IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mark A. Sangston, Petitioner	:	
v.	:	
Unemployment Compensation Board of Review, Respondent	:	No. 2838 C.D. 2010
	:	Submitted: May 20, 2011

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

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: July 12, 2011

Mark A. Sangston (Claimant) petitions for review of the December 8, 2010 order of the Unemployment Compensation Board of Review (Board) affirming the Referee's order reversing the Notice of Determination by the Indiana Unemployment Compensation Service Center (UC Service Center), and denying unemployment compensation (UC) benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law).[1] The issues before this Court are: 1) whether the Board erred in failing to consider relevant evidence submitted by Claimant, 2) whether the Board erred in determining that Mount Macrina Manor Nursing Home (Employer) met its burden of proving willful misconduct, and 3) whether Claimant had good cause for disregarding a supervisor's direct orders. For the reasons that follow, we affirm the order of the Board.

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

Claimant worked for Employer as a full-time registered nurse supervisor from January 5, 2000 until July 8, 2010. On July 7, 2010, Employer's Administrator, Patricia Benford, and Assistant Administrator and Acting Director of Nursing, Debbie Palmer, requested a meeting with Claimant to discuss Employer's mandation policy[2] and three LPNs under Claimant's supervision who refused mandation. Claimant was not told of the reason for the meeting when he was called to the Administrator's office. When Claimant arrived at the meeting, he noticed pink documents on the conference table and believed that he was being terminated for incidents that resulted in his suspension during the previous month. Before the Administrator could explain the reason for the meeting, Claimant ran out of the room and to the stairwell because he did not want to discuss anything further until he had witnesses to vouch for him. The Administrator yelled after Claimant to stop, demanding to know who his witnesses would be, so as to avoid any potential conflicts. Claimant did not stop. He returned with two employees, one of whom was an LPN who refused to sign the mandation policy. This employee was dismissed from the meeting.

Once Claimant returned to the Administrator's office, he was repeatedly asked to sit down, but he refused. Instead, he stood and, at one point, he leaned on a chair toward the Assistant Administrator who testified that she felt threatened by his behavior. Claimant testified that he was in pain during the meeting due to recent surgery, and it was too painful to sit down; however, he never informed anyone in the meeting of his pain. The mandation policy issue was addressed and Claimant went back to work for the remainder of his shift. On July 8, 2010, the Administrator met

[2] Typically, the term "mandation" is used in the nursing field in reference to mandated overtime working hours for nurses.

with Employer's legal department, and it was decided that Claimant should be terminated for insubordination.

Claimant filed for and was granted benefits by the UC Service Center. Employer appealed, and a hearing was held at which Claimant was represented by counsel. Three witnesses for Employer appeared. The Referee reversed the UC Service Center's Notice of Determination and denied benefits pursuant to Section 402(e) of the Law. Claimant appealed, pro se, to the Board which affirmed the Referee's decision. A request by Claimant for reconsideration by the Board was denied. Claimant appeals the December 8, 2010 order of the Board to this Court.[3]

Claimant first argues that the Board erred in affirming the Referee's determination based on all currently available evidence, which included copies of policies and procedures, and eyewitness statements he produced for the first time to the Board, rather than at the hearing before the Referee. He argued that the evidence is relevant and should have been considered when the Board made its decision. We disagree. The Board cannot review evidence that was not submitted to the Referee. 34 Pa. Code § 101.106; *see also Lock Haven Univ. of Pa. of State Sys. of Higher Educ. v. Unemployment Comp. Bd. of Review*, 559 A.2d 1015 (Pa. Cmwlth. 1989); *Perrelli v. Unemployment Comp. Bd. of Review*, 426 A.2d 1272 (Pa. Cmwlth. 1981). The relevance of the evidence is of no moment if it was not admitted into the record below. Therefore, the Board did not err in failing to consider the evidence Claimant submitted to the Board upon appeal.

Claimant next argues that Employer has not met its burden of proving that Claimant committed willful misconduct. We disagree.

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[3] This Court's review is limited to determining whether the findings of fact were supported by substantial evidence, whether constitutional rights were violated, or whether errors of law were committed. *Brunswick Hotel & Conference Ctr., LLC v. Unemployment Comp. Bd. of Review*, 906 A.2d 657 (Pa. Cmwlth. 2006).

Under Section 402(e) of the Law, an employee is not eligible for benefits if "his unemployment is due to his discharge . . . for willful misconduct connected with his work . . . ."

> 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.

Elser v. Unemployment Comp. Bd. of Review, 967 A.2d 1064, 1069 n.7 (Pa. Cmwlth. 2009). "Whether a claimant's conduct constituted willful misconduct is a question of law subject to this Court's review. Further, the employer bears the burden of establishing that the claimant was discharged for willful misconduct on the job." *Roberts v. Unemployment Comp. Bd. of Review*, 977 A.2d 12, 16 (Pa. Cmwlth. 2009) (citation omitted). "Where an employee is discharged for refusing or failing to follow an employer's directive, both the reasonableness of the demand and the reasonableness of the employee's refusal must be examined." *Dougherty v. Unemployment Comp. Bd. of Review*, 686 A.2d 53, 54 (Pa. Cmwlth. 1996). Insubordination and threatening behavior or language has been held to constitute willful misconduct. *Dep't of Gen. Servs. v. Civil Serv. Comm'n*, 707 A.2d 1210 (Pa. Cmwlth. 1998); *Perry v. Tioga Cnty*, 649 A.2d 186 (Pa. Cmwlth. 1994); *Blount v. Unemployment Comp. Bd. of Review*, 466 A.2d 771 (Pa. Cmwlth. 1983); *Nesmith v. Unemployment Comp. Bd. of Review*, 402 A.2d 1132 (Pa. Cmwlth. 1979).

The Administrator testified that she tried to stop Claimant from obtaining a witness because the meeting did not concern disciplinary action against Claimant, and she wanted to make sure he did not ask anyone who was involved in

the matter she wanted to discuss with Claimant to be a witness. She was not denying Claimant access to a witness for matters of a personal concern to him. Clearly, Employer's direct order to return to her office was reasonable. Further, based on his behavior in disregarding the Administrator's demand that he stop and tell her who his witnesses would be, it is not unreasonable for the Administrator and Assistant Administrator to interpret his later refusal to sit down as threatening and insubordinate behavior. Therefore, the Board did not err in affirming the Referee's determination that Employer proved its burden that Claimant committed willful misconduct.

Finally, Claimant argues that he had good cause for not following Employer's direct orders. We disagree. "An employee may question or disobey a direct order from a superior if it is unreasonable or if the employee has good cause." *Kalenevitch v. Unemployment Comp. Bd. of Review*, 531 A.2d 590, 591 (Pa. Cmwlth. 1987). Claimant's reasons for his disregard of Employer's directive and for the alleged threatening behavior were that 1) he felt he needed a witness before anything was said in the meeting because he was afraid that he would be fired, and 2) he did not sit down because he was in pain from recent surgery. Unfortunately, Claimant jumped to the wrong conclusion about the purpose for the meeting before giving the Administrator a chance to explain why she called him to her office. The testimony indicates that had Claimant waited to hear the reason for the meeting, the Administrator would have allowed him to find someone to be his witness if he felt that he needed one.

In addition, Claimant admitted during the hearing that he never informed anyone in the meeting that he was in pain from his recent surgery and could not sit down. In cases in which this Court has found that good cause has been established, a claimant has first informed his employer of the reasons for his conduct. *Bortz v.*

Unemployment Comp. Bd. of Review, 464 A.2d 609, 611 (Pa. Cmwlth. 1983). Even if those in the meeting knew that Claimant had recently returned to work after having surgery, it is reasonable to assume that they were unaware that he was, at that moment, in so much pain that he could not sit down, since he made no mention of his reason for wanting to stand. Therefore, the Board did not err in affirming the Referee's determination that Claimant did not have good cause for his actions.

For the reasons stated above, we affirm the Board's order.

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JOHNNY J. BUTLER, Judge

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O R D E R

AND NOW, this 12th day of July, 2011, the December 8, 2010 order of the Unemployment Compensation Board of Review is affirmed.

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JOHNNY J. BUTLER, Judge