

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Frank W. DiLeo, Jr., :
 :
 Petitioner :
 :
 v. : No. 2555 C.D. 2010
 :
 : Submitted: April 1, 2011
 Unemployment Compensation :
 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 McCULLOUGH

FILED: June 23, 2011

Frank W. DiLeo, Jr. (Claimant) petitions *pro se* for review of the September 30, 2010, order of the Unemployment Compensation Board of Review (Board), which affirmed a referee's determination that Claimant is ineligible for benefits pursuant to section 402(e) of the Unemployment Compensation Law (Law).¹ We affirm.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937), 2897, as amended, 43 P.S. §802(e). Section 402(e) provides that an employee is ineligible for compensation for any week in which his unemployment is due to his discharge from work for willful misconduct.

Claimant was employed by Hartmann Electrical (Employer) as a full-time mechanic. On April 30, 2010, Employer discharged Claimant for refusing to respond when questioned about a bill for a service call.² Claimant applied for unemployment compensation benefits, which were denied by the local service center pursuant to section 402(e) of the Law. Claimant appealed, and the referee conducted a hearing on August 2, 2010. Claimant and Employer appeared at the hearing and presented testimony.

After reviewing the evidence, the referee made the following findings of fact:

2. The employer's procedure requires that a mechanic is to complete a bill either at the completion of the job or the end of the work day.
3. The claimant knew or should have known the employer's procedure as being employed in excess of nine years with the employer.
4. On April 23, 2010, the employer dispatched the claimant to assist another mechanic on a job.
5. On April 23, 2010, the other mechanic was sent to another job leaving the claimant to complete the job that they were working on.
6. On April 23, 2010, the claimant returned to the office and was questioned about the bill.
7. The claimant became agitated, picked up his paycheck and failed to respond to the employer.

² When he applied for benefits, Claimant checked the boxes on the "Claimant Questionnaire" indicating that he was discharged from his employment because of his "attitude," and that he admitted to having a negative attitude or to being a disruptive influence at work. (Claimant Questionnaire at 1, Questions Nos. 5, 6.)

8. On April 26, 2010 through April 30, 2010, the claimant took approved time off.

9. On April 30, 2010, the employer discharged the claimant due to his failure to respond to the employer on April 23, 2010.

(Findings of Fact Nos. 2-9.) The referee concluded Claimant's actions rose to the level of willful misconduct because, when Employer asked Claimant to complete a bill for work performed, Claimant did not complete the bill, refused to acknowledge Employer, and then walked out of the office. Accordingly, the referee denied benefits pursuant to section 402(e) of the Law.

Claimant appealed to the Board, raising the following issues for the Board's review:

The reason for this appeal is the Decision/Order is erroneous since the employer failed to present evidence that the claimant's alleged conduct amounted to willful misconduct under Pennsylvania law. Furthermore the employer failed to present evidence that the employee's alleged conduct detrimentally affected the employer's^{1,1} business or was adverse to the employer's interest.

(Petition for Appeal, Letter of Attorney C. Daniel Higgins, Jr.) The Board affirmed and adopted the referee's findings of fact and conclusions of law.

On appeal to this Court,³ Claimant contends that the Board erred by concluding that he engaged in disqualifying willful misconduct. Claimant argues that he did not refuse to produce a bill and that this situation merely reflects a lack of

³ Our scope of review is limited to determining whether constitutional rights were violated, whether errors of law were committed, or whether findings of fact are supported by substantial evidence. Thompson v. Unemployment Compensation Board of Review, 723 A.2d 743 (Pa. Cmwlth. 1999).

communication. Claimant also argues that Employer waited one week following the events of April 23, 2010, to discharge him.

Initially, we note that while the Law does not define “willful misconduct,” our courts have defined that term as including: (1) a wanton or willful disregard for an employer's interests; (2) a deliberate violation of an employer's rules; (3) a disregard for standards of behavior which an employer can rightfully expect of an employee; or (4) negligence indicating an intentional disregard of the employer's interest or an employee's duties or obligations. Moran v. Unemployment Compensation Board of Review, 973 A.2d 1024 (Pa. Cmwlth. 2009). An employee's refusal to comply with a directive or request of the employer may constitute willful misconduct. Brooks v. Unemployment Compensation Board of Review, 547 A.2d 493 (Pa. Cmwlth. 1988) (holding that a claimant engaged in willful misconduct by refusing the employer’s request for a medical excuse supporting the claimant’s absence from work).

In the instant case, Claimant challenges the Board’s credibility determinations and argues his version of the facts. However, in making this argument, Claimant is inviting this Court to exceed its scope of review and encroach upon the fact finding authority of the Board. In an unemployment compensation case, the Board is the ultimate fact finder; the assessment of the credibility and weight of evidence are matters within the exclusive province of the Board to decide and may not be disturbed by an appellate court. Conemaugh Memorial Medical Center v. Unemployment Compensation Board of Review, 814 A.2d 1286 (Pa. Cmwlth. 2003). Moreover, because Claimant did not contend in his appeal to the Board that the referee’s findings of fact were unsupported by substantial evidence, that issue is waived and the Board’s findings are conclusive on appeal. Wing v.

Unemployment Compensation Board of Review, 496 Pa. 113, 436 A.2d 179 (1981) (holding that issues not raised before the Board are waived and cannot be raised for the first time on appeal).

The Board's findings reveal that when Employer questioned Claimant about a bill, Claimant became agitated, picked up his paycheck, and refused to respond to Employer. (Findings of Fact Nos. 6, 7.) Employer's request for information about the bill was reasonable, and Claimant does not argue that he had good cause for refusing to respond to Employer. Therefore, we conclude that Claimant engaged in disqualifying willful misconduct. See Hartmann-Hansen v. Unemployment Compensation Board of Review, 420 A.2d 20 (Pa. Cmwlth. 1980) (holding that the claimant, a college professor, engaged in willful misconduct by refusing to answer employer's questions as to whether she would resume her assigned duties and compute student grades).

Claimant argues that Employer waited one week following the events of April 23, 2010, to discharge him. Claimant asserts that, during the week between the incident and his discharge, he had telephone conversations with Employer and that Employer never mentioned anything about him refusing to produce a bill. However, Claimant waived this argument by failing to raise it in his appeal to the Board.⁴ Wing.

⁴ Even if this issue was preserved for review, it would fail. The Board found that Claimant was off work from April 26, 2010, through April 30, 2010, (Finding of Fact No. 8), and Thomas Hartmann, the owner of Employer, credibly testified that Claimant had possession of a company van during the week of the April 26th and that he did not want to terminate Claimant until the van was safely in his possession. (Notes of Testimony at 20.)

Accordingly, the Board's order is affirmed.

PATRICIA A. McCULLOUGH, Judge

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Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 23rd day of June, 2011, the September 30, 2010, order of the Unemployment Compensation Board of Review is hereby affirmed.

PATRICIA A. McCULLOUGH, Judge