IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Charles T. Gibs, Petitioner	:	
v.	:	No. 2122 C.D. 2010
Unemployment Compensation Board of Review, Respondent	:	Submitted: March 25, 2011

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: August 5, 2011**

Charles T. Gibbs (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) that affirmed the decision by an Unemployment Compensation Referee (Referee), which found Claimant ineligible for unemployment compensation (UC) benefits pursuant to Section 402(e) of the Unemployment Compensation Law [1] (Law) due to willful

[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 is ineligible for UC benefits if "unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work." Id.

misconduct. On appeal, Claimant challenges, *inter alia*, the finding of ineligibility by the Board, asserting that he did not commit willful misconduct, and that certain of the Board's findings were based on inadmissible hearsay evidence.

Claimant was employed by Service Group, Inc. (Employer) as a Program Manager and was separated from his employment for violating work rules. The UC Service Center found Claimant eligible for UC benefits because "the employer has not sustained its burden of proof." (Notice of Determination at 1, R. Item 4.) Employer then appealed the determination. (See generally, Petition for Appeal, R. Item 5.) Following this appeal, a hearing before the Referee commenced. Based on the evidence presented at the hearing, the Referee found the following:

> 1. The claimant was employed from April 7, 2009, until April 5, 2010,[2] at Service Group Inc. as a full-time Program Manager, earning $19.71 per hour.
>
> 2. Service Group Inc. is contracted by the Lancaster Downtown Investment District Authority to maintain the appearance of the Downtown Investment District with snow removal, leaf collection and trash removal.
>
> 3. In November 2009, the claimant received a verbal warning for unsatisfactory work performance, for loitering in businesses, and for talking on his personal cell phone.
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> 4. The employer continued to receive complaints about the claimant's work performance, specifically in regard to time wasted for socializing, loitering in businesses and doing personal business.
>
> 5. The claimant was made aware that failure to address and eliminate the complaints would result in termination of employment.

[2] There is confusion in the record regarding the dates of Claimant's hiring and termination. The particular dates do not affect the outcome of the case; therefore, all dates will conform to the Referee's findings of fact.

6. In November 2009, the claimant was clearly instructed that greeting and interacting with the public was desired and encouraged, that any greeting and/or information dispensing should take no longer than 2 minutes and should not interfere with the completion of cleaning duties. Loitering on duty in any business or public establishment is against corporate policy, as well as doing personal business during work hours.

7. The claimant was also notified that there should be no personal phone calls, other than emergencies, during work hours.

8. On March 16, 2010, the employer discussed performance issues with the claimant. The claimant was given a 1-day suspension for talking on his personal cell phone and loitering in businesses.

9. The claimant was made aware that his job was in jeopardy.

10. The employer reminded the claimant again that the only phone that should be carried was the employer's work phone. The claimant was informed that he could use the work cell phone for personal emergencies.

11. On March 16, 20[10], when the claimant was advised of his suspension, he was wearing his personal blue tooth device.

12. The claimant was aware that personal cell phone use was not permitted while on duty.

13. On April 5, 2010, after receiving another customer complaint, the director of quality assessment visited the Downtown Investment District and witnessed the claimant sitting on a bench and talking with a young lady for 15 minutes.

14. On April 5, 2010, the employer also noticed that claimant was wearing his personal blue tooth device in his ear.

15. On April 5, 2010, the claimant was discharged for loitering and for using his personal cell phone during work hours.

16. The claimant continued to use his personal cell phone during work hours because the claimant has a son with medical issues and it was difficult and time consuming to provide the claimant's work

number to the individual's [sic] who need[ed] to reach him in case of an emergency.

(Referee's Decision, Finding of Facts (FOF) ¶¶ 1-16.) Applying these facts, the Referee reversed the UC Service Center determination because Claimant "failed to show good cause for his failure to adhere to the employer's reasonable request." (Referee's Decision at 3.) Claimant then appealed the Referee's decision to the Board. On appeal, the Board adopted the Referee's findings of facts and upheld the Referee's determination, finding Claimant ineligible for benefits. (Board's Decision at 1.) The Board did not find Claimant's testimony that he was on a break during the April 5, 2010 incident credible. (Board's Decision at 1.) The Board also found Employer's testimony credible that, when confronted after the incident, Claimant denied speaking with the young lady for 15 minutes. (Board's Decision at 1.) Further, the Board found that Claimant never informed Employer that he was on break and failed to establish good cause for his conduct. (Board's Decision at 1.) Claimant now petitions this Court for review of the Board's order.

Claimant argues that: (1) there was no rule in Employer's employee policy relating to cell phone use; (2) he was on his break on April 5, 2010 between 1:45 p.m. and 2:00 p.m., when Employer's witness observed him; and (3) no complaints from the public cited him specifically. Claimant asserts, therefore, that his actions did not violate any work rule. (Claimant's Br. at 9.) Claimant further contends that he had good cause to have his personal cell phone at work. (Claimant's Br. at 8.) Finally, Claimant challenges the credibility findings of the Board and asserts that the Board based some of its factual findings on inadmissible hearsay evidence.

Claimant first argues that the incident on April 5, 2010 did not constitute willful misconduct because he did not violate any work rules. Claimant asserts that, even if Employer's rule against personal cell phones existed, he had good cause to violate that rule. Our Courts have defined willful misconduct as:

> (1) the wanton and willful disregard of the employer's interests, (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.

Guthrie v. Unemployment Compensation Board of Review, 738 A.2d 518, 521 (Pa. Cmwlth. 1999) (citing Kentucky Fried Chicken of Altoona, Inc. v. Unemployment Compensation Board of Review, 309 A.2d 165, 168-69 (Pa. Cmwlth. 1973)). If an employer alleges that a claimant committed willful misconduct by violating a work rule, the employer must establish the existence of a reasonable work rule and that the claimant knowingly violated the work rule. Williams v. Unemployment Compensation Board of Review, 596 A.2d 1191, 1193 (Pa. Cmwlth. 1991) (citing Connelly v. Unemployment Compensation Board of Review, 450 A.2d 245 (Pa. Cmwlth. 1982)); BK Foods, Inc. v. Unemployment Compensation Board of Review, 547 A.2d 873, 875 (Pa. Cmwlth. 1988). A work rule can be conveyed orally, but any requests for conduct expressed to an employee by an employer must not contradict the employer's written policies. LeGare v. Unemployment Compensation Board of Review, 498 Pa. 72, 77-79, 444 A.2d 1151, 1153-54 (1982); see, e.g., Williams, 596 A.2d at 1191, 1192 (finding claimant ineligible for UC benefits when claimant was informed of a new parking policy, and violated that policy after repeated warnings); Teasley v. Unemployment Compensation Board of Review, 431 A.2d 1155, 1157 (Pa.

Cmwlth. 1981) (finding claimant ineligible for UC benefits when claimant violated a rule which was orally conveyed individually and at staff meetings); McAlister v. Unemployment Compensation Board of Review, 395 A.2d 660, 661 (Pa. Cmwlth. 1978) (finding claimant ineligible for UC benefits when claimant took ten vacation days when told by employer to take eight). If an employer satisfies its burden of proof, the burden then shifts to the claimant to establish good cause for violating the rule. Frumento v. Unemployment Compensation Board of Review, 466 Pa. 81, 87, 351 A.2d 631, 634 (1976). A claimant establishes good cause when "the action of the employee is justifiable or reasonable under the circumstances." Id.

Here, the Board found that Employer met its burden of proof and established that: (1) Employer warned Claimant to stay within his assigned break schedule, not loiter in public, not talk to members of the public for more than two minutes, and not use his personal cell phone or its blue tooth; (2) Employer received complaints about Claimant's actions before and after the warnings; (3) Employer previously warned and suspended Claimant for violating these rules; and (4) Employer's witness observed Claimant violating Employer's work rules by sitting on a bench for 15 minutes with his blue tooth ear piece in his ear and talking to a young lady from 1:45 p.m. to 2:00 p.m., when Claimant's break time was between 1:20 p.m. and 1:30 p.m. (FOF ¶¶ 1-14; Hr'g Tr. at 7-12, 14, 25, R. Item 11.) Because Claimant was orally informed of these work rules, which did not contradict with any of Employer's written policies, we agree with the Board that Employer established the existence of these work rules. Thus, Claimant's knowing violation of those rules constitutes disqualifying willful misconduct, particularly

where he continued to violate the rules after repeated warnings. (Hr'g Tr. at 7, R. Item 11.)

Claimant argues that no credible testimony establishes that he was talking on his personal cell phone at the time of his termination. (Claimant's Br. at 9.) However, Employer's work rule was not limited to phone conversations. Instead, Employer informed Claimant "that the only phone that should be carried [during work hours] was the employer's work phone." (FOF ¶ 10; Hr'g Tr. at 7, 8, R. Item 11) Additionally, at no point in the history of his employment or in the Referee's hearing, did Claimant contest the previous instances where Employer reprimanded him for personal phone use. Further, the hearing transcript indicates, and the Board found, that Employer's witness observed Claimant speaking to a member of the public for longer than permitted. (FOF ¶ 13; Hr'g Tr. at 7, R. Item 11.) Because Employer established that Claimant violated Employer's work rules against loitering, speaking with the public for an extended period of time, and carrying a personal cell phone during work hours, the burden shifted to Claimant to show good cause for those violations.

Claimant asserts that he had good cause to have his personal cell phone available to him at work for emergencies. If a claimant can prove "good cause" for committing willful misconduct, he still may be eligible for UC benefits under Section 402(e) of the Law despite violating an employer's work rule. Frumento, 466 Pa. at 86-87, 351 A.2d at 634. Claimant states that he must have his personal cell phone available at all times in case medical emergencies involving his son arise. (Claimant's Br. at 8.) However, Employer allows Claimant to use his work

cell phone for such purposes. (FOF ¶ 10; Hr'g Tr. at 13, R. Item 11.) Although Claimant argues that it is unreasonable to require him to inform all of his children's doctors, teachers, therapists, and caretakers of a new phone number, he did not object to Employer's policy when it was instituted and did not challenge Employer's testimony stating he was previously disciplined for using his personal phone during work hours. (Claimant's Br. at 9; Hr'g Tr. at 13, R. Item 11.) Furthermore, Claimant never asserted that the use of his blue tooth on April 5, 2010 was for emergency purposes, only that he forgot that he had it in. (Hr'g Tr. at 9, R. Item 11.) Because Claimant did not establish good cause for violating Employer's work rule, the Board correctly found him ineligible for UC benefits pursuant to Section 402(e) of the Law.

Claimant next challenges the Board's credibility findings The Board is the ultimate fact finder in UC proceedings and its findings of credibility are resolutions of evidentiary conflicts, which are not subject to judicial review. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 270, 501 A.2d 1383, 1385 (1985). Claimant stated that he was taking his break at the time Employer's witness observed him; however, Employer's witness testified that it was not Claimant's break time when he observed Claimant violating Employer's work rules. (Hr'g Tr. at 7, 20, R. Item 11.) The Board did not find Claimant's testimony credible, choosing to believe Employer's version of the facts. (Board's Decision at 1.) That a claimant might believe a different version of the events that took place does not create grounds for reversal if the Board's findings are supported by substantial evidence. Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994).

Finally, Claimant asserts that some of the Board's findings of facts were based on inadmissible hearsay evidence. In UC proceedings, the admission and consideration of hearsay evidence is governed by the rule set forth in Walker v. Unemployment Compensation Board of Review, 367 A.2d 366 (Pa. Cmwlth. 1976), which provides:

> (1) Hearsay evidence, Properly objected to, is not competent evidence to support a finding of the Board. . . (2) Hearsay 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. . . .

Id. at 370 (internal citations omitted). Claimant argues that e-mail complaints about his loitering introduced by Employer are inadmissible hearsay evidence because Employer's witness did not generate the e-mails, or offer the authors of the e-mails for cross-examination. Moreover, Claimant notes that the e-mails do not designate a specific employee. (Claimant's Br. at 10.) However, Claimant made no objections to any of the evidence presented by Employer at the Referee hearing, including these e-mails. (See, e.g., Hr'g Tr. at 4, 7, R. Item 11.) Thus, they can be given their natural probative effect if they are corroborated by any competent evidence in the record. Walker, 367 A.2d at 370. Our review of the record reveals that the allegations contained in the e-mails are corroborated by Employer's witness's credible testimony that he saw Claimant, after his designated break time, sitting on a park bench for fifteen minutes with his blue tooth headset in his ear and conversing with a member of the public. (Hr'g Tr. at 7-9, R. Item 11.) We conclude that the Board properly gave the e-mails their natural and probative effect, which, in addition to the credible and corroborating testimony of Employer's witness, supported its findings of facts.

In reviewing the evidence, the Board correctly found that Claimant violated known work rules. This conduct constitutes willful misconduct, which, without good cause, will result in a finding of ineligibility for UC benefits. Because Claimant did not establish good cause for violating Employer's work rules, the Board correctly affirmed the Referee's determination that found Claimant ineligible for UC benefits. Accordingly, the Board's order is affirmed.

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RENÉE COHN JUBELIRER, Judge

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	:	
Petitioner	:	
	:	
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	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

O R D E R

NOW, August 5, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is **AFFIRMED**.

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RENÉE COHN JUBELIRER, Judge