

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Henry Warren,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 247 C.D. 2011
	:	Submitted: June 24, 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 JUDGE BROBSON

FILED: August 31, 2011

Petitioner Henry Warren (Claimant) petitions *pro se* for review of an order of the Unemployment Compensation Board of Review (Board). The Board affirmed the Unemployment Compensation Referee's (Referee) decision denying Claimant unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law)¹. For the reasons set forth below, we affirm.

Claimant applied for unemployment compensation benefits after being discharged from his employment as a part-time loan officer at Superior Mortgage (Employer). The Philadelphia Unemployment Compensation Service Center (Service Center) issued a determination, finding Claimant ineligible for unemployment compensation benefits under Section 402(e) of the Law. Claimant

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

appealed the Service Center's determination, and an evidentiary hearing was held before the Referee.

Employer presented the testimony of Marilyn MacFarlane (Assistant Vice President (AVP) of Human Resources) and Adam Waldman (Sales Manager) in support of its position. The AVP testified that Employer discovered that Claimant no longer possessed a Pennsylvania mortgage license when Employer's licensing department² was entering its loan officers' information into a new computer system, the National Mortgage Licensing System. (Certified Record (C.R.), Item 10.) The AVP testified that Claimant's license was terminated in April 2010 because Claimant did not provide the Pennsylvania Department of Banking (Banking) with the financial information that it requested.³ (*Id.*) The AVP testified that for a loan officer to originate business in Pennsylvania, the loan officer must have a Pennsylvania license. (*Id.*) Further, it is the loan officer who is ultimately responsible for ensuring proper licensure within a state. (*Id.*) The AVP testified that when Banking discovers a problem with a person's license, Banking communicates directly with the licensee, not the employer. (*Id.*) Therefore, upon the termination of Claimant's license, Banking would have sent a letter directly to Claimant's home. (*Id.*) She reported that Claimant never disclosed to Employer that his license had been revoked or terminated. (*Id.*)

The AVP testified that once Employer discovered Claimant's license had been terminated, Employer contacted the Sales Manager on August 27, 2010, and informed him that Claimant was to immediately cease doing business in

² Employer's licensing department, among other functions, tracks and renews licenses, alerts loan officers of licenses that need to be renewed, and alerts loan officers of tests that need to be taken. (C.R., Item 10.)

³ Claimant's licenses in New Jersey and Delaware remained active. (*Id.*)

Pennsylvania. (*Id.*) The AVP thereafter learned, however, that Claimant pulled a credit report on September 7, 2010, after he was instructed not to do so, and thus, jeopardized Employer's ability to conduct business in Pennsylvania. (*Id.*) The AVP testified that she provided Claimant an opportunity to submit the required paperwork, and, thus, rectify the licensure issue, but that Claimant never provided the complete documentation to Employer. (*Id.*) Further, despite Claimant's assertion that he had previously provided such information to Employer, there was no record of Employer receiving that information. The AVP testified that because Claimant never supplied Employer with all the necessary documentation and because Employer did not trust that Claimant would cease activity on Pennsylvania files, Employer terminated his employment. (*Id.*) Finally, the AVP testified that on prior occasions Claimant also had not complied with Employer's directives and that the AVP had reiterated the need to follow directives after an incident that occurred approximately one (1) month prior to his termination. (*Id.*)

The Sales Manager testified that on August 27, 2010, he called Claimant to ensure that Claimant understood that he was not permitted to originate business in Pennsylvania as a result of his license being revoked. (*Id.*) The Sales Manager testified that he specifically told Claimant, "you are no longer allowed to originate in Pennsylvania." (*Id.*) He then testified that on August 30, 2010, he discovered that Claimant pulled a credit report. (*Id.*) The Sales Manager stated that pulling a credit report was a necessary part of originating a loan. (*Id.*) He testified that Claimant stated he was just trying to provide Employer with a complete file. (*Id.*) The Sales Manager reported, however, that pulling the credit report was not necessary at that time because the file could have been successfully processed without further assistance from Claimant. (*Id.*)

Claimant testified to the circumstances surrounding his separation from employment. Claimant testified that he was discharged for failing to supply Employer with the appropriate licensure reinstatement documentation and only later learned that Employer perceived his act of pulling the credit report as insubordinate. (*Id.*) Claimant testified that he was advised to stop originating in Pennsylvania but that he only pulled a credit report for a file that was already complete; he simply printed off and attached the document. (*Id.*) He did not believe pulling a credit report constituted “originating” and noted that Employer would typically return files to the loan officer if they were incomplete. (*Id.*) Claimant also testified that until Employer notified him, he was not aware that his Pennsylvania license had been terminated. (*Id.*) He stated that Banking had previously requested information from him which he provided to Employer at that time, and that if Banking did not receive that documentation, it was Employer who was responsible for not following through with the submission. (*Id.*) Claimant noted that he did not call Banking to verify the status of his license but stated that this was because he believed Employer’s licensing department was working on the issue. (*Id.*) Finally, Claimant testified that Employer did not provide him with enough time to compile the requested documentation before he was terminated. (*Id.*)

Following the hearing, the Referee issued a decision, which affirmed the Service Center’s determination denying unemployment compensation benefits pursuant to Section 402(e) of the Law. The Referee made the following relevant findings:

1. The claimant most recently worked part-time as a loan officer from September 2007 until his last day worked on

September 7, 2010, at a final rate of pay of \$7.25 offset against his commissions.

2. Prior to his current position, the claimant worked March 2004 until September 2007 as a co-branch manager.

3. As a loan officer, the claimant is required to be licensed by the Pennsylvania Department of Banking.

4. In late August 2010, the employer discovered that the claimant's license had been revoked as of April 2010.

5. The claimant's license was revoked because of tax liens filed against him in various states including an IRS Tax Lien.

6. On August 27, 2010, the employer contacted the claimant to inform him the company discovered the claimant's license had been revoked.

7. The license is issued to the individual and it is the individual's responsibility to maintain the license.

8. On August 27, 2010, the claimant's branch manager informed him that because he was not licensed in Pennsylvania he was to cease all activity, including originating loans in Pennsylvania.

9. The claimant was still licensed in Delaware and New Jersey and could continue to process loans for consumers in those states.

10. On August 30, 2010, the claimant's branch manager discovered that the claimant had pulled a credit report for a loan in Pennsylvania despite the supervisor's express direction not to process any loans for Pennsylvania consumers since the claimant was not licensed to do so.

11. The employer requested that the claimant provide them with copies of documents he previously provided to them and/or to the Pennsylvania Department of Banking.

12. As of September 7, 2010, the claimant did not provide the employer with sufficient documentation in regard to his license.

13. The branch manager informed human resources of the claimant's failure to comply with his directions.

14. On September 7, 2010, the employer discharged the claimant because the claimant acted against the specific management direction that prohibited him from originating business in Pennsylvania. The employer considered the claimant's failure to comply with that direction to constitute an insubordinate act.

15. The employer had previously warned the claimant within the last two months about his failure to comply with express directions from management.

(C.R., Item 11.)

The Referee reasoned that Employer gave Claimant express directions not to originate any business in Pennsylvania, and, despite Employer's express directions, Claimant continued to process loans in Pennsylvania. (*Id.*) The Referee determined that Employer credibly testified that Claimant's continued origination and processing of loans in Pennsylvania jeopardized the company's license and ability to continue doing business in Pennsylvania. (*Id.*) In addition, the Referee noted that Employer previously warned Claimant about failing to comply with express management directives, and when there was no change in his course of conduct, Employer discharged Claimant as a result of the most recent act of insubordination. (*Id.*) The Referee concluded that Claimant's actions must be considered a deliberate violation of Employer's rules. (*Id.*) The Referee, therefore, determined that Claimant was ineligible for benefits under Section 402(e) of the Law due to his willful misconduct. (*Id.*)

Claimant appealed the Referee's order to the Board, which affirmed the Referee's decision. (C.R., Item 13.) In its order, the Board adopted and incorporated the Referee's findings of fact and conclusions of law. (*Id.*) In addition, the Board rejected Claimant's testimony as not credible that Claimant did not believe pulling the credit report for a Pennsylvania loan on August 30, 2010, qualified as "originating" or "processing" of a loan, and thus, it did not fall under Employer's restrictions. (*Id.*) The Board concluded that Employer credibly testified that pulling a credit report for a Pennsylvania loan was a necessary part of originating a loan and, as such, was prohibited by Employer's directive. (*Id.*) Claimant now petitions this Court for review of the Board's order.

On appeal,⁴ Claimant essentially argues that: (1) the Board's findings of fact, adopted from the Referee's findings of fact, are not supported by substantial evidence, and (2) the Board erred in concluding that Claimant's conduct rose to the level of willful misconduct under Section 402(e) of the Law.

First, we will address whether the Board's findings of fact are supported by substantial evidence. Substantial evidence is defined as relevant evidence upon which a reasonable mind could base a conclusion. *Johnson v. Unemployment Comp. Bd. of Review*, 502 A.2d 738, 740 (Pa. Cmwlth. 1986). In determining whether there is substantial evidence to support the Board's findings, this Court must examine the testimony in the light most favorable to the prevailing party, giving that party the benefit of any inferences that can logically and reasonably be drawn from the evidence. *Id.* A determination as to whether substantial evidence exists to support a

⁴ 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).

finding of fact can only be made upon examination of the record as a whole. *Taylor v. Unemployment Comp. Bd. of Review*, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). The Board's findings of fact are conclusive on appeal only so long as the record taken as a whole contains substantial evidence to support them. *Penflex, Inc. v. Bryson*, 506 Pa. 274, 286, 485 A.2d 359, 365 (1984).

Claimant essentially argues that the Board's finding that he originated or processed a Pennsylvania loan against Employer's directive is not supported by substantial evidence. Claimant contends that Employer's instructions were unclear and not properly communicated to Claimant because Claimant believed he was asked to send a complete file which required an attached credit report. In an unemployment compensation case, the Board is the ultimate fact finder and is, therefore, entitled to make its own determinations as to witness credibility and evidentiary weight. *Peak v. Unemployment Comp. Bd. of Review*, 509 Pa. 267, 272, 501 A.2d 1383, 1386 (1985). The Board is also empowered to resolve conflicts in the evidence. *DeRiggi v. Unemployment Comp. Bd. of Review*, 856 A.2d 253, 255 (Pa. Cmwlth. 2004). Here, the Board resolved any conflicts in testimony in favor of Employer. (C.R., Items 11 & 13.) The Board accepted Employer's testimony that pulling a credit report was a necessary part of originating a loan and specifically rejected Claimant's testimony that he did not believe that pulling a credit report constituted originating or processing of a loan. (C.R., Item 13.) The Board determined that, despite Employer's instructions to the contrary, Claimant originated business in Pennsylvania by pulling the credit report, which constituted an insubordinate act. The testimony of Employer, as summarized above, supports the Board's finding that Employer established a directive that Claimant was required to immediately discontinue all loan activity in

Pennsylvania, including pulling credit reports. Therefore, our review of the record demonstrates that there is substantial evidence to support the Board's finding.

Claimant also argues that the Board's finding that he had been previously warned about failing to comply with express management directives is not supported by substantial evidence. The testimony of Employer, as summarized above, indicates that there were prior occasions that Claimant did not follow Employer's directives. This testimony supports the Board's finding of fact #15 that Claimant had been subject to prior warnings for insubordination. (C.R., Item 11.) When viewed in a light most favorable to Employer, our review of the record in this case demonstrates that there is substantial evidence to support the Board's findings.⁵

Second, we address Claimant's contention that the Board erred in concluding that his conduct rose to the level of willful misconduct. Section 402(e) 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." The employer bears the burden of proving that the claimant's unemployment is due to the claimant's willful misconduct.⁶ *Walsh v. Unemployment Comp. Bd. of Review*, 943 A.2d 363, 369 (Pa. Cmwlth. 2008). The term "willful misconduct" is not defined by statute. The courts, however, have defined "willful misconduct" as:

⁵ We find Claimant's argument that Employer prejudiced the Referee and the Board by erroneously referring to Claimant's license as "terminated" and "revoked" rather than properly describing it as "withdrawn," to be without merit. Regardless of the terminology used, the point properly conveyed was that Claimant did not have a current active license; the proper description by which the license became inactive was not necessary to the decision.

⁶ Whether or not an employee's actions amount to willful misconduct is a question of law subject to review by this Court. *Nolan v. Unemployment Comp. Bd. of Review*, 425 A.2d 1203, 1205 (Pa. Cmwlth. 1981).

- (a) wanton or willful disregard of employer's interests,
- (b) deliberate violation of the employer's rules,
- (c) disregard of 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 and obligations.

Grieb v. Unemployment Comp. Bd. of Review, 573 Pa. 594, 600, 827 A.2d 422, 425 (2003).

An employee's refusal or failure to follow a specific order by his employer constitutes willful misconduct. *Frumento v. Unemployment Comp. Bd. of Review*, 466 Pa. 81, 351 A.2d 631 (1976). To establish whether an employee's non-compliance rises to the level of willful misconduct, the reasonableness of the employer's demand and the reasonableness of the employee's refusal must be examined. *Id.* The burden of proving the reasonableness of the demand rests with the employer. *LaGare v. Unemployment Comp. Bd. of Review*, 498 Pa. 72, 444 A.2d 1151 (1982). The burden then shifts to the claimant to prove good cause for his refusal by demonstrating that his non-compliance was a reasonable response. *Id.*; *Devine v. Unemployment Comp. Bd. of Review*, 429 A.2d 1243 (Pa. Cmwlth. 1981).

First, we must determine whether Employer's directive, that Claimant was required to immediately discontinue all Pennsylvania loan activity, was reasonable.⁷ Employer's directive was reasonable in light of Banking's requirement that loan officer's maintain a license.⁸ (C.R., Item 11.) Because

⁷ We note that Claimant does not dispute that Employer issued a directive.

⁸ Further, failure to obtain a license when it is a condition of employment can constitute willful misconduct. *See Williams v. Unemployment Comp. Bd. of Review*, 651 A.2d 708 (Pa. Cmwlth. 1994) (holding that employee's termination was based on willful misconduct, where he was terminated from job which required valid driver's license after his license was suspended as result of his failure to pay fine); *Adams v. Unemployment Comp. Bd. of Review*, 484 A.2d 232 (Pa. Cmwlth. 1984) (holding that nurse's failure to obtain a valid nursing license within deadline

Claimant did not have a current Pennsylvania license, Claimant no longer satisfied Banking's requirements, and, therefore, Claimant's continued loan activity jeopardized Employer's license and ability to do business in Pennsylvania.

Because Employer established the reasonableness of its directive, the burden shifted to Claimant to establish good cause for his action of pulling a credit report for a Pennsylvania loan after he was instructed not to do so. While the employer bears the burden of proving that a claimant's behavior constitutes willful misconduct, it is the claimant who bears the burden of proving good cause for his actions. *Kelly v. Unemployment Comp. Bd. of Review*, 747 A.2d 436, 438-39 (Pa. Cmwlth. 2000). To prove good cause, the claimant must demonstrate that his actions were justifiable and reasonable under the circumstances. *Id.* at 439. Claimant essentially argues that he had good cause because Employer failed to properly and concisely communicate its instructions and Claimant was simply trying to provide Employer with a complete file as requested. The Board may either accept or reject a witness's testimony, whether or not it is corroborated by other evidence of record. *Peak*, 509 Pa. at 275, 501 A.2d at 1388. As previously discussed, the Board found that Employer prohibited Claimant from originating or processing Pennsylvania loans and that Employer credibly testified that pulling a credit report qualified as originating or processing a loan. Further, the Board specifically rejected Claimant's testimony that he did not believe pulling a credit report qualified as originating or processing of a loan. Despite Employer's express direction not to originate or process any Pennsylvania loans, Claimant pulled a Pennsylvania consumer's credit report. While Claimant wished to provide a

set by employer following expiration constituted willful misconduct); *Chacko v. Unemployment Comp. Bd. of Review*, 410 A.2d 418 (Pa. Cmwlth. 1980) (holding that nurse's failure to comply with state licensing requirements constituted willful misconduct).

complete file for Employer, Employer testified that it could have easily completed the file itself, and, therefore, there was no reason for Claimant to violate Employer's directive. Claimant's action of pulling the credit report constituted a deliberate violation of Employer's directive without good cause. The Board, therefore, properly concluded that Claimant failed to establish good cause for his actions.

Given the record before us, we cannot conclude that the Board erred when it determined that Claimant's conduct rose to the level of willful misconduct and that he is, therefore, ineligible for benefits under Section 402(e) of the Law. Accordingly, we affirm the Board.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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 v. : No. 247 C.D. 2011
 :
Unemployment Compensation Board :
of Review, :
 Respondent :

ORDER

AND NOW, this 31st day of August, 2011, the order of the Unemployment Compensation Board of Review is hereby AFFIRMED.

P. KEVIN BROBSON, Judge