

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Gary Pettus,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2491 C.D. 2010
	:	
Unemployment Compensation	:	Submitted: April 8, 2011
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE COHN JUBELIRER**

**FILED: June 23, 2011**

Gary Pettus (Claimant), pro se, petitions for review of an order of the Unemployment Compensation (UC) Board of Review (Board), which affirmed the UC Referee's (Referee) determination finding Claimant ineligible for benefits under Section 402(e) of the Unemployment Compensation Law (Law).<sup>1</sup> The Board determined that Claimant was ineligible for benefits because he committed willful misconduct by violating a work rule prohibiting sleeping on the job.

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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).

Claimant applied for UC benefits after becoming separated from his employment with Mercy Life Center Corporation (Employer). The UC Service Center found Claimant ineligible for benefits pursuant to Section 402(e) of the Law and Claimant appealed. The Referee conducted an evidentiary hearing on June 2, 2010. Those who testified were Claimant and Employer's witnesses: Employer's Counselor III; Employer's Senior Counselor; Employer's Medical Financial Specialist; and Employer's Human Resources Generalist. Based on the testimony and evidence presented at the hearing, the Referee made the following findings of fact:

1. The claimant was employed between May 1, 2009 and February 26, 2010 as counselor for Mercy Life Center Corporation.
2. The claimant worked in a community living arrangement located in an apartment complex.
3. The claimant worked 3pm to 10:30pm on his last day and was emotionally stressed because of the recent passing of a resident he provided care for.
4. The claimant was responsible for providing a different resident with medication at approximately 5:30pm, but had until 6:30pm to actually do this.
5. A co-worker entered the apartment the claimant was working in at 5:30pm and found the apartment to be dark without any lights turned on.
6. The resident in need of medication was seen eating at the table in the dining area and indicated that he had not received his medications yet.
7. The co-worker found the claimant leaning on the couch in the livingroom area stretched out, with one leg on the floor and the other on the couch.

8. The resident asked that the television be adjusted and while the co-worker did this, the claimant's head popped up from the couch and then went back down.

9. When the claimant raised his head, he asked his co-worker what she was doing.

10. The co-worker then notified their supervisor of her observations and a short time later the supervisor and another employee entered the apartment.

11. The supervisor found the claimant stretched out on the couch with one leg on the floor and the claimant's head partially supported by his hand.

12. The supervisor called the claimant's name several times before he woke up.

13. The claimant was then suspended but took approximately 15 minutes to leave the worksite.

14. The claimant's employment was then terminated for sleeping on the job on February 26, 2010 and the claimant later made an application for benefits dated April 4, 2010.

(Referee Decision, Findings of Fact (FOF) ¶¶ 1-14.) The Referee found Employer's witnesses credible that Claimant was sleeping on the job and determined that Claimant was ineligible for benefits because of willful misconduct due to violating Employer's work rule. (Referee Decision/Order at 2.) On appeal, the Board adopted, in their entirety, the Referee's factual findings and legal conclusions. (Board Op. at 1). Claimant requested reconsideration of the Board's order, which the Board denied. (Reconsideration Order, October 26, 2010.) Claimant now petitions this Court for review.<sup>2</sup>

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<sup>2</sup> This "Court's review is limited to determining whether constitutional rights were violated, whether an error of law was committed, whether a practice or procedure of the Board was not followed, or whether the findings of fact are supported by substantial evidence in the

Section 402(e) provides that a claimant will not be eligible for unemployment compensation when “his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work.” 43 P.S. § 802(e). Willful misconduct is defined as follows:

- 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.

Caterpillar, Inc. v. Unemployment Compensation Board of Review, 550 Pa. 115, 123, 703 A.2d 452, 456 (1997). A “violation of an employer’s rule or policy ordinarily constitutes willful misconduct.” Duquesne Light Company v. Unemployment Compensation Board of Review, 648 A.2d 1318, 1320 (Pa. Cmwlth. 1994). An employer has the initial burden of proving the existence of a reasonable work rule and that claimant violated the work rule. Arbster v. Unemployment Compensation Board of Review, 690 A.2d 805, 808-09 (Pa. Cmwlth. 1997). In addition, the employer must prove that the employee was aware of the work rule. Roberts v. Unemployment Compensation Board of Review, 977 A.2d 12, 16 (Pa. Cmwlth. 2009).

Here, Claimant was discharged for violating Employer’s work rule prohibiting sleeping on the job. (Employer Questionnaire, Hr’g Tr. Ex. 2;

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record.” The Western & Southern Life Insurance Co. v. Unemployment Compensation Board of Review, 913 A.2d 331, 334 n.2 (Pa. Cmwlth. 2006). Substantial evidence is defined as “such relevant evidence which a reasonable mind would accept as adequate to support a conclusion.” Guthrie v. Unemployment Compensation Board of Review, 738 A.2d 518, 521 (Pa. Cmwlth. 1999).

Employer Corrective Disciplinary Action Form, Hr’g Ex. 4 at 2; Hr’g Tr. at 4, 15.)<sup>3</sup> In support of its decision to terminate Claimant, Employer presented its handbook at the hearing which, in relevant part, states “[e]xamples of offenses which may earn probation, suspension, or termination upon the first occurrence include, but are not limited to, the following . . . [s]leeping on the job or during work hours.” (Employer Handbook, Hr’g Tr. Ex. 5 at 4-5.) This work rule stating that one cannot sleep on the job is reasonable because “this Court has held that sleeping on the job is prima facie an act of willful misconduct.” Ragland v. Unemployment Compensation Board of Review, 428 A.2d 1019, 1020 (Pa. Cmwlth. 1981).<sup>4</sup> Claimant admitted to being aware of the work rule prohibiting sleeping on the job when he was asked “were [you] aware from the handbook that sleeping on the job would result in discharge” and he replied “yes.” (Hr’g Tr. at 15.) As such, the Board found that Employer established its burden of proving the existence of a reasonable work rule, that Claimant was aware of the work rule, and that Claimant violated the work rule. (Referee Decision/Order at 2; Board Op. at 1.)

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<sup>3</sup> The following exchange took place between Employer’s Tax Consultant Representative (ET) and Claimant (C):

ET And you were aware from the handbook that sleeping on the job would result in discharge?

C Yes.

ET Is that the reason you were given for discharge?

C Yes.

(Hr’g Tr. at 15.)

<sup>4</sup> Sleeping on the job is categorized under willful misconduct because, in addition to being a work rule violation, it is also considered a “‘wanton and wil[l]ful disregard of the employer’s interest’ or [a] ‘disregard of standards of behavior which an employer can rightfully expect.’” Ragland, 428 A.2d at 1020 (quoting Unemployment Compensation Board of Review v. Simone, 355 A.2d 614 (Pa. Cmwlth. 1976)).

On appeal, Claimant argues that: (1) he did not violate Employer's rule because he was not sleeping on the job; (2) the work rule is not uniformly enforced; and (3) he was not fired for a work rule violation but, instead, fired for another reason, specifically, retaliation.

We first address Claimant's argument that he was not sleeping on the job. This argument is primarily a challenge of the Board's credibility determinations and its findings of fact. The Board found Employer's witnesses credible that Claimant was sleeping on the job. (Referee Decision/Order at 2; Board Op. at 1.) Resolving conflicts in the evidence, determining credibility, weighing evidence, and drawing inferences therefrom are matters for the Board in its capacity as the ultimate fact-finder. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 269-70, 276-77, 501 A.2d 1383, 1385, 1388 (1985). In making credibility determinations, the Board "may accept or reject the testimony of any witness, in whole or in part." Greif v. Unemployment Compensation Board of Review, 450 A.2d 229, 230 (Pa. Cmwlth. 1982). As long as the Board's factual findings are supported by substantial evidence, those findings are conclusive on appeal. Geesey v. Unemployment Compensation Board of Review, 381 A.2d 1343, 1344 (Pa. Cmwlth. 1978). That Claimant may have given "a different version of the events, or . . . might view the testimony differently than the Board, is not grounds for reversal if substantial evidence supports the Board's findings." Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994).

In this case, there is substantial evidence to support the Board’s finding that Claimant was asleep on the job. The first person to notice Claimant sleeping was Claimant’s co-worker, Counselor III. Counselor III testified she entered the apartment where Claimant was supposed to be administering medicine and “the apartment . . . was completely dark.” (Hr’g Tr. at 6.) She turned the kitchen light on and asked the resident if he had his medication; the resident replied no. (Hr’g Tr. at 6.) Counselor III testified that she gave the resident the medication and

[Claimant] was on the couch, leaning to the left and his legs were down on the floor like, stretched out, but he didn’t acknowledge that I was in there at that point. And as I was giving the medication and talking to the [resident], he – I saw his head pop up.

(Hr’g Tr. at 6.) She testified that she had only been in the apartment a couple of minutes, but that when she went to fix the resident’s television because it was snowy, Claimant asked what she was doing, then “plopped back down to the left.” (Hr’g Tr. at 6.) Counselor III notified the Senior Counselor that Claimant seemed as if he was sleeping. (Hr’g Tr. at 6.)

Consistent with Counselor III’s testimony, the Senior Counselor testified, in relevant part:

I . . . saw [Claimant] stretched out. He had his head into his fist, his right arm. He was stretched out on the couch, one leg was on the ground, one leg was on the couch and I stood in front of him for a few seconds and I had yelled his name. After a few times of yelling his name, he finally woke up and you were able to see that he was sleeping.

(Hr’g Tr. at 9.) Also, the Medical Financial Specialist, who accompanied the Senior Counselor to the apartment where Claimant was sleeping, testified that she

had witnessed the event that occurred as described by the Senior Counselor. (Hr'g Tr. at 12.)<sup>5</sup> The Board found the testimony of Employer's witnesses credible and found that Claimant was, in fact, sleeping. (Referee Decision/Order at 2; Board Op. at 1.)<sup>6</sup> This evidence is substantial and supports the Board's finding that Claimant was asleep on the job and, thus, violated Employer's work rule.<sup>7</sup>

Claimant next argues that, if he had been sleeping in violation of the work rule, the work rule was not uniformly enforced. Claimant testified that the reason the rule was not uniformly enforced was because he "worked overnight and slept and never had a problem." (Hr'g Tr. at 18.) However, we note that there is a

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<sup>5</sup> The following exchange took place between Employer's Tax Consultant Representative (ET) and the Medical Financial Specialist (EW3):

ET Were you still present when [Senior Counselor] returned to the site?

EW3 Yes.

ET And what request did she make of you?

EW3 Just for me to accompany her to the apartment because she had got a phone call that [Claimant] was asleep.

ET Okay. And it's not necessary to repeat her testimony, but do you agree that her testimony is correct about what you saw when you entered the apartment?

EW3 Yes.

(Hr'g Tr. at 12.)

<sup>6</sup> We note that in his decision, the Referee stated that "the [E]mployer's *two witnesses* testified credibly regarding the [C]laimant's actions on February 26, 2010 and given that credible testimony, the Referee must conclude that the [C]laimant was in fact sleeping that day." (Referee Decision/Order at 2 (emphasis added).) The record is not clear why the Referee only found two of Employer's witnesses credible and who he was identifying as the two credible witnesses. However, three of Employer's witnesses testified that Claimant was sleeping on the job on February 26, 2010. That the Referee found only two of Employer's witnesses credible does not alter our decision because all three witnesses testified about the same occurrence.

<sup>7</sup> Claimant also argues he did not intentionally violate the work rule by sleeping on the job. This argument is disingenuous because, throughout his entire testimony, Claimant asserted that he was not sleeping so he could not have violated the work rule.



difference between sleeping on the job and getting caught, and sleeping on the job without the employer's knowledge. Here, Employer's witnesses were found credible that Claimant was caught sleeping on the job. (Referee Decision/Order at 2; Board Op. at 1.) Moreover, Employer's Senior Counselor, who was found credible, testified that the rules were uniformly enforced and that "no one is permitted to sleep." (Hr'g Tr. at 17.) That Claimant may have previously slept on the job without Employer's knowledge does not prove that the work rule was not uniformly enforced, especially in light of the fact that Employer's witnesses were found credible that the work rule is uniformly enforced.

Finally, Claimant argues that the reason he was discharged was because of retaliation and not a work rule violation. However, there is no evidence in the record to suggest that retaliation was the reason for Claimant's discharge. In fact, the record establishes that Claimant admitted at the evidentiary hearing that the reason for his discharge was violating Employer's work rule prohibiting sleeping on the job and not for any other reason. (Hr'g Tr. at 15.)<sup>8</sup>

Accordingly, we affirm the order of the Board.

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**RENÉE COHN JUBELIRER, Judge**

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<sup>8</sup> We note that Claimant presented this argument for the first time in his motion for reconsideration to the Board, which the Board denied. The Board has broad discretion in granting or denying reconsideration requests, and we cannot conclude that the Board abused its discretion in denying his motion in light of the fact that he had ample opportunity to present his case initially before the Referee. Ensle v. Unemployment Compensation Board of Review, 740 A.2d 775, 779-80 (Pa. Cmwlth. 1999).

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**ORDER**

**NOW**, June 23, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

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**RENÉE COHN JUBELIRER, Judge**