

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Irwine I. Vasconez,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 260 C.D. 2011
	:	
Unemployment Compensation	:	Submitted: July 22, 2011
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: November 30, 2011

Irwine I. Vasconez (Claimant), pro se, petitions for review of the Order of the Unemployment Compensation Board of Review (Board) that affirmed the decision of an Unemployment Compensation Referee (Referee), who found Claimant ineligible for Unemployment Compensation (UC) benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law).¹ On appeal, Claimant challenges the finding of ineligibility by the Board, asserting that

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

Alternative Consulting Enterprise, Inc. (Employer) failed to meet its burden of establishing that Claimant's actions constituted willful misconduct.

Claimant worked for Employer as an out-patient therapist when Employer fired him for unprofessional conduct in the workplace in violation of Employer's policy. The UC Service Center (Service Center) found Claimant ineligible for UC benefits because he was discharged as a result of a specific incident of willful misconduct. (Notice of Determination at 1, R. Item 2.) Claimant appealed and, on November 3, 2010, a hearing was held before the Referee, who affirmed the Service Center's determination. Based on the evidence presented at the hearing, the Referee made the following Findings of Fact:

1. The claimant was last employed full-time as an out[-]patient therapist by Alternative Consulting Enterprise from April 2009 until his last day of work on August 6, 2010.
2. The employer's professional code of conduct calls for disciplinary action for showing disrespect, swearing, using intimidation or threatening gestures towards clients or other staff.
3. The claimant was aware of the employer's professional code of conduct.
4. On July 6, 2010, the claimant and the receptionist engaged in a conflict. Prior to July 6, 2010, the claimant and receptionist worked well without any problems.
5. The claimant complained about the receptionist to the clinical director stating that the receptionist was putting her nose into the claimant's work.

6. The conflict between the claimant and receptionist escalated throughout the month of July with both parties complaining to the employer about the other's behavior.
7. On July 23, 2010, the employer met with claimant and receptionist and instructed both to resolve their personal issues outside the office.
8. On July 29, 2010, the clinical director assured the claimant that she had addressed his issues with the receptionist redirecting inappropriate comments from clients to the clinical directors so that rumors would not be started.
9. On July 30, 2010, the clinical director sent a memo to everyone reiterating the professional code of conduct and violations would result in disciplinary action up to and including termination if problems in the office continue to occur.
10. On July 30, 2010, the employer also again met with the claimant and receptionist because the situation had not improved since the July 23rd meeting and in fact claimant had become more agitated throughout the week.
11. In the July 30, 2010 meeting, the claimant accused the clinical director of siding with receptionist and working against him.
12. The claimant requested off from work August 3, 2010 "to collect himself."
13. The claimant reported for work on August 4, 2010 and said that he was "unable to work here today" and that he was leaving.
14. The claimant went to the employer's Shillington office to talk with [the] executive director.
15. The executive director told the claimant that he must keep his personal issues with the receptionist out of the workplace and improve his conduct.

16. The claimant returned to work on August 5, 2010 and engaged in another conflict with the receptionist about a client and insurance coverage.
17. On August 6, 2010, the employer discharged the claimant for unprofessional conduct.
18. The employer subsequently discharged the receptionist also.

(Referee's Decision, Findings of Fact (FOF) ¶¶ 1-18.) The Referee also determined that the ongoing conflicts between Claimant and the receptionist disrupted office operations and created tension in the workplace. Both Claimant and the receptionist received numerous warnings that their personal conflict was to remain outside of the workplace, and Claimant was aware he could lose his job. (Referee's Decision at 2.) On the basis of these facts, the Referee found that "[C]laimant was terminated for engaging in unprofessional conduct in the workplace." (Referee's Decision at 2.) By continuously engaging in conflict with the receptionist, even after he knew his job was at stake, Claimant disregarded the "standards of behavior an employer has the right to expect of an employee." (Referee's Decision at 2.) The Referee determined Claimant's actions rose to the level of willful misconduct for which he failed to show good cause. (Referee's Decision at 2.)

Claimant appealed the Referee's decision to the Board, arguing that the Referee erroneously determined his actions rose to the level of willful misconduct; Claimant also made an unspecific and unsupported charge of discrimination against the Employer. The Board affirmed the Referee's decision, concluding the Referee's decision was proper and that Claimant was not subject to disparate treatment. (Board's Decision at 1.) The Board accepted the Referee's decision in

full, adopting and incorporating the Referee’s findings and conclusions as its own. (Board’s Decision at 1.) Claimant now petitions this Court for review of the Board’s Order.²

Before this Court, Claimant argues that the Board erred in holding that his conduct constituted willful misconduct and, in essence, argues that the Board’s findings of fact were in error or not supported by substantial evidence.

We first address whether the Board properly denied Claimant UC benefits by concluding that, as a matter of law, Claimant’s actions rose to the level of willful misconduct. Under the Law, an employee is not eligible for UC benefits when his “unemployment is due to his discharge . . . from work for willful misconduct connected with his work.” 43 P.S. § 802(e). Willful misconduct has been defined by our courts as:

(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.

Philadelphia Parking Authority v. Unemployment Compensation Board of Review, 1 A.3d 965, 968 (Pa. Cmwlth. 2010). Employer has the burden to establish that

² In UC proceedings, our “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 record.” Western and Southern Life Insurance Co. v. Unemployment Compensation Board of Review, 913 A.2d 331, 334 n.2 (Pa. Cmwlth. 2006).

Claimant's conduct constituted willful misconduct. Weingard v. Unemployment Compensation Board of Review, 26 A.3d 571, 574 (Pa. Cmwlth. 2011). If supported by substantial evidence, findings of disruption and decreased efficiency in the workplace can fall under the definition of willful misconduct. Jones v. Unemployment Compensation Board of Review, 562 A.2d 935, 936-37 (Pa. Cmwlth. 1989). Conduct that creates discord and disrupts the orderly, efficient operation of the workplace may also constitute willful misconduct. Gallagher v. Unemployment Compensation Board of Review, 400 A.2d 926, 927 (Pa. Cmwlth. 1979). The claimant's actions must be considered in light of all the circumstances. Navickas v. Unemployment Compensation Board of Review, 567 Pa. 298, 305, 787 A.2d 284, 288 (2001). "If the employer meets its burden, the burden then shifts to the claimant to demonstrate good cause for h[is] conduct." Philadelphia Parking Authority, 1 A.3d at 968.

Here, Claimant argues the Board erred in finding that he committed willful misconduct. However, Claimant bases his legal argument on a factual scenario other than that found by the Board.³ Claimant argues that Employer had a progressive discipline policy, but that he did not receive the benefit of that policy.

³ The Board argues that, because Claimant did not preserve this challenge in his Statement of Questions Involved, this issue is waived pursuant to Rule 2116(a) of the Pennsylvania Rules of Appellate Procedure and the Referee's findings are conclusive on appeal. However, this Court may, in its discretion, consider an issue that has not been presented in the Statement of Questions Involved if the party has provided ample notice of the nature of the party's argument. Izzi v. Workmen's Compensation Appeal Board (Century Graphics), 654 A.2d 176, 178 n.3 (Pa. Cmwlth. 1995) (citing Sun Oil Co. v. Workmen's Compensation Appeal Board (Thompson), 631 A.2d 1084, 1088 n.7 (Pa. Cmwlth. 1993)). As inartfully drafted as Claimant's brief may have been, Claimant's implicit challenge to the Board's findings of facts can be gleaned from his brief, and the Board understood Claimant's implicit arguments well enough to address the merits of those arguments in its brief.

Claimant also maintains that it was the receptionist who initiated their confrontations, showed disrespect, and used foul language. He further argues that, by attending the meetings with his supervisors and the receptionist, his conduct in the office cannot be viewed as disruptive. Claimant essentially contends the Board's factual determinations do not support the legal conclusion that he engaged in willful misconduct. The record demonstrates otherwise.

In UC cases, the Board's findings of fact are "conclusive on appeal so long as the record, taken as a whole, contains substantial evidence to support those findings." Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). In turn, substantial evidence has been defined as "such relevant evidence which a reasonable mind might accept as adequate to support a conclusion." Philadelphia Gas Works v. Unemployment Compensation Board of Review, 654 A.2d 153, 157 (Pa. Cmwlth. 1995). As the prevailing party below, Employer "is entitled to the benefit of all reasonable inferences drawn from the evidence." Ductmate Industries, Inc. v. Unemployment Compensation Board of Review, 949 A.2d 338, 342 (Pa. Cmwlth. 2008).

As the Board noted in its brief, Claimant's entire argument is rooted in his own interpretation of the facts, not the Board's conclusive findings. That a claimant might interpret the facts differently does not create grounds for reversal if the Board's findings are supported by substantial evidence. Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994). Here, the record supports the Board's findings that Claimant acted

in an unprofessional manner in the workplace, disregarded Employer's expected standards of behavior, and failed to offer good cause for his actions.

Throughout his brief, Claimant argues that, in contravention of Employer's policy, he never received the benefit of progressive discipline for his behavior. The Board, however, never found that Employer had a policy of progressive discipline. The Board determined that Employer had a policy calling for disciplinary action in the event an employee shows disrespect, swears, intimidates, or makes threatening gestures toward clients or staff. (FOF ¶ 2.) The Board also found that a memorandum sent out by Claimant's supervisor, Jennifer Toplak, reiterated Employer's professional code of conduct and pointed out that "violations would result in disciplinary action up to and including termination if problems in the office continue to occur." (FOF ¶ 9.) There is nothing in this memorandum to support Claimant's contention that he should have received progressive discipline before he was terminated. The memorandum indicated different, increasingly severe punishments were possible, including suspension and termination, but in no way mandated progressive discipline. In pertinent part, the memorandum read:

At no time is anyone to show disrespect, swear, use intimidation or threatening gestures towards clients or other staff. Immediate disciplinary action will take place, if seen or reported doing so. At no time should staff interrupt a therapy session in progress unless a true emergency occurs or arrangements were made before hand to address therapy issues. . . . You are not to take out personal conflicts with others at the work place, if you do so, disciplinary action will be taken, which may result in suspension without pay, and inevitably termination if problems continue to occur.

(Hr’g Tr. Ex. E-2, R. Item 7.) The language used in the memorandum more than adequately supports the Board’s determination that any disciplinary measure, including termination, could be taken at any time, particularly “if problems continue[d] to occur.” (Hr’g Tr. Ex. E-2, R. Item 7.)⁴

Claimant also maintains that the receptionist caused all of the problems and was the instigator in the workplace.⁵ This claim is not supported by the Board’s findings. Nowhere in its findings of fact does the Board attempt to lay blame for these problems. Instead, the Board simply found that there was an ongoing conflict between Claimant and the receptionist that was disrupting the office and forcing Claimant’s supervisors to hold special meetings to try and resolve the problem. (FOF ¶¶ 4-16.) On July 23, 2010, Ms. Toplak instructed Claimant and the receptionist to resolve their problems outside of the office, and the executive director did the same on August 4, 2010. (FOF ¶¶ 7, 15.) The Board was not concerned with who started the conflicts, but with how Claimant comported himself in dealing and resolving the conflicts.

⁴ Assuming, arguendo, that Employer had a progressive discipline policy, it could be argued that Claimant did receive progressive discipline. He was repeatedly warned about his conduct, required to attend meetings to try and resolve the problem, and he was warned that his job was at stake. When none of these measures resolved the problem, Claimant was terminated.

⁵ Claimant repeatedly directs this Court’s attention to documentation of the receptionist’s behavior presented at the Referee’s hearing. (Hr’g Tr. Ex. C-1, C-3, C-4, R. Item 7.) While perhaps illustrative of why the receptionist was terminated, these documents prove nothing regarding Claimant’s own behavior in the workplace. If anything, these documents reinforce that Claimant and the receptionist continued to allow their personal issues to manifest themselves in the workplace after being explicitly told by Employer to resolve them outside of the office. By continuing to engage in a conflict with the receptionist in a manner that disrupted the efficient operation of the agency and created tension and discord, Claimant willfully disregarded the standards of behavior Employer rightfully expects of all its employees. See Jones, 562 A.2d at 936-37; Gallagher, 400 A.2d at 927.

The record supports these findings. Ms. Toplak testified that she was forced to call the meetings with Claimant and the receptionist because their confrontations were disrupting the work of the office. Also, because she constantly had to address concerns related to the conflict between Claimant and the receptionist, Ms. Toplak's sessions with her own clients were regularly interrupted, and she struggled to finish her own work as a result. (Hr'g Tr. at 6, R. Item 7.) Ms. Toplak also testified that the tension was "impossible" and was beginning to affect the entire office. (Hr'g Tr. at 6, R. Item 7.) In the various meetings between Claimant and his supervisors to address these concerns, he was repeatedly warned that any further violations of Employer's policies could result in disciplinary action, including the loss of his job. (Hr'g Tr. at 5, R. Item 7.)

Claimant's third challenge to the Board's findings centers on his attendance at the meetings called by his supervisors to resolve the conflict. Claimant argues that, by virtue of his presence at these meetings, his conduct could not be regarded as a disruption of the office or in disregard of Employer's expectations. The Board made no such determination. Instead, the Board found that Employer met with Claimant and the receptionist on more than one occasion in order to resolve the problems that had caused a disruption and adjust the behavior that had dropped below Employer's expectations. (FOF ¶¶ 7, 10.) In fact, the Board found that between the initial meeting on July 23, 2010 and the second meeting on July 30, 2010, Claimant "had become more agitated throughout the week." (FOF ¶ 10.) The Board also adopted the Referee's reasoning that Claimant knew "his job was

in jeopardy if he did not correct his behavior.” (Board’s Decision at 1, Referee’s Decision at 2.)⁶

These findings, too, are supported by the record. Due to ongoing problems between Claimant and the receptionist, Ms. Toplak called a meeting on July 23, 2010, to address the issues and to remind them both that personal issues were to be kept outside the office. (Hr’g Tr. at 5, R. Item 7.) Ms. Toplak instructed Claimant and the receptionist to resolve their issues outside of the workplace. (Hr’g Tr. at 5, R. Item 7.) When their relations did not improve, Ms. Toplak was forced to call a second meeting on July 30, 2010, where Claimant behaved irrationally and suggested that Ms. Toplak was sleeping with the receptionist. (Hr’g Tr. at 5, R. Item 7.) Ms. Toplak warned both Claimant and the receptionist that “changes would occur” if they did not resolve their personal issues. (Hr’g Tr. at 12, R. Item 7.) Disruptions of this nature fall far below the standards of conduct Employer had a right to expect from Claimant and constitute willful misconduct. See Jones, 562 A.2d at 936-37; Gallagher, 400 A.2d at 927.

As Employer has established that Claimant disregarded the standards of behavior that can be rightfully expected of an employee, the burden shifts to Claimant to demonstrate good cause for his actions. Rather than demonstrating good cause, however, Claimant argues he did not violate the code of conduct. Claimant further contends his problem with the receptionist was merely a “normal work conflict.” (Claimant’s Br. at 5.)⁷ The record does not support this. Prior to

⁶ The Referee made this factual finding in her reasoning.

⁷ Claimant’s brief is unpaginated. Counting of the pages with Arabic numerals began on the page that contained Claimant’s Statement of the Questions Involved.

July 2010, Claimant and the receptionist were friends. However, a rift developed between the two following an undisclosed incident outside of the office and the rift carried over into the office, creating tension, and disrupting the operations of the workplace. (Hr'g Tr. at 5, R. Item 7.) This is not analogous to, say, two co-workers disagreeing over how to proceed on a project or who gets the bigger office. It was a personal issue between Claimant and the receptionist that they could not leave at the office door and their personal problems became the office's problems. In effect, they created an atmosphere of discord that prevented the office from operating in an orderly and efficient manner, and such conduct constitutes willful misconduct. See Jones, 562 A.2d at 936-37; Gallagher, 400 A.2d at 927.

Accordingly, we affirm the Order of the Board.

RENÉE COHN JUBELIRER, Judge

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Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

NOW, November 30, 2011, the Order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge