

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert P. Smith, :  
 :  
 : Petitioner :  
 :  
 : v. : No. 2453 C.D. 2010  
 : Submitted: June 3, 2011  
 :  
 : Unemployment Compensation :  
 : Board of Review, :  
 : Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE FRIEDMAN

FILED: July 8, 2011

Robert P. Smith (Claimant) petitions for review of the October 25, 2010, order of the Unemployment Compensation Board of Review (UCBR), which reversed a referee's decision to grant his claim for unemployment compensation benefits. The UCBR determined that Claimant was ineligible for benefits because his discharge was the result of willful misconduct under section 402(e) of the Unemployment Compensation Law (Law).<sup>1</sup> We affirm.

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<sup>1</sup> 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 shall be ineligible for compensation for any week in which his unemployment is due to his discharge for willful misconduct connected with his work. 43 P.S. §802(e).

Claimant worked as a pharmacist for Giant Eagle (Employer) for two years until his termination on July 30, 2009.<sup>2</sup> (UCBR's Findings of Fact, No. 1.) Employer has a policy prohibiting its employees from smoking and using tobacco products in the workplace. (UCBR's Findings of Fact, No. 2.) In 2007, Claimant received a verbal warning for chewing tobacco while working in one of Employer's pharmacies. (UCBR's Findings of Fact, No. 5.) At that time, Claimant was told that he was not permitted to chew tobacco in the workplace. (UCBR's Findings of Fact, No. 6.) Claimant was aware of Employer's anti-tobacco policy. (UCBR's Findings of Fact, No. 7.)

In June 2009, Employer received a complaint from a pharmacist that Claimant was chewing tobacco and spitting into a bottle while working in the pharmacy. (UCBR's Findings of Fact, No. 9.) After investigating the matter on its security cameras, Employer confirmed the allegation. (UCBR's Findings of Fact, No. 10.) Claimant admitted that he kept the tobacco bottle in his general workspace while dispensing medication. (UCBR's Findings of Fact, No. 8.) On July 30, 2009, Claimant was discharged for violating Employer's anti-tobacco policy. (UCBR's Findings of Fact, No. 11.)

Claimant filed a claim for unemployment benefits, which was denied by the local service center. Claimant timely appealed to the referee, who held an evidentiary hearing. Jill Sinkhorn, Employer's human resources manager, testified that Employer has a written policy prohibiting the use of smokeless tobacco products in the workplace and that the use of chewing tobacco inside one of its pharmacies is

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<sup>2</sup> Claimant was a "floating" pharmacist who worked in numerous Employer-owned pharmacies on an as-needed basis. (N.T., 11/20/09, at 9, 23, 38.)

grounds for termination. (N.T., 11/20/09, at 7, 20.) Employer's district manager, William Rumcik, Jr., testified that, in 2007, he received a complaint from a technician that Claimant was chewing tobacco while working in the pharmacy. Rumcik confronted Claimant and told him that he was prohibited from chewing tobacco in the pharmacy. (*Id.* at 23, 26.)

Claimant testified that he has used chewing tobacco in each of the twenty-five pharmacies in which he has worked for Employer and that he was never informed that such behavior violated a work policy. (*Id.* at 34-35.) Claimant further testified that he never received the employee handbook containing the prohibition on smokeless tobacco products. (*Id.* at 33.) Over Employer's counsel's objection, Claimant also offered testimony regarding his allegations that (1) he was the victim of age and gender discrimination, and (2) Employer asked him to perform unlawful acts as a pharmacist. (*Id.* at 37-39.)

The referee ultimately reversed the service center's decision. The referee found that Claimant was not aware of Employer's anti-tobacco policy and was never informed that he was prohibited from chewing tobacco in the workplace. The referee also found that, after receiving the complaint about Claimant's tobacco use in June 2009, Employer failed to take prompt action to discipline Claimant. Therefore, the referee concluded that Claimant did not commit willful misconduct and awarded him benefits.

Employer timely appealed to the UCBR, which reversed the referee's decision. The UCBR found that Claimant became aware of Employer's anti-tobacco policy when he received a verbal warning in 2007. Thus, because Claimant

knowingly violated Employer's policy without good cause, the UCBR concluded that he was ineligible for benefits under section 402(e) of the Law. Claimant now petitions for review of that decision.<sup>3</sup>

Claimant first argues that the UCBR's findings are unsupported by substantial evidence. We disagree.

"Willful misconduct" is defined as: (1) wanton and willful disregard of the employer's interests; (2) deliberate violation of the employer's rules; (3) disregard of the standards of behavior that an employer rightfully can expect from its employees; or (4) negligence that manifests culpability, wrongful intent, evil design, or intentional or substantial disregard for the employer's interests or the employee's duties and obligations. *Andrews v. Unemployment Compensation Board of Review*, 633 A.2d 1261, 1262 (Pa. Cmwlth. 1993). When an employee is discharged for violating a work rule, the employer has the burden of proving that the employee knew of the existence of the work rule and that he or she violated the rule. *Roberts v. Unemployment Compensation Board of Review*, 977 A.2d 12, 16 (Pa. Cmwlth. 2009). The burden then shifts to the employee to establish that he or she had good cause for the violation or that the rule itself was unreasonable. *Id.*

Here, the UCBR found that Employer had a policy prohibiting the use of tobacco products in the workplace. The UCBR further found:

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<sup>3</sup> Our scope of review is limited to determining whether constitutional rights were violated, an error of law was committed, or findings of fact were unsupported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

Although it is unclear whether the claimant knew about the policy prior to 2007, the employer credibly established that the claimant was issued a verbal warning for chewing while inside one of its pharmacies. Based on that verbal warning, the claimant was made aware of the employer's policy.

(UCBR's Decision & Order at 3.) Finally, the UCBR concluded that Claimant failed to establish good cause for violating Employer's policy, stating that "the fact that [Claimant] always violated the employer's policy without its knowledge or that his conduct was overlooked by previous employers does not establish good cause." (*Id.*)

The UCBR resolved the conflicts in the evidence in Employer's favor and specifically disbelieved Claimant's testimony that he was not informed of the anti-tobacco policy in 2007. Issues of witness credibility and evidentiary weight are within the sole discretion of the UCBR, which is the ultimate factfinder. *Walsh v. Unemployment Compensation Board of Review*, 943 A.2d 363, 368 (Pa. Cmwlth. 2008). Therefore, the testimony credited by the UCBR provides substantial evidence to support the finding that Claimant deliberately violated Employer's policy without good cause.

Next, Claimant argues that the UCBR erred in failing to remand the matter to allow him to present evidence of disparate treatment. This claim also lacks merit.

The UCBR concluded that the record was adequate to resolve Claimant's disparate treatment claims. First, the UCBR found that Claimant failed to prove that other employees used chewing tobacco at work but did not receive similar punishment. As the UCBR explained:

[T]he only evidence of disparate treatment that the claimant offered was his subjective fear that his job was in jeopardy because the employer recently hired 40 new pharmacists that were younger than him and who allegedly were mainly female. His subjective fear, however, does not establish that the employer treated him any differently than its other employees.

(UCBR's Decision & Order at 4.)

Second, the UCBR disbelieved Claimant's testimony that he was discharged for refusing to perform an illegal act. Claimant testified that his supervisor told him that he could take back previously dispensed medication from a customer and return the customer's co-pay. (N.T., 11/20/09, at 39.) However, Claimant failed to offer any evidence that such a practice is illegal. In fact, Claimant admitted on cross-examination that it is permissible in some circumstances. (*Id.* at 40.) Thus, Claimant's own testimony undermines his claim of unlawful activity.

Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Senior Judge

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Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 8th day of July, 2011, we hereby affirm the October 25, 2010, order of the Unemployment Compensation Board of Review.

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ROCHELLE S. FRIEDMAN, Senior Judge