in writing. However, evidence of the work rule must be supported by substantial evidence of record. *Ductmate Industries, Inc., v. Unemployment Compensation Board of Review*, 949

---

<sup>2</sup> Our review is limited to determining whether constitutional rights have been violated, errors of law were committed, or whether findings of fact are supported by substantial evidence. *Sheets v. Unemployment Compensation Board of Review*, 708 A.2d 884, 885 n.3 (Pa. Cmwlth. 1998).

A.2d 338, 342 (Pa. Cmwlth. 2008). Circumstantial evidence may constitute substantial evidence of record. *Ruiz v. Unemployment Compensation Board of Review*, 887 A.2d 804, 808 (Pa. Cmwlth. 2005).

Once an employer establishes the existence and violation of a work rule, the burden shifts to the claimant to show he had good cause for violating the work rule. *ATM Corporation of America*, 892 A.2d at 865. In any unemployment case, the Board is the ultimate finder-of-fact. “The fact that a witness has presented a different version of the facts as found by the Board is not a basis for reversal if substantial evidence supports the Board’s findings.” *Ruiz*, 887 A.2d at 808.

We begin with Claimant’s first allegation of error, *i.e.*, whether there was sufficient evidence that he committed willful misconduct. Claimant alleges that the evidence was not sufficient because the company handbook did not expressly state that a contract’s date must be the date of execution. Further, Claimant argues that Hill’s testimony that he instructed her to date contracts on the date of execution was not corroborated by documentary evidence.

The Board counters that DeBaufre testified that Claimant knew that a contract must be dated when executed, a point confirmed by Hill’s testimony. Hill’s testimony established that Claimant had instructed her to date a contract on the date of its creation and that he post-dated the February 28<sup>th</sup> contract to improve his March sales numbers. Claimant’s admissions against interest constitute exceptions to the hearsay rule.

We agree with the Board. The testimonial evidence constitutes substantial evidence of Employer’s work rule and Claimant’s violation thereof. Claimant is really assailing the credibility of Employer’s witnesses and the weight

assigned to their testimony, which are issues beyond the scope of this Court's review.

Claimant argues, next, that the Referee abused her discretion by denying his request for two subpoenas, one to compel the testimony of the client with whom he executed the post-dated contract and one to compel Employer to provide its copy of the March 2, 2009, warning memo. The issuance of a subpoena to compel the attendance of witnesses or the production of documents is a matter of discretion. *Walsh v. Unemployment Compensation Board of Review*, 943 A.2d 363, 371 (Pa. Cmwlth. 2008). A referee is only required to issue a subpoena if it would lead to relevant testimony that is necessary to make a proper determination. *Miller v. Unemployment Compensation Board of Review*, 512 A.2d 797, 799 (Pa. Cmwlth. 1986).

Claimant sought to compel the testimony of his customer because he believed she would confirm that he did not conceal any information from her or in any way act dishonestly. In denying the subpoena, the Referee reasoned that the customer's testimony was irrelevant. We agree. Whether the customer believed that Claimant acted honestly toward her is irrelevant to the issue of whether Claimant violated a work rule or acted dishonestly toward Employer. Because the customer's testimony would have been irrelevant, the Referee did not abuse her discretion in refusing to issue a subpoena.

Claimant also argues that the Referee erred by denying his request to subpoena Employer's copy of the March 2, 2009, memorandum warning Claimant that he could be terminated if he failed to meet his sales quota for a third time in a six-month period. Although Claimant's copy of this memorandum was admitted into evidence, Claimant alleged that his handwritten notations on Employer's copy

documented that Employer's sales figures had actually improved in the previous year at Claimant's location. We agree with the Board that this information, even if true, would not have been relevant. The issue before the Referee was whether Claimant violated a work rule, not whether he was doing his best to meet Employer's sales quotas. The Referee did not abuse her discretion in denying Claimant's request to subpoena Employer's copy of the warning memo.

In his third and final issue, Claimant argues that the Board erred in finding that he did not have good cause for his actions. Good cause can be established if the employee can show his actions were justifiable or reasonable in light of the attendant circumstances. *Department of Corrections v. Unemployment Compensation Board of Review*, 943 A.2d 1011, 1015-16 (Pa. Cmwlth. 2008). Whether a claimant's actions constitute good cause is a question of law subject to this Court's review. *Id.* at 1016.

Claimant asserts that his actions were done for the benefit of his trainee, Deena Hill. Claimant contends that training a new sales employee necessarily includes incentivizing that employee. Claimant explains that he was motivating his trainee to do extra work on the last weekend of the month in order to get a headstart on sales for the following month.

We reject Claimant's rationale. Changing the date of the contract did not benefit anyone but Claimant. Moreover, we do not agree that directing a new employee to post-date a contract in violation of company policy constituted an appropriate way to teach motivation.

Claimant described the sale on Saturday, after the last business day in February, as a "head start" on the March quota. Claimant could have made this

point to Employer and requested the sale to be assigned to his March quota. Instead, he post-dated the contract, in violation of a work rule.

Accordingly, the order of the Board is affirmed.

---

MARY HANNAH LEAVITT, Judge



IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David Gilbert,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2053 C.D. 2009
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

**ORDER**

AND NOW, this 30<sup>th</sup> day of June, 2010, the order of the Unemployment Compensation Board of Review dated August 24, 2009, in the above-captioned matter is hereby AFFIRMED.

\_\_\_\_\_  
MARY HANNAH LEAVITT, Judge