

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

James Vitaliano, :  
 :  
 Petitioner :  
 :  
 v. :  
 :  
 Unemployment Compensation Board :  
 of Review, : No. 2500 C.D. 2009  
 Respondent : Submitted: December 17, 2010

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE DAN PELLEGRINI, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE PELLEGRINI

Filed: January 19, 2011

James Vitaliano (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) affirming the decision of the Unemployment Compensation Referee (Referee) finding him ineligible for benefits under Section 402(e) of the Unemployment Compensation Law<sup>1</sup> (Law) because his actions amounted to willful misconduct. Discerning no error, we affirm the Board.

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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). That section provides, in pertinent part, as follows:

An employee shall be ineligible for compensation for any week –

(e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected

**(Footnote continued on next page...)**

Claimant was employed full-time by the Pennsylvania Department of Revenue (Employer) as a Revenue Research Analyst 3 from August 6, 2006, until his discharge on June 24, 2009, with a rate of pay of \$24.45 per hour. At the time Claimant was hired, Employer was aware that he had outstanding tax obligations and penalties dating back to 1994. Claimant's employment, like all of Employer's employees, was conditional upon his fulfillment of his tax obligations, including the filing of past returns and payment of valid taxes due. However, Claimant failed to satisfy his outstanding tax obligations, and on June 3, 2009, Employer issued a direct order requiring Claimant to: contact the Office of Attorney General (OAG) to address his tax delinquencies; sign a payment agreement with the OAG; make a significant down payment, the amount of which was to be determined by the OAG; and file his state sales and use tax return. Employer mandated that these directives be fully completed by June 17, 2009. When Claimant failed to comply with the direct order

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**(continued...)**

with his work, irrespective of whether or not such work is "employment" as defined in this act.

While the term "willful misconduct" is not specifically defined in the Law, our courts utilize the following definition:

(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; and (d) negligence indicating an intentional disregard of the employer's interest or an employee's duties or obligations.

*Grieb v. Unemployment Compensation Board of Review*, 573 Pa. 594, 600, 827 A.2d 422, 425 (2003) (citing *Navickas v. Unemployment Compensation Review Board*, 567 Pa. 298, 304, 787 A.2d 284, 288 (2001)). In order to make such a determination, the court must consider all of the facts and circumstances, including the employee's proffered reasons for noncompliance.

by the specified deadline, his employment was terminated. Claimant filed an unemployment compensation claim, which the Department of Labor and Industry's Office of UC Benefits denied, finding Claimant ineligible for benefits under Section 402(e) of the Law because he failed to comply with Employer's Standards of Conduct and his actions showed a willful disregard of Employer's interests. Claimant appealed this decision to the Referee.

Karen Malone (Ms. Malone), Human Resource Analyst 3, testified on behalf of Employer that Claimant was discharged for failing to comply with a direct order requiring him to address his state tax liability issues. This was in direct conflict with Employer's policy that all employees must be prompt in filing their tax returns and payment of taxes. Specifically, Employer's "Standards of Conduct" state the following:

The mission of the Department [Employer] includes achieving the highest degree of voluntary compliance with the tax laws and maintaining public confidence in state government. Therefore, it is mandatory that Department employees comply fully with all requirements of governmental taxing authorities. Employees must:

1. File all tax returns timely and properly in keeping with the requirements of laws, regulations, and ordinances. Those who file joint returns are responsible for insuring that their return is filed timely.
2. Pay on a timely basis any valid tax due. Revenue employees are entitled to the same rights as any other individuals relative to filing extensions, requests for hearing, etc., however, when a final determination has been made the tax due must be paid promptly.

According to Ms. Malone, Employer was aware at the time Claimant was hired that he had outstanding tax obligations.

Jane Baldo (Ms. Baldo), Human Resource Analyst 3, also testified that Employer was aware of Claimant's state tax obligations when he was initially hired. However, Claimant was informed that he must set up a payment plan and memos were regularly sent to all employees via e-mail reminding them of Employer's policy requiring the timely filing of all tax returns and prompt payment of valid taxes that are due. According to Ms. Baldo, Claimant failed to make *any* payments from the time he was hired in 2006 until June of 2009, and the amount Claimant owed increased during this time period due to penalties and interest. Ms. Baldo testified that in March of 2008, Employer ran a cross check between its employees and individuals with delinquent taxes. Claimant's name appeared on this list and his case was referred to the OAG. When the OAG contacted Claimant about his tax delinquency in March of 2008, Claimant, although employed by the Department since 2006, stated that he was unemployed and would set up a deferred payment plan as soon as his wife obtained employment.

Ms. Baldo testified that she was present at a meeting with Claimant on June 3, 2009, to discuss his delinquent taxes. At that meeting Claimant informed her that he contacted Pennsylvania's Taxpayer Services Center and was waiting for the OAG to contact him, but he believed his information "got lost in the shuffle." At the conclusion of this meeting, Ms. Baldo handed Claimant a copy of Employer's direct order and made it clear that his employment could be terminated as a result of his

failure to comply. The order mandated that Claimant must fully complete the following no later than June 17, 2009:

- contact Michael Roman of the Office of Attorney General's (OAG) Office . . . in order to address these delinquencies,
- sign a payment agreement with the OAG,
- make a significant payment (determined by the OAG),
- and file your PA-3 Sales and Use Tax return.

According to Ms. Baldo, Michael Roman (Mr. Roman) told Employer that Claimant did make contact with him as required and provided a statement of financial interest. Based upon the information provided in that statement, the OAG offered Claimant a payment plan of twenty percent down and set monthly payments over the next two years in order to pay off the entirety of his tax liability. However, Claimant did not accept this agreement and instead contacted the OAG on June 18, 2009, a day after the deadlines, with an interim plan. Ms. Baldo testified that Claimant's interim plan did not include a down payment, proposed significantly smaller sums to be paid over the first 14 months, a slight increase beginning with the 15<sup>th</sup> month, and then another increase in five years. Employer did not believe Claimant's interim plan filled the requirements of the direct order as it did not include a significant down payment, payment was drawn out over several additional years, and it was not even proposed until after the deadline. Ms. Baldo admitted on cross-examination that she did not know if Claimant had the resources and ability to make the payments as proposed by the OAG.

Claimant admitted that he had outstanding tax liabilities. However, he testified that prior to issuing the direct order, Employer never requested that he pay off his tax liabilities by a specific date, at a certain rate, or make a down payment. While he also admitted that he did not comply with the four directives by the June 17 deadline, he claims all of the requirements were “in progress” at the time his employment was terminated and that it was impossible to accomplish all four mandates within the ten days allowed by Employer. According to Claimant, he and his wife had several telephone conversations with Mr. Roman during which they made clear that they were not financially able to make a substantial down payment. As an alternative, they offered to have the Commonwealth place a lien on a natural gas lease they owned. Claimant testified that he contacted Employer before the expiration of the deadline and explained that he was still negotiating with Mr. Roman, but he did not remember to whom he spoke regarding this matter.

The Referee found Claimant ineligible for benefits under Section 402(e) of the Law because his failure to comply with Employer’s direct order constituted willful misconduct. He found that Claimant was aware or should have been aware of Employer’s policy regarding the prompt filing of tax returns and timely payment of taxes due because the policy was contained in Employer’s Standards of Conduct and Employer issued yearly memos to all employees reminding them of the importance of this rule. Employer’s policy was mandatory and Claimant was aware that failure to comply could result in disciplinary action, including discharge and even criminal prosecution. The Referee also found that Claimant failed to comply with Employer’s direct order and was discharged for his non-compliance. Given Claimant’s violation of Employer’s policy and his failure to comply with the direct order, the Referee

found that Employer met its burden of establishing that Claimant's discharge was for willful misconduct and that he was ineligible for benefits. Claimant appealed to the Board, which affirmed the Referee's decision. This appeal followed.<sup>2</sup>

On appeal, Claimant argues that the Board's finding of willful misconduct was not supported by substantial evidence.<sup>3</sup> According to Claimant, Employer essentially waived its own policy by permitting him to remain employed for three years without specifically addressing his state tax issues. Because Employer did not immediately enforce its policy, Claimant insists that he could reasonably have interpreted Employer's silence as its "blessing" and that he was an exception to the rule.

Claimant also maintains that Employer's direct order allowing him to pay off his tax liabilities gradually conflicted with its policy outlined in the Standards of Conduct that mandated all taxes must be paid when due. Claimant argues that this inconsistency demonstrates that the policy was flexible, or would not be enforced as written. Because Claimant was making efforts to resolve his tax problems, was hired by Employer with full knowledge of his outstanding tax liabilities, was not questioned relative to his delinquent taxes until almost three years into his

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<sup>2</sup> The Court's scope of review in this matter is limited to determining whether there was a constitutional violation or error of law, whether any practice or procedure of the Board was not followed, and whether the necessary findings of fact are supported by substantial evidence. *Glenn v. Unemployment Compensation Board of Review*, 928 A.2d 1169, 1171 n.1 (Pa. Cmwlth. 2007).

<sup>3</sup> Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a finding of fact." *Seton Co. v. Unemployment Compensation Board of Review*, 663 A.2d 296, 299 n.3 (Pa. Cmwlth. 1995).

employment, and Employer did not consistently enforce its own policy, Claimant argues that his conduct did not amount to willful misconduct.<sup>4</sup> We disagree.

First, just because Employer did not immediately enforce its policy by requiring payment of the delinquent taxes prior to or immediately after Claimant was hired does not mean Employer waived its right to enforce this policy. Employer's policy did not call for immediate discipline of all employees, and it is well known that the process of collecting delinquent taxes does not move swiftly. Employer repeatedly reminded Claimant of his obligations, and his case was referred to the OAG immediately after his name appeared on a list of employees with delinquent taxes. There is also some "cheekiness" in Claimant's argument that he should be excused from complying with the work rule because he sought to delay collection by being untruthful when he told OAG that he could not enter into a payment plan because he was unemployed when, in fact, he was employed. He also forgets that it is not Employer's obligation to come into compliance with the work rule but his and, until given a direct order to do so, he made no effort to set up a payment plan or make even a single payment during his almost three years of employment.

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<sup>4</sup> It is well-settled that in unemployment compensation cases an employer has the burden of proving an employee has engaged in willful misconduct. *Williams v. Unemployment Compensation Board of Review*, 596 A.2d 1191, 1193 (Pa. Cmwlth. 1991). When such misconduct involves the refusal to obey a directive or the violation of a work rule, an employer must establish the existence of a reasonable work rule and violation of that rule. *Brunson v. Unemployment Compensation Board of Review*, 570 A.2d 1096, 1098 (Pa. Cmwlth. 1990). Once this has been established, the burden shifts to the employee to prove he had "good cause" for his actions, which this Court has described as "requiring a 'balancing of the reasonableness of the supervisor's directive against the reasonableness of the claimant's refusal.'" *Connelly v. Unemployment Compensation Board of Review*, 450 A.2d 245, 246 (citing *Patterson v. Unemployment Compensation Board of Review*, 430 A.2d 1011, 1014 (Pa. Cmwlth. 1981)).



The incident that led to his termination for willful misconduct was that he failed to comply with Employer's direct order to enter into a payment agreement with the OAG and make a significant payment (determined by the OAG). Claimant did not dispute that he was aware of the "Standards of Conduct" which contains a specific section mandating the prompt filing of all tax returns and timely payment of valid taxes due. Claimant also admitted that he violated this work rule by acknowledging that he had outstanding tax liabilities and admitting that he did not comply with the mandates contained in Employer's direct order to resolve his outstanding tax obligations. Finally, Claimant failed to provide any evidence of good cause for his violation of the policy or failure to comply with Employer's direct order, other than a self-serving statement, without any substantiation, that he could not afford to make a substantial down payment.

Because there is no dispute that Claimant violated a reasonable work rule by failing to pay his taxes, failed to comply with a direct order to come into compliance with the work rule, and did not provide good cause for his actions, there was substantial evidence that Claimant's actions amounted to willful misconduct. Accordingly, the order of the Board is affirmed.

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DAN PELLEGRINI, JUDGE

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**ORDER**

AND NOW, this 19<sup>th</sup> day of January, 2011, the order of the Unemployment Compensation Board of Review, dated November 19, 2009, is affirmed.

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DAN PELLEGRINI, JUDGE