

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Marshall Lewis,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2744 C.D. 2010
	:	
Unemployment Compensation	:	Submitted: May 6, 2011
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: August 1, 2011**

Marshall Lewis (Claimant), representing himself, petitions for review of an order of the Unemployment Compensation Board of Review (Board) denying his claim for benefits under Section 402(e) of the Unemployment Compensation Law (Law).<sup>1</sup> Claimant contends the Board erred in finding he engaged in insubordination and willful misconduct. Upon review, we affirm.

Claimant worked for Ecore International (Employer) as a material handler from November, 2004, until his last day of work in April, 2010. Employer discharged Claimant after an incident on April 29, 2010, in which he yelled obscenities at his supervisor and a racist comment at a fellow employee.

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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).

Thereafter, Claimant applied for unemployment benefits, which the local service center denied.

Claimant appealed, and a referee's hearing followed. Employer presented testimony from its director of human resources, its vice president of operations, and two co-employees who were present for Claimant's outburst. In addition, Employer presented documentary evidence of prior policy violations by Claimant. Claimant testified on his own behalf. He was assisted by a non-legal representative.

After the hearing, the referee found Claimant credible and reversed the service center. Employer appealed.

The Board made its own findings, and it reversed the referee. Most notably, the Board found "employer's witnesses credible and resolve[d] any conflicts in the testimony in favor of the employer." Bd. Op. at 3. Based on these credibility determinations, the Board made the following findings of fact:

2. The employer's written policy includes Group 1 offenses for which an employee can receive discipline up to and including discharge.
3. Included in Group 1 offenses are: Insubordination or other disrespectful conduct, and sexual or other unlawful or unwelcome harassment.
4. The claimant signed that he received the handbook that contained the employer's policies.

5. On April 29, 2010, the claimant's supervisor held a meeting with his subordinate employees to explain why he was leaving his supervisor's position and taking a lower position with the employer.

6. The claimant's supervisor explained that it was for health reasons and because he felt that although he tried to help everybody some employees complained about him to the employer, behind his back.

7. The claimant interrupted saying that he knew that he was referring to him. He used profanity -in addressing his supervisor including that statement "I know you're f—king talking about me." "You never did shit for me."

8. When told by another employee that it was not the place and time for the claimant to do what he was doing the claimant told him "to shut the f—k up."

9. The claimant continued yelling at his supervisor and at one point stated:

...and this f—king white boy here, he just f—king got the job because he's related to John McFall, and that's the only reason he got that job, he doesn't do sh-t but walk around, but you never did sh-t for me."

10. Due to the claimant's outburst several employees left the meeting.

11. The claimant then finished yelling and cursing at his supervisor and left.

12. The employer received complaints about the claimant's conduct and suspended the claimant pending investigation.

13. The employer concluded after its investigation-that the claimant had committed the conduct.

14. On May 3, 2010, the employer discharged the claimant by phone and letter for violation of its policies.

Bd. Op. at 1-2. The Board reasoned, “The claimant’s conduct was disrespectful to the supervisor, disruptive, and constituted harassment as defined in the employer’s policy, including the claimant’s racial statement to his co-worker.” Id. at 2. Accordingly, the Board denied benefits under Section 402(e) of the Law. Claimant petitions for review.<sup>2</sup>

Preliminarily, it is necessary to observe that Claimant’s brief lacks citation to any authority for any substantive principle of law. Additionally, in the statement of issues and the argument sections of his brief Claimant ignores the April 29, 2010, event that lead to his termination. Instead, he argues Employer created a hostile work environment by not disciplining his supervisor.

A hostile work environment may provide a necessitous and compelling cause for a person to voluntarily terminate employment. W. & S. Life Ins. Co. v. Unemployment Comp. Bd. of Review, 913 A.2d 331 (Pa. Cmwlth. 2006). However, it is unclear at best that this principle applies to willful misconduct cases. More importantly, the Board did not accept Claimant’s testimony on this issue, and it did not make any findings regarding a hostile work environment. In the absence of facts supported by credible evidence, Claimant cannot prevail on this issue.

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<sup>2</sup> Our review is limited to determining whether the necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Oliver v. Unemployment Comp. Bd. of Review, 5 A.3d 432 (Pa. Cmwlth. 2010).

Furthermore, Claimant did not challenge any findings made by the Board. Therefore, those findings bind this Court. Beddis v. Unemployment Comp. Bd. of Review, 6 A.3d 1053 (Pa. Cmwlth. 2010).

Section 402(e) of the Law states an employee shall be ineligible for compensation for any week in which his unemployment is due to willful misconduct connected to his work. 43 P.S. §802(e). Willful misconduct is defined as: 1) a wanton and willful disregard of an employer's interests; 2) deliberate violation of rules; 3) disregard of the standards of behavior which an employer can rightfully expect from an employee; or 4) negligence showing an intentional disregard of the employer's interests or the employee's duties and obligations. Grieb v. Unemployment Comp. Bd. of Review, 573 Pa. 594, 827 A.2d 422 (2002). The employer bears the initial burden of establishing a claimant engaged in willful misconduct. Id. Whether a claimant's actions constitute willful misconduct is a question of law fully reviewable on appeal. Id. If a claimant's termination is based on a violation of policy, employer must prove the existence of the rule or policy and its violation. Caterpillar, Inc. v. Unemployment Comp. Bd. of Review, 550 Pa. 115, 703 A.2d 452 (1997); Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review, 949 A.2d 338 (Pa. Cmwlth. 2008).

Here, Employer had a policy prohibiting "insubordination or other disrespectful conduct" as well as "unwelcome harassment." Notes of Testimony (N.T.), 1/3/10, Employer's Ex. 1, Employee Handbook. Violations of this policy could result in termination from employment. Claimant's outbursts towards his supervisor and his fellow employees support a conclusion of willful misconduct.

Claimant verbally challenged and berated the supervisor in front of approximately 15 other employees. He also referred to a co-employee in a racially derogatory manner. Under the policy this conduct provided a sufficient basis for termination.

Accordingly, we affirm.

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ROBERT SIMPSON, Judge

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**ORDER**

**AND NOW**, this 1<sup>st</sup> day of August, 2011, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

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ROBERT SIMPSON, Judge