IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mark A. Heider, Petitioner	:	
v.	:	
Unemployment Compensation Board of Review, Respondent	:	No. 2263 C.D. 2009
	:	Submitted: June 25, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: August 5, 2010

Mark Heider (Claimant) petitions this Court for review of the October 21, 2009 order of the Unemployment Compensation Board of Review (UCBR) reversing the decision of the Referee and denying benefits. Claimant presents five issues for review before this Court: (1) whether the UCBR abused its discretion or committed an error of law by ordering two remand hearings, (2) whether the UCBR abused its discretion or committed an error of law by remanding this case to take testimony from an allegedly subpoenaed witness, (3) whether the UCBR abused its discretion or committed an error of law by ordering a second remand hearing to present after-created evidence, (4) whether the UCBR abused its discretion or committed an error of law by relying on the witness presented by U.S. Steel Corporation (Employer), and (5) whether there was substantial evidence for the UCBR to find that Claimant was discharged for willful misconduct. For reasons that follow, we affirm the UCBR's order.

Claimant was hired by Employer as a full-time utility man/tractor driver beginning January 7, 1992 and ending June 17, 2008. Employer has a zero tolerance policy in regard to discriminatory harassment which provides for discipline up to and including immediate discharge. Claimant was or should have been aware of this policy. On June 18, 2008, Employer received reports that Claimant had violated this policy by using threatening, offensive, and profane language towards another employee in the workplace, and immediately suspended Claimant pending an investigation. On June 24, 2008, Claimant's suspension was converted to a discharge.

Claimant subsequently applied for unemployment compensation (UC) benefits. On August 8, 2008, the Erie UC Service Center mailed a notice of determination denying benefits under Section 402(e) of the Unemployment Compensation Law (Law).[1] Claimant appealed and a hearing was held by a Referee. On September 11, 2008, the Referee mailed his decision reversing the determination of the UC Service Center and granting Claimant benefits under Section 402(e) of the Law. Employer appealed to the UCBR. The UCBR remanded the matter twice, and subsequently reversed the decision of the Referee. Claimant appealed to this Court.[2]

Claimant argues that the UCBR abused its discretion or committed an error of law by ordering two remand hearings. We disagree.

"Under Pennsylvania law, the [UCBR] has the discretion to decide whether to grant a request for remand." *Fisher v. Unemployment Compensation Bd.*

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[1] Act of December 5, 1936, Second Ex.Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(e).

[2] This Court's review is limited to determining whether the findings of fact were supported by substantial evidence, whether constitutional rights were violated, or whether errors of law were committed. *Johnson v. Unemployment Comp. Bd. of Review*, 869 A.2d 1095 (Pa. Cmwlth. 2005).

of Review, 696 A.2d 895, 897 (Pa. Cmwlth. 1997). An appellate court "will reverse a decision to grant or to deny remand only for an abuse of discretion." *Procito v. Unemployment Comp. Bd. of Review*, 945 A.2d 261, 265 (Pa. Cmwlth. 2008). Pursuant to Section 504 of the Law, 43 P.S. § 824:

> The board shall have power, on its own motion, or on appeal, to remove, transfer, or review any claim pending before, or decided by, a referee, and in any such case and in cases where a further appeal is allowed by the board from the decision of a referee, may affirm, modify, or reverse the determination or revised determination, as the case may be, of the department or referee on the basis of the evidence previously submitted in the case, or *direct the taking of additional evidence.*

(Emphasis added). "[A] remand hearing is generally granted to allow a party the opportunity to present evidence not offered at the original hearing because it was not then available." *Fisher*, 696 A.2d at 897. In the instant case, Employer first requested a remand to obtain the testimony of a previously subpoenaed witness who failed to appear at the hearing before the Referee. Although Employer subpoenaed the witness, the fact that he did not appear made the testimony not then available. Thus, this Court cannot find that the UCBR abused its discretion in ordering a remand so Employer could procure said testimony. Employer requested the second remand in order to submit testimony concerning admissions made at a grievance arbitration hearing by Claimant after the hearing before the Referee. Clearly, said admissions were not available at the time of the hearing. Thus, this Court cannot find that the UCBR abused its discretion in ordering a second remand so Employer could submit said evidence.

Claimant next argues that the UCBR abused its discretion or committed an error of law by remanding this case to take testimony from an allegedly

subpoenaed witness. Specifically, Claimant contends Employer failed to prove that the witness was ever subpoenaed. We disagree.

At the first remand hearing scheduled January 15, 2009, Employer introduced a subpoena for Christopher Bender, the witness who was subpoenaed to appear before the Referee and failed to appear, and was again subpoenaed for the January 15th remand hearing and failed to appear.[3] The subpoena was accepted into evidence. Said subpoena was signed by Christopher Bender as well as Stephen Crawford, the person who served the subpoena. This Court holds that the signed subpoena was sufficient to prove that Christopher Bender was in fact served with the same. Accordingly, the UCBR did not abuse its discretion or commit an error of law by remanding this case to take testimony from a subpoenaed witness.[4]

Claimant next argues that the UCBR abused its discretion or committed an error of law by ordering a second remand hearing to present after-created evidence. Specifically, Employer requested a second remand hearing to introduce the testimony of a witness who attended Claimant's grievance arbitration hearing. Claimant contends this is after-created evidence, not after-acquired evidence as it did not exist at the time Claimant was discharged.[5] We disagree.

Claimant was discharged on June 24, 2008. A hearing was held before a Referee on September 10, 2008. The grievance arbitration hearing was held on November 7, 2008. Clearly, any admissions made by Claimant at the grievance

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[3] A signed subpoenaed was entered into evidence at the hearing before the Referee on September 10, 2008 as well.

[4] This Court notes that this is, in reality, a moot issue as the subpoenaed witness failed to appear at the third hearing as well.

[5] An admission to the actual occurrence that caused Claimant's discharge is not after-created evidence because although the admission occurred after the discharge, it is not a new basis for the discharge, only another piece of evidence proving the occurrence.

arbitration hearing would be considered newly discovered evidence, thus admissible at a subsequent remand hearing. Accordingly, the UCBR did not abuse its discretion or commit an error of law by ordering a second remand hearing to present the newly discovered evidence.

Claimant next argues that the UCBR abused its discretion or committed an error of law by accepting the testimony of Todd Seitz (Seitz),[6] Employer's witness. Specifically, Claimant contends Seitz' testimony concerning Claimant's admissions at the grievance arbitration hearing was not the best evidence and thus should not have been admitted. It is Claimant's contention that the transcript from the grievance arbitration hearing should have been admitted. We disagree.

The best evidence rule is derived from Pa.R.E. 1003 which states "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." As Claimant is not referring to a duplicate document versus an original document this rule does not apply.

This Court notes that the testimony is admissible as an exception to the hearsay rule. Specifically, it is an admission by a party-opponent. As Seitz was testifying regarding admissions made by Claimant at the grievance arbitration hearing, the testimony is admissible under Pa.R.E. 803(25).[7] Accordingly, the UCBR did not abuse its discretion or commit an error of law by relying on the witness presented by Employer.

[6] Seitz works in Employer's Labor Relations Department.

[7] The statement is offered against a party and is the party's own statement.

Finally, Claimant argues that the UCBR's finding that Claimant was discharged for willful misconduct was not supported by substantial evidence. We disagree.

"Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *City of Pittsburgh, Dep't of Pub. Safety v. Unemployment Comp. Bd. of Review*, 927 A.2d 675, 676 n.1 (Pa. Cmwlth. 2007) (quotation marks omitted). Further,

> Section 402(e) of the Law provides that an employee is ineligible for unemployment compensation benefits when his unemployment is due to discharge from work for willful misconduct connected to his work. The employer bears the burden of proving willful misconduct in an unemployment compensation case. Willful misconduct has been defined as (1) an act of wanton or willful disregard of the employer's interest; (2) a deliberate violation of the employer's rules; (3) a disregard of standards of behavior which the employer has a right to expect of an employee; or (4) negligence indicating an intentional disregard of the employer's interest or a disregard of the employee's duties and obligations to the employer.

Dep't of Transp. v. Unemployment Comp. Bd. of Review, 755 A.2d 744, 747 n.4 (Pa. Cmwlth. 2000) (citation omitted). "In the case of a work rule violation, the employer must establish the existence of the rule, the reasonableness of the rule and its violation." *Lindsay v. Unemployment Comp. Bd. of Review*, 789 A.2d 385, 389 (Pa. Cmwlth. 2001).

At the hearing before the Referee, Claimant, through his attorney stipulated to the admission of Employer's manual which contains Employer's discriminatory harassment policy. Original Record (O.R.), Item No. 11 at 21. Further, Seitz testified that the policy is a zero tolerance policy for any act of discriminatory harassment. O.R., Item No. 11 at 11. Moreover, Claimant, through

his counsel, stipulated at the hearing that he was aware of the contents of the policy in its entirety. O.R., Item No. 11, at 12-13. As it is more than reasonable for an employer to establish an antidiscrimination harassment policy, Employer has established the first two requirements for proving willful misconduct in the context of a work rule violation.

Regarding Claimant's violation of the antidiscrimination harassment policy, Seitz testified at the remand hearing that Claimant admitted to making certain specified statements about a certain co-worker. Such statements consist of such profane and obscene threats and vulgarities such as will not be repeated here, as to do so would be an affront to the dignity of this honorable Court. Suffice it to say that, according to Seitz, Claimant's statements included the following along with a racial epithet: "I'll cut him three ways, wide, deep and repeatedly." O.R., Item No. 37 at 9-10. Clearly, this is relevant evidence that a reasonable mind might accept as adequate to support the conclusion that Claimant violated Employer's policy. Accordingly, the UCBR did not err in finding that Claimant committed willful misconduct.

For all of the above reasons, the order of the UCBR is affirmed.

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JOHNNY J. BUTLER, Judge

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O R D E R

AND NOW, this 5th day of August, 2010, the October 21, 2009 order of the Unemployment Compensation Board of Review is affirmed.

JOHNNY J. BUTLER, Judge