

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

James A. Kraftician,	:	
Petitioner	:	
	:	
v.	:	No. 2399 C.D. 2009
	:	Submitted: April 23, 2010
Unemployment Compensation Board of Review,	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE BROBSON**

FILED: June 30, 2010

Petitioner James A. Kraftician (Claimant) petitions *pro se* for review of an order of the Unemployment Compensation Board of Review (Board). The Board affirmed a Referee’s decision that Claimant was ineligible for unemployment 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 benefits after being discharged from his employment as a school bus driver for Paragon Transit, Inc. (Employer).

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

The Allentown UC Service Center (Service Center) issued a determination, finding Claimant eligible for benefits under Section 402(e) of the Law.

Employer appealed the Service Center's determination, and a hearing was held before a Referee. Following the hearing, the Referee issued a decision, in which he made the following relevant findings:

1. Claimant was last employed as school bus driver with Paragon Transit, Inc. from August 23, 2007 through May 13, 2009.
2. Claimant was assigned to drive mini bus #51, transporting school students back and forth from their homes to school for the Salisbury School District.
3. On or about May 13, 2009, Employer received a complaint from a parent that Claimant had stopped his school bus and left the school bus, thereby leaving the children on the bus unattended.
4. Claimant at the time was transporting seven children in the grade range of grades 5 through 8. He admitted stopping the school bus and leaving the school bus to cross the street to make a personal appointment for car detailing at a business establishment.
5. Under Employer[']s rules, disciplinary action can be taken up to and including termination for any conduct that creates an unacceptable security risk or affects Employer's public image or causes embarrassment to Employer or its clients.
6. Claimant was or should have been aware of the above-mentioned rules.
7. Claimant was initially suspended for three days and subsequently terminated as a result of leaving his vehicle unattended with students on board during his run in the final incident.

(Certified Record (C.R.), Item No. 11.)

Based on the findings of fact, the Referee concluded that Claimant's actions were contrary to the standards of behavior Employer had a right to expect of an employee when he left school age children unattended on his school bus to take care of a personal matter. The Referee found, even in the absence of a specific rule which would prohibit such actions, that Claimant's behavior created a security risk for the students entrusted to Employer's care and constituted a violation of Employer's disciplinary policy. The Referee also found that Claimant did not establish good cause for his actions, and, therefore, he was ineligible to receive unemployment benefits under Section 402(e) of the Law.

Claimant appealed the Referee's order 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.² Claimant now petitions this Court for review of the Board's order. On appeal,³ Claimant argues that the Board erred in concluding that his conduct rose to the level of willful misconduct under Section 402(e) of the Law. Claimant further states that although he may have used poor judgment, he was unaware of any rule that prohibited him from leaving his school bus unattended.

² Claimant does not challenge the Board's findings of facts. Therefore, the findings are conclusive and binding on this Court upon review. *Campbell v. Unemployment Comp. Bd. of Review*, 694 A.2d 1167, 1169 (Pa. Cmwlth. 1997).

³ 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, 1161 (Pa. Cmwlth. 1992).

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. An employer bears the burden of proving that a claimant's unemployment is due to the claimant's willful misconduct. *Walsh v. Unemployment Comp. Bd. of Review*, 943 A.2d 363, 368 (Pa. Cmwlth. 2008). The term "willful misconduct" is not defined by statute. The courts, however, have defined "willful misconduct" as:

- (a) wanton or willful disregard for an employer's interests;
- (b) deliberate violation of an employer's rules;
- (c) disregard for 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 or 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. However, "[an] employer need not have an established rule where the behavioral standard is obvious and the employee's conduct is so inimical to the employer's best interest that discharge is a natural result." *Biggs v. Unemployment Comp. Bd. of Review*, 443 A.2d 1204, 1206 n.3 (Pa. Cmwlth. 1982). In either case, if 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 the Board should not conclude that an employee's conduct constitutes willful misconduct. *Walsh*,

943 A.2d at 369. Whether an employee's conduct constitutes willful misconduct is a question of law subject to this Court's review. *Id.* at 368.

First, we must determine whether Employer sustained its burden and established a *prima facie* case of willful misconduct. Although Employer acknowledged that it does not have a specific rule prohibiting a school bus driver from leaving his vehicle unattended while on a bus run, Employer does have work and safety rules that prohibit employees from creating an unacceptable security risk or engaging in activity that affects Employer's public image or cause embarrassment to Employer or its clients. (C.R., Item No. 10 at 6.) The Board found that under Employer's rules, disciplinary action can be taken up to and including termination for any conduct that creates an unacceptable security risk. (C.R., Item No. 15.) Employer argues that Claimant's actions violated Employer's employee work and safety rules by creating an unacceptable security risk when he left children alone on the school bus to attend to personal business. Claimant admitted he stopped and left his school bus with seven children on it to make a personal appointment to have his car detailed. *Id.* We must agree with Employer and the Board that Claimant's actions in leaving children unattended on his school bus created an unacceptable security risk, and, therefore, constituted willful misconduct. Even in the absence of the work and safety rules, Claimant's actions alone constituted willful misconduct because Claimant disregarded the standard of behavior Employer had the right to expect of him by leaving the children unattended. Our review of the record, therefore, supports the Board's conclusion that Employer sustained its burden to establish a *prima facie* case of willful misconduct.

Because Employer satisfied its burden of proof as to willful misconduct, the burden shifted to Claimant to prove that he had good cause for leaving his school bus unattended. To prove “good cause” the claimant must demonstrate that his actions were justifiable and reasonable under the circumstances. *Walsh*, 943 A.2d at 369. Claimant does not argue he had good cause for his action. He only asserts that he exercised poor judgment when he left the school bus unattended because he did not know about the Employer’s work and safety rules. (C.R., Item No. 10.) Although non-compliance of an employer’s rule may be justified by lack of knowledge of the rule, *Williams v. Unemployment Compensation Board of Review*, 380 A.2d 932, 935 (Pa. Cmwlth. 1977), the Board also found that Claimant was or should have been aware of the rules. (C.R., Item No. 15). Thus, we reject Claimant’s argument that lack of knowledge of Employer’s work and safety rules justified his conduct.⁴

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.⁵

⁴ Moreover, even if Claimant did not have knowledge of the work and safety rules, Claimant’s actions nevertheless would have constituted willful misconduct because they showed a disregard for standards of behavior which an employer can rightfully expect of an employee. Such disregard for expected general standards of behavior cannot be overcome by lack of knowledge of a specific work rule.

⁵ Although not properly preserved, Claimant attempts to argue in his brief that Employer did not have the right to fire him because Employer violated its progressive disciplinary policy when it first suspended him and then later terminated his employment. *See Coraluzzi v. Commonwealth*, 524 A.2d 540 (Pa. Cmwlth. 1987) (ordinarily, no point will be considered which is not set forth in statement of questions involved or suggested thereby); *Tyler v. Unemployment Comp. Bd. of Review*, 591 A.2d 1164 (Pa. Cmwlth. 1991) (where claimant fails to include issue in petition for review, but addresses issue in brief, issue is waived). Employer presented testimony that initially it suspended Claimant for three days. (C.R., Item No. 10 at 5.) After **(Footnote continued on next page...)**

Accordingly, the order of the Board is affirmed.

P. KEVIN BROBSON, Judge

(continued...)

further investigation and discussion with the school district, however, Employer terminated Claimant's employment. *Id.* Employer's policy provides for progressive discipline, beginning with a verbal warning, then progressing to a written warning, followed by suspension, then, ultimately, termination. (C.R., Item No. 16). Employer's policy specifically states that Employer "may, at it[s] sole and absolute discretion, deviate from any order of progressive disciplinary actions and utilize whatever form of discipline deemed appropriate under the circumstances, up to and including immediate termination of employment without warning." *Id.* Moreover, Employer's disciplinary policy "in no way alters the at-will employment relationship." *Id.* Nothing in Employer's disciplinary policy prevents it from imposing a discipline immediately upon learning of an incident and then altering the discipline following further investigation and consideration of the underlying circumstances. Moreover, Claimant presents no case law in support of his argument, and we discern nothing inappropriate in Employer's actions in altering the discipline imposed.

Claimant also attempts to argue in his brief that the real reason he was fired was because he was involved in an accident with the bus two days prior to the subject incident and because his license to operate a school bus was to be revoked in two weeks due to a medical condition. A review of the record reveals that these issues were not raised or addressed in any manner during the hearing, and, therefore, they are waived. *See* Pa. R.A.P. 1551 (Generally, "no question shall be heard or considered by the court which was not raised before the government unit.").

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Unemployment Compensation Board	:	
of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 30th day of June, 2010, the order of the Unemployment Compensation Board of Review is hereby AFFIRMED.

P. KEVIN BROBSON, Judge