IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mickey Nickens, Petitioner	:	
v.	:	No. 713 C.D. 2010
Unemployment Compensation Board of Review, Respondent	:	Submitted: November 24, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: January 5, 2011

Mickey Nickens (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board) affirming a Referee's decision finding Claimant ineligible for unemployment compensation benefits pursuant to 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) provides in pertinent part:

> An employe shall be ineligible for compensation for any week---
>
> (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 the act.

Claimant was last employed by Susquehanna Bank as a branch manager from November 8, 2005, until his last day of work on July 31, 2009. Shortly thereafter, Claimant filed an internet claim for unemployment compensation benefits. By determination mailed on August 18, 2009, the Philadelphia UC Service Center (Service Center) determined that Claimant was eligible for benefits pursuant to Section 402(e) of the Law. Employer appealed the Service Center's determination and a hearing before a Referee ensued.

In support of its appeal, Employer presented the testimony of two witnesses: (1) Debbie Deissroth, Human Resources Manager; and (2) Jeremy Shackleford, Regional Sales Manager. Claimant appeared *pro se* and testified on his own behalf.

Based on the evidence presented, the Referee found as follows. Employer maintains rules of conduct where certain offenses may result in immediate termination, that include but are not limited to: failure or refusal to carry out orders or instructions; failure to fulfill the responsibilities of a job to an extent that might or does cause injury to a person or damage to or loss of product, machinery, equipment facilities or other property; and falsifying records or failure to accurately report time worked or time off. Claimant was aware of Employer's policy.

On October 30, 2008, Claimant received a verbal warning for failing to obtain proper approval for time off. The verbal warning advised Claimant that if he intended to take personal time off, he must clear it with his supervisor first and then enter the time request into the computer system. Claimant was also advised at the time of the warning that failure to comply could result in disciplinary action up to and including termination.

On March 12, 2009, Claimant received a second verbal warning for taking personal time off without approval, and failing to input the time request into

the system. Claimant was advised that he must have all personal time off approved by his supervisor and entered into the computer system before he took the time off. Failure to do so could lead to disciplinary action up to and including immediate termination.

Claimant was absent from work from July 20, 2009, through July 24, 2009, on personal time off. Claimant failed to obtain his supervisor's approval, failed to input the time into the computer system and failed to receive approval prior to taking the time off. This was Claimant's third offense and in itself were grounds for termination.

Employer became aware that at the time that Claimant was on vacation, one of the Employer's branches he supervised may have been without proper supervision. Claimant also failed to communicate critical elements of information to his supervisor and staff.

On July 31, 2009, Claimant was terminated for insubordination for failing to comply with time keeping procedures in reference to the personal time off and for gross negligence in managing his staff and sales initiatives.

Based on the foregoing findings, the Referee concluded that Employer provided competent evidence to establish that certain rules of conduct existed including the rule that an employee's failure to accurately report time worked or time off would result in immediate termination. The Referee concluded further that Employer presented credible testimony that Claimant received two previous warnings for failing to request and receive approval for personal time off and for failing to input his request into Employer's computer system. Claimant was notified with each warning that if he failed to comply it would result in disciplinary action up to and including termination.

The Referee concluded that Claimant violated Employer's policy where he took time off for one week in July 2009 without receiving prior approval or putting the request for the time off into the computer system. The Referee pointed out that while there were other issues that also caused Claimant's termination, Employer credibly testified that the failure to comply with the time off request and input into the system were grounds for termination. The Referee stated that Claimant's action in continuing to take personal time off without receiving prior approval or putting the request into Employer's computer system must be considered a deliberate violation of Employer's rule and rose to the level of willful misconduct as contemplated by Section 402(e) of the Law.

Accordingly, the Referee reversed the Service Center's determination. Claimant appealed the Referee's decision to the Board. Upon review of the record and the testimony submitted at the hearing before the Referee, the Board affirmed the Referee's decision without making any independent findings of fact or conclusions of law. This appeal by Claimant followed.

Initially, we note that this Court's review of the Board's decision is set forth in Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704, which provides that the Court shall affirm unless it determines that the adjudication is in violation of the claimant's constitutional rights, that it is not in accordance with law, that provisions relating to practice and procedure of the Board have been violated, or that any necessary findings of fact are not supported by substantial evidence. See Porco v. Unemployment Compensation Board of Review, 828 A.2d 426 (Pa. Cmwlth. 2003). Findings of fact are conclusive upon review provided that the record, taken as a whole, contains substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977). Substantial evidence is relevant evidence that a reasonable mind might

consider adequate to support a conclusion. Hercules v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992). The Board is the ultimate fact finder and is, therefore, entitled to make its own determinations as to witness credibility and evidentiary weight. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985).

Willful misconduct has been judicially defined as that misconduct which must evidence the wanton and willful disregard of employer's interest, the deliberate violation of rules, the disregard of standards of behavior which an employer can rightfully expect from his employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional substantial disregard for the employer's interest, or the employee's duties and obligations. Frumento v. Unemployment Compensation Board of Review, 466 Pa. 81, 351 A.2d 631 (1976).

Whether an employee's conduct constituted willful misconduct is a matter of law subject to this Court's review. Miller v. Unemployment Compensation Board of Review, 405 A.2d 1034 (Pa. Cmwlth. 1979). In order to prove willful misconduct by showing a violation of employer rules or policies, the employer must prove the existence of the rule or policy and that it was violated. Caterpiller, Inc. v. Unemployment Compensation Board of Review, 654 A.2d 199 (Pa. Cmwlth. 1995); Duquesne Light Company v. Unemployment Compensation Board of Review, 648 A.2d 1318 (Pa. Cmwlth. 1994).

Herein, Claimant acknowledges that after his initial warning in October 2008, he was aware of Employer’s policy regarding the input of vacation time into the computer system. However, Claimant contends that the evidence shows that while he may have made mistakes regarding the time off system, at most the errors were negligent or inadvertent and not intentional or in bad faith. Claimant contends

further that the July 2009 incident that led to his termination was again the result of inadvertence and not willful misconduct.

Claimant argues that despite Employer's testimony to the contrary, he did notify his supervisor in advance that he needed to take the week of July 20-24, 2009, to help his daughter after she had knee surgery on July 15, 2009. Claimant points out that his supervisor admitted knowing of Claimant's request for personal time off on July 15, 2009, and the record shows that Claimant did input his time off request for July 15, 2009, into the computer system. Claimant contends that he also notified his supervisor that he required personal time off for the week of July 20-24, 2009, and that he input his request for time off for that week at the same time he input his request for time off on July 15, 2009. Claimant argues that inexplicably, the request did not register in the computer system.

Finally, Claimant contends that Employer failed to prove any pattern of willful misconduct and that he acted in good faith in his efforts to properly seek approval of the personal time off. Therefore, Claimant argues, Employer did not meet its burden of showing willful misconduct. We disagree.

A review of the record shows that Employer proved the existence of a reasonable rule and that Claimant was aware of the rule. The record also shows that Claimant violated the rule. The Board accepted as credible the testimony of Employer's witness, that Claimant did not request in advance the week of July 20-24, 2009, off for personal time nor did Claimant enter the request into Employer's computer system. While Claimant contends that he did indeed request the time off in advance and that he did indeed enter the request into Employer's computer system, the evidence found credible by the Board shows otherwise. Moreover, the record supports the Board's finding that this was the third time that Claimant failed to input his request for personal time off into Employer's computer system as required by

Employer. Accordingly, we conclude, as did the Board, that Employer established that Claimant's actions in failing to follow Employer's rule rose to the level of willful misconduct and were not merely negligent or inadvertent.

We conclude further that the Board properly determined that Claimant failed to establish good cause for his actions. The record fails to support Claimant's assertions that he did follow Employer's rules and that there was a problem with the computer system which resulted in his request not being inputted properly. In fact, Claimant states outright that it is inexplicable as to why his request did not register in the computer system.

In essence, Claimant's argument is that the Board should have believed his testimony over that of Employer's; however, it is well settled that the Board is the ultimate finder of fact and it is not within this Court's province to overturn credibility determinations. Peak. The Board's order is affirmed.[2]

JAMES R. KELLEY, Senior Judge

[2] Since the Board determined that Claimant's failure to properly follow Employer's rule regarding requests for personal time off constituted willful misconduct and were sufficient grounds for termination, we need not address Claimant's contentions that the Board's findings with regard to Claimant's failure to properly supervise his staff and to properly communicate with his staff are not supported by substantial evidence.

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O R D E R

AND NOW, this 5th day of January, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

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JAMES R. KELLEY, Senior Judge