

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Shawn Kehs, :
Petitioner :
 :
v. : No. 2767 C.D. 2010
 : Submitted: August 19, 2011
Unemployment Compensation :
Board of Review, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: September 13, 2011

Shawn Kehs (Claimant) has filed a *pro se* petition for review from a decision of the Unemployment Compensation Board of Review (Board) affirming the decision of the Referee denying him unemployment benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law)¹ for willful

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937), 2897, *as amended*, 43 P.S. §802(e). That section provides, in relevant part:

An employe shall be ineligible for compensation for any work –

(e) in which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work, irrespective of whether or not such work is “employment” as defined in this act.

(Footnote continued on next page...)

misconduct because he refused to leave the premises of McCoy Design (Employer) when asked to do so numerous times by the owner. For the reasons that follow, we affirm the Board's order.

Claimant was employed as a full-time production manager and designer by Employer. On June 7, 2010, Claimant was to meet with Jon McCoy (Jon), one of the owners of the company, and Jon's business partner, Catherine McCoy (Catherine), to discuss Claimant going to part-time employment status. When Claimant showed up for the meeting, he was unaware that the meeting had been postponed due to a death in the owners' family and was told by Shannon McGraw (Shannon), the office manager, that the meeting would not be held. When Shannon went to lunch, Claimant, who had permission to do so, logged into Jon's e-mail account to check the production schedule and found an e-mail from Shannon which Claimant believed was unfavorable to him. Claimant became angry and called Catherine to discuss the matter. She was with Jon, both coming back from the funeral in Georgia. Catherine explained about the funeral and told Claimant they would talk upon their return the next day. When Shannon returned from lunch, Claimant confronted Shannon in a hostile manner. Shannon called Jon about the situation who spoke to Claimant several times stating that they would

(continued...)

Willful misconduct has been defined as (1) the wanton and willful disregard of the employer's interest; (2) the deliberate violation of rules; (3) the disregard of standards of behavior which an employer can rightfully expect from his employee; or (4) negligence which manifests culpability, wrongful intent, evil design or intentional and substantial disregard for the employer's interests or the employee's duties and obligations. *Sheetz, Inc. v. Unemployment Compensation Board of Review*, 578 A.2d 621 (Pa. Cmwlth. 1990).

talk upon their return the next day but, in the meantime, asking Claimant to leave the premises immediately. Claimant refused and Catherine terminated his employment that day.

Claimant filed for unemployment compensation benefits, and the UC Service Center denied benefits under Section 402(e) of the Law. It found that Claimant was discharged for insubordination when he was ordered to leave the premises and asked to return the following day to discuss the issue at hand, but Claimant refused to leave and his reason for doing so was that he wanted to immediately resolve the issue over the phone. Claimant filed an appeal alleging that he was not insubordinate because when he was asked to leave, he stated that he needed to gather his belongings.

Before the Referee, Jon testified that on June 7, 2010, Catherine received a phone call from Claimant after leaving the funeral. Three hours later, as they were driving on the freeway, he received another call from Shannon who said that Claimant was very upset, that she was scared and that she had to leave the office. Jon then called the office, and Claimant stated that he refused to leave the office. When Jon told him he had to leave the office, Claimant again refused. Jon stated that he was going to give him 10 minutes and when he called back, he hoped he would be gone. They would have the meeting the next day. When Jon called back, Claimant was still there and refused to leave. Jon told Claimant that he was upsetting everybody and that he wanted him to leave. Finally, Jon asked Claimant if he wanted him to call the police. Then Catherine took the phone from him and said to Claimant:

“Jon asked you over and over, repeatedly, just leave. We’re going to talk about it tomorrow as you upset everybody up in the office.” And he said, “Well, what are you going to do? Fire me?” “Don’t make us do that.” Finally, she said, “Well, if you’re not going to leave, then you’re fired.” And he said, “Okay, then, I’m fired.” So, that was it. And then, she said to me, “Is that correct, Jon?” I said, “Yes. If he’s not going to leave, then, yes, we can’t, we can’t work for that.”

(November 1, 2010 hearing at 7.) Jon stated that he gave Claimant at least seven opportunities to leave before terminating him. William McCoy, a passenger in the car, also testified that he heard the conversation that occurred between Jon and Claimant, and Jon accurately described what was told to Claimant in that conversation. He also stated that Claimant was out of control from what he heard of the conversation.

Shannon then testified briefly explaining that Jon had called her to let her know that the meeting had been cancelled and to tell everyone who was to attend the meeting, but when she told Claimant, he became very upset. She then left the building and called Jon. Jon told her he would call Claimant and ask him to leave and that they would all come back tomorrow. About a half-hour later, Shannon stated that she received a call from Catherine saying that Claimant had been fired for refusing to leave.

Claimant testified that when he asked Shannon what time Jon and Catherine were arriving for the meeting, Shannon responded to him with an air of superiority that they were not coming because they were at a funeral in Georgia. He stated that because he was dressed up for the meeting, Shannon began to pick

on him and humiliated him in front of his coworkers. He stated that he had been working in a hostile work environment for several weeks, and that he was under a lot of stress. When Shannon went to lunch, he went on Jon's AOL account to look at a production schedule. He went to Jon's e-mail account and saw an e-mail from Shannon with the production schedule. Contained in that e-mail was Claimant's work hours where he stated that Shannon was poking fun at his math on the hours he worked. At that point, he inferred that he was being demoted or fired because Jon and/or Catherine had not spoken to him about this directly. After looking at the e-mail, Claimant stated that he was very upset and called Catherine who told him they would talk about it tomorrow. He went back to work and when Shannon returned from lunch, he confronted Shannon and raised his voice saying that the e-mail was a lie and that she was a liar. She then called Jon, and Jon was not calm. Jon yelled at him and told him to leave. Claimant stated that he told Jon to calm down and tried to talk it out, but Jon told him to "get your ass out of there." (November 1, 2010 hearing at 17.) Claimant also testified that although Jon gave him 10 minutes to gather his stuff and Catherine stated that he would be fired if he did not leave the building, it took him at least 15 minutes to gather his lunch containers, his personal belongings and to close down his area. Claimant stated that he was only told to leave twice, not seven times, but admitted that it was fair to say that he was given the opportunity to leave and come back the next day to discuss the matter. He also alleged that this was all a ruse and not the real reason he was fired. He claimed that he was fired for filing discrimination charges related to a hostile work environment. "I was put into four weeks of hostile environment. I was continually harassed. I was coerced into acting out. I was pushed into a corner of coerced [sic] into acting out. I mean, they used the constructed [sic]

discharge. They, they used – they, they used elements of constructed [sic] discharge in order to get me to act out of it.” (November 1, 2010 hearing at 19.)

Based on the credible evidence before him, the Referee found that Claimant was repeatedly insubordinate to Employer when he refused to leave the premises when asked, and that he did not have good cause for his refusal. Claimant appealed to the Board, which also denied him benefits, resolving the conflicts in the testimony, in relevant part, in favor of Employer, and also finding the testimony of Employer’s witnesses to be credible. The Board stated that there was no dispute that Claimant became upset over the fact that a meeting between him and the owners had been cancelled due to a death in the owners’ family, and that he was not informed about the cancellation. The Board found that Employer’s witnesses credibly established that Claimant was told numerous times to leave and Employer would meet with Claimant the next day, but Claimant refused to leave. The Board found that Employer’s directive for Claimant to leave was not unreasonable but Claimant’s refusal to leave was unreasonable. Although Claimant alleged that he could not leave because he had to gather his personal belongings, the Board did not find him credible, especially because he admitted that Employer promised to meet with him the next day. This appeal by Claimant followed.²

² Our scope of review of the Board’s decision is limited to determining whether an error of law was committed, constitutional rights were violated or findings of fact were supported by substantial evidence. *Frazier v. Unemployment Compensation Board of Review*, 833 A.2d 1181 (Pa. Cmwlth. 2003).

Claimant first contends that the Board erred in denying him benefits because the Referee should have allowed the e-mail that he reviewed on the owner's computer into evidence and considered its importance. He alleges that the contents of that e-mail were relevant because they helped to illustrate the circumstances leading up to his willful misconduct, thereby displaying "good cause."

What Claimant fails to realize is that regardless of what the e-mail stated about his job performance or the tone of the e-mail, it was not good cause for Claimant to disobey a direct order from Employer to leave its premises. Because the e-mail was not relevant to his refusal to leave, the Referee correctly denied its admission into evidence. Further, the Board did not find Claimant credible that he could not leave the premises because he had to gather his personal belongings. In unemployment compensation cases, the Board is the ultimate fact finder and determiner of credibility in unemployment cases. *McCarthy v. Unemployment Compensation Board of Review*, 829 A.2d 1266 (Pa. Cmwlth. 2003). Because the Board found Employer most credible, we will not disturb that credibility determination on appeal.

Claimant next argues that the Board's findings are not supported by the evidence. He provides several examples where the findings of fact are, in his opinion, not precisely quoted from the transcript so that the Board has mischaracterized the events that took place or mischaracterized his demeanor as being out of control. For example, Claimant refers us to finding of fact #10 and states that the Board stated that "the business partner was in the car with the

owners and their family” and that Claimant “demanded” to know why the meeting had been cancelled. Claimant directs us to the relevant pages of transcript and points out that the business partner was not in the car but at the hotel unloading the car, and there is no evidence that Claimant “demanded” to know why the meeting had been cancelled.³

We have reviewed the findings of fact with which Claimant finds fault and agree that the Board may have made one or two errors in its findings. However, while it may have made those errors, they are truly *de minimis* in nature and do not detract from the fact that Claimant’s behavior caused him to be terminated. Whether the business partner was in the car when he spoke to Claimant or was at the hotel or any of the other alleged mistakes by the Board are irrelevant to whether Claimant obeyed a directive from Employer. While Claimant believes these few errors are of such a nature to establish a lack of substantial

³ Claimant also argues that finding of fact #7 is incorrect as is finding of fact #16 and finding of fact #34. Regarding finding of fact #7, the Board found that “The office manager told the claimant that they could have a conversation if he calmed down, but she was ‘not going to do this.’” Claimant argues this conversation did not happen after he found out the meeting was cancelled but happened two to three hours later after Claimant found the e-mail, and there was no evidence that Claimant was in need of calming down. The exact timing of the statement made by Shannon is not of so much importance as is the fact that the Board made a credibility determination and did not find Claimant’s testimony credible. Claimant also contends that finding of fact #16 is incorrect in that the Board found that the office manager was hiding from Claimant in her office even though the transcript clearly states that she testified she had “left the premises.” Again, while the Board mistakenly stated she was in her office while she stated she left the building because she was scared, in either case, the Board found Shannon credible that she was fearful of Claimant. As for finding of fact #34, Claimant argues that the Board improperly found that he could not leave because he wanted to gather his personal belongings when he actually testified that he wanted to calm the owner down and work things out. However, this is a credibility determination which the Board found in favor of Employer.

evidence to support the Board's decision, he is incorrect. What caused Claimant to be terminated was that he refused to leave Employer's premises when asked by one of the owners and the business partner. All that is relevant is that Claimant failed to leave the premises when asked to in violation of a direct order from Employer. Claimant alleged that it was because he was gathering personal belongings. Employers' witnesses testified that was not the case. Again, this case came down to a credibility determination by the Board as to whether it believed Claimant's version as to why he did not leave the premises when asked or Employer's witnesses' version of the events. It chose to believe Employer's witnesses, and we cannot disturb those credibility determinations on appeal. *McCarthy*.⁴

⁴ Claimant also makes a separate argument that his testimony is credible, is supported by evidence, and has been consistent since the beginning with his correspondences with the Department of Labor and Industry. That issue has already been determined.

Claimant further argues that the Board's finding that Employer's testimony is credible and that Employer's actions were reasonable are not supported by the evidence creates an error of law. Aside from the fact that we have determined that Employer's request for Claimant to leave was not unreasonable and that the Board is the ultimate determiner of credibility, in making this argument, Claimant raises several arguments which were not raised before the Board: 1) Employer tried to misrepresent facts about Claimant's job title early in the proceedings; 2) Employer changes its testimony as to whether the meeting was cancelled and what the meeting was about; 3) Employer gave Claimant an unreasonable amount of time to leave the premises; and 4) Claimant understood Employer's actions to be pugnacious and individually targeted and discriminatory towards him. Arguments not raised before the Board are waived on appeal before this Court and will not be discussed. *See* Pa.R.A.P. 1551(a).

Accordingly, the order of the Board is affirmed.

DAN PELLEGRINI, JUDGE

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ORDER

AND NOW, this 13th day of September, 2011, the order of the Unemployment Compensation Board of Review, dated November 9, 2010, at No. B-508876, is affirmed.

DAN PELLEGRINI, JUDGE