

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Benjamin Travers, :
 :
 Petitioner :
 :
 : No. 2713 C.D. 2010
 v. :
 :
 : Submitted: May 13, 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: July 14, 2011

Benjamin M. Travers (Claimant) petitions for review of the December 3, 2010, order of the Unemployment Compensation Board of Review (Board), which held that Claimant was ineligible for benefits under 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) of the Law provides 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. Although the Law does not define willful misconduct, it has been construed by our court as: (1) the wanton or willful disregard of the employer's interests; (2) the deliberate violation of the employer's rules/directives; (3) the disregard of the standards of behavior which an employer can rightfully expect from an employee; and (4) negligence demonstrating an intentional disregard of the employer's interest or the employee's duties and obligations. Kelly v. Unemployment Compensation Board of Review, 747 A.2d 436 (Pa. Cmwlth. 2000). The employer bears the burden to prove that a discharged employee was guilty of **(Footnote continued on next page...)**

Claimant was employed by Shanna Inc., d/b/a/ the River Street Jazz Café (Employer) from November 27, 2005 to July 8, 2010, when he was discharged for smoking marijuana while on duty. (Finding of Fact No. 1.) On July 6, 2010, Diane Dougherty (Dougherty), manager of the café, “walked in on Claimant and another individual smoking outside while on the clock and believed she smelled marijuana.” (Finding of Fact No. 3.) On July 7, 2010, Dougherty spoke to Claimant, and Claimant admitted that he had been smoking marijuana the day before while he was on the clock. (Findings of Fact Nos. 4-5.) On July 8, 2010, Dougherty discussed the matter with the café’s owner, who immediately discharged Claimant for unlawful conduct. (Findings of Fact Nos. 6-7.)

Claimant filed a claim for benefits with the Wilkes-Barre Unemployment Compensation Service Center (Service Center), which determined that Claimant was ineligible for benefits under section 402(e) of the Law. Claimant appealed, and the case was assigned to a referee for a hearing. During the brief hearing, Dougherty testified as to the facts described above. In his testimony, Claimant denied smoking marijuana during the course of his employment. (N.T. at 5.) Claimant also denied that he admitted the same to Dougherty the day after the alleged incident. Id.

The referee credited Claimant’s testimony, reversed the Service Center’s determination, and concluded that Claimant was eligible for benefits. Employer appealed to the Board, which reversed the referee’s decision and concluded that Claimant was ineligible for benefits under section 402(e) of the Law. The Board

(continued...)

willful misconduct. Gillins v. Unemployment Compensation Board of Review, 534 Pa. 590, 633 A.2d 1150 (1993).

resolved the conflicting testimony in favor of Employer and concluded that Claimant's conduct fell below the reasonable standards of behavior that an employer has a right to expect of an employee, thus constituting willful misconduct.²

On appeal to this Court,³ Claimant argues that the Board's decision is not supported by substantial evidence. Specifically, Claimant argues that the testimony before the referee contradicts the Board's findings of fact and that Dougherty's vague testimony is insufficient as a matter of law to satisfy Employer's burden. We disagree.

Claimant points out that Dougherty did not testify that she found Claimant outside, whereas the Board's Finding of Fact No. 3 states that "[o]n July 6, 2010, the manager walked in on the claimant and another individual smoking outside while on the clock and believed she smelled marijuana." Claimant contends that this finding is not supported by substantial evidence because, in response to a question from the referee, Dougherty responded only that she "walked in to his, the end result of it, the smell of it and everything." (N.T. at 3.) Although Claimant is correct that Dougherty never indicated whether Claimant was smoking inside or outside, the

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

³ Our scope 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. Shrum v. Unemployment Compensation Board of Review, 690 A.2d 796 (Pa. Cmwlth.), appeal denied, 548 Pa. 663, 698 A.2d 69 (1997). Furthermore, 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, 378 A.2d 829 (1977). Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Brown v. Unemployment Compensation Board of Review, 854 A.2d 626 (Pa. Cmwlth. 2004).

specific location of the incident is irrelevant and does not warrant a reversal in this case.

Claimant also contends that Employer's evidence is insufficient as a matter of law to establish willful misconduct. However, Dougherty testified that Claimant admitted to smoking marijuana while he was working for Employer, and the Board specifically credited this testimony. Where there is a conflict in testimony, the resolution of evidentiary conflicts and credibility determinations are within the Board's discretion and are not subject to reevaluation on judicial review. Duquesne Light Company v. Unemployment Compensation Board of Review, 648 A.2d 1318 (Pa. Cmwlth. 1994). Moreover, an employee's admission can constitute sufficient evidence justifying a dismissal and a disqualification from benefits on the basis of willful misconduct. See, e.g., Kilpatrick v. Unemployment Compensation Board of Review, 429 A.2d 133 (Pa. Cmwlth. 1981).

In Kilpatrick, the claimant and another employee engaged in an altercation on the employer's premises. Immediately thereafter, the claimant admitted to his supervisor that he and the other employee had a disagreement and decided to step outside to settle the matter. The claimant was subsequently discharged for violating the employer's rules against fighting and disorderly conduct on the premises. The claimant applied for unemployment compensation benefits. At a later hearing before the referee, the claimant testified that he did not step outside to fight, that he was only seeking fresh air, and that he was struck by an unknown assailant. The claimant's supervisor testified regarding the claimant's admission immediately following the incident. The Board credited the testimony of the claimant's supervisor and concluded that the claimant's actions constituted disqualifying willful misconduct. This Court affirmed, holding that the claimant's

admission was competent evidence to support a finding that the claimant was fighting.

Similarly, Dougherty's testimony regarding Claimant's admission constituted substantial evidence in support of the Board's finding that Claimant was smoking marijuana while working for Employer. We agree with the Board that Claimant's conduct fell below the reasonable standards of behavior that the employer had a right to expect,⁴ and, thus, constituted willful misconduct under section 402(e) of the Law.

Accordingly, the order of the Board is affirmed.

PATRICIA A. McCULLOUGH, Judge

⁴ We note that marijuana is classified as a Schedule I controlled substance under section 104(1)(iv) of The Controlled Substance, Drug, Device and Cosmetic Act (Act), Act of April 14, 1972, P.L. 233, as amended, 35 P.S. §780-104(1)(iv). Furthermore, possession of even a small amount of marijuana is punishable as a misdemeanor under sections 113(a)(31) and (g) of the Act. 35 P.S. §780-113(a)(31), (g). In regards to drug use by an employee in the workplace and its effect of the interests of the employer, our Supreme Court explained in Rebel v. Unemployment Compensation Board of Review, 555 Pa. 114, 120, 723 A.2d 156, 159 (1988), as follows:

The employer has a strong interest in maintaining a workplace that is free from the influence of drugs. This is true of the entire work site, not just areas that are regarded as highly safety-sensitive. Employees who have consumed drugs can incur reductions in their productivity, reliability, and competency, thereby adversely affecting the employer's interests. In turn, interests of customers can be detrimentally affected as well. There are also overriding concerns of safety and liability. Workplace safety is obviously undermined by employees who are impaired in their physical and mental capacities. Not only are fellow workers endangered, but the public is likewise placed at risk. The avoidance of injury, as well as concern for vicarious liability that can accrue to the employer, are legitimate interests of the employer that must be accorded substantial weight.

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	:	
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ORDER

AND NOW, this 14th day of July, 2011, the order of the Unemployment Compensation Board of Review, dated December 3, 2010, is hereby affirmed.

PATRICIA A. McCULLOUGH, Judge