

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Allen K. Foulkrod,	:	
Petitioner	:	
	:	
v.	:	No. 835 C.D. 2010
	:	Submitted: October 8, 2010
Unemployment Compensation Board	:	
of Review,	:	
Respondent	:	

**BEFORE: HONORABLE DAN PELLEGRINI, Judge  
          HONORABLE P. KEVIN BROBSON, Judge  
          HONORABLE JIM FLAHERTY, Senior Judge**

***OPINION NOT REPORTED***

**MEMORANDUM OPINION  
BY JUDGE BROBSON**

**FILED:** December 22, 2010

Petitioner Allen Foulkrod (Claimant) petitions for review of a decision and order of the Unemployment Compensation Board of Review (Board). The Board reversed the decision of a Referee and determined Claimant to be ineligible for benefits under Section 402(e) of the Unemployment Compensation Law (Law)<sup>1</sup> based on willful misconduct. We affirm the Board's order.

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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).

Claimant applied for unemployment compensation benefits after being discharged from his employment as a full-time custodian with Employer.<sup>2</sup> The unemployment compensation Service Center (Service Center) issued a determination, finding Claimant ineligible for unemployment compensation benefits under Section 402(e) of the Law. Claimant appealed this determination, and an evidentiary hearing was held before the Referee. Following a hearing, the Referee awarded benefits, concluding that Employer did not meet its burden of proving willful misconduct. Employer appealed to the Board.

The facts, found by the Board, are as follows:

1. The claimant was last employed as a full-time custodian by the Williamsport Area School District [(Employer)] for approximately fourteen (14) years at a final rate of \$15.57 per hour and his last day of work was November 20, 2009.
2. The claimant's work hours were from 9:30 p.m. to 6:00 a.m.
3. On November 20, 2009, the school principal, the supervisor of maintenance and facilities and two other gentlemen in supervisory positions arrived at the high school on or about 4:00 a.m.
4. The individuals above surveyed the building and performed an operational visit.
5. The school principal found claimant inside a classroom at approximately 4:18 a.m. in a reclining position with the television on. The

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<sup>2</sup> Employer is an Intervenor in this case.

school principal proceeded to walk into the room and was approximately 15 feet away from the claimant. The claimant did not move.

6. The school principal then proceeded to get the supervisor of maintenance and both of them went back inside the classroom. The claimant did not move.
7. The claimant was sleeping inside the classroom.
8. The supervisor of maintenance and facilities then went to the main office to see what time the claimant would leave the classroom. The claimant left the classroom at approximately 4:50 a.m.
9. At approximately 4:57 a.m., the claimant was found by another supervisor smoking a cigarette.
10. School custodians are not permitted to watch television during their shift and are not permitted to sleep during their shift. In addition, it is against school policy to use tobacco of any kind on district property.
11. The claimant was aware or should have been aware of the employer's rules.
12. On the same day of the incident, the school principal met with the claimant and two other custodians, who were also found in violation of the employer's rules.
13. The claimant did not deny that he was sleeping or that he was watching television. The claimant admitted that he smoked cigarettes while on school premises. The claimant was suspended for his actions on November 23, 2009.

14. A due process hearing was held on December 4, 2009. At that time, the claimant alleged that he sat down because he felt lightheaded, and that he “dozed off.
15. The claimant had received previous warnings for unsatisfactory work performance.
16. The two other custodians were not terminated for their actions. Rather, the one custodian was given a 10 day suspension for sleeping, and the other custodian was given a written warning for apparently sleeping while on duty.
17. The two other custodians were not terminated for their actions because they did not have previous warnings like the claimant. In addition, the claimant was in violation of three work rules whereas the other custodians were in violation of one rule.
18. After being confronted about the incident, the claimant did not bill the employer for an hour of work on November 20, 2009.
19. The claimant was discharged for sleeping while on duty, watching television while on duty, and smoking on school property.

(Petitioner’s Brief, Appendix “A”.)

The Board reversed the Referee, holding that Claimant was ineligible for benefits under Section 402(e) of the Law. The Board determined that Employer had an established rule prohibiting school custodians from sleeping while on duty, watching television while on duty, and smoking tobacco on school property. Further, the Board concluded that Claimant was aware or should have

been aware that it was against school policy to engage in these activities, and that Claimant violated these rules, based on his own testimony. Claimant now petitions this Court for review of the Board's order.

On appeal,<sup>3</sup> Claimant presents two arguments. First, Claimant argues that the Board erred in concluding that Employer sustained its burden of proving that Claimant's conduct rose to the level of willful misconduct under Section 402(e) of the Law. Second, Claimant argues that even if the Court finds his conduct rose to the level of willful misconduct, he had good cause for doing so and, therefore, should be eligible for unemployment compensation benefits.

Section 402(e) of the Law provides, in part, that an employee shall be ineligible for compensation for any week "[i]n which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work." The term "willful misconduct" is not defined by statute. The courts, however, have defined "willful misconduct" as:

- (a) wanton or willful disregard of employer's interests,
- (b) deliberate violation of an employer's rules, (c) disregard for standards of behavior which an employer can rightfully expect of an employee, or (d) negligence indicating an intentional disregard of the employer's interest of an employee's duties or obligations.

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<sup>3</sup> This Court's standard 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. 2 Pa. C.S. § 704.

*Grieb v. Unemployment Comp. Bd. of Review*, 573 Pa. 594, 600, 827 A.2d 422, 425 (2003). The burden is on an employer to prove that a discharged employee was guilty of willful misconduct.<sup>4</sup> *Gillins v. Unemployment Comp. Bd. of Review*, 534 Pa. 590, 597, 633 A.2d 1150, 1154 (1993). An employer, seeking to prove willful misconduct by showing that the claimant violated the employer's rules or policies, must prove the existence of the rule or policy and that the claimant violated it. *Walsh v. Unemployment Comp. Bd. of Review*, 943 A.2d 363, 369 (Pa. Cmwlth. 2008).

Claimant argues<sup>5</sup> that the Board erred in concluding that Employer met its burden to prove that Claimant's actions rose to the level of willful misconduct because Employer failed to present any evidence to establish a written work rule regarding not sleeping, not watching television, and not smoking while at work. Employer must initially establish the existence of a policy or rule. Here,

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<sup>4</sup> Whether or not an employee's actions amount to willful misconduct is a question of law subject to review by this Court. *Nolan v. Unemployment Comp. Bd. of Review*, 425 A.2d 1203 (Pa. Cmwlth. 1981).

<sup>5</sup> Additionally, Claimant argues that Employer did not have the right to fire him because Employer violated its progressive discipline policy when it first suspended him and then later terminated his employment. Employer's policy provides for progressive discipline, beginning with a verbal warning, then progressing to a written warning, followed by suspension, then ultimately termination. (Reproduced Record (R.R.) at 9a-14a.) Employer testified and submitted as evidence documentation of every step it followed for the progressive discipline of Claimant. (*Id.*) Claimant had received written and verbal warnings for unsatisfactory job performance before the incident on November 20, 2009. (*Id.*) Contrary to what Claimant argues, nothing in Employer's disciplinary policy requires that each distinct variation of unsatisfactory job performance proceed through all levels of progressive discipline. Claimant's argument is without merit.

Employer's Principal of Williamsport Area High School, Jeffery Robbins, testified that custodians are not permitted to sleep during their shift. (R.R. at 13a.) Principal Robbins testified that during the first week of September 2009, Employer was having an issue with custodians watching television at work, so Employer went so far as to have the television signal shutoff each night to prevent the employees from watching it.<sup>6</sup> (*Id.* at 13a-14a.) This was done to enforce Employer's rule that prohibited custodians from watching television while at work. (*Id.* at 14a.) Principal Robbins also testified that custodians are not permitted to smoke on school property at any time because it is against district policy for anyone to use tobacco of any kind on district property. (*Id.* at 13a.) The Board accepted Principal Robbins' testimony on these issues as credible. Based upon this testimony, Employer sustained its burden to establish that it has work rules prohibiting custodians from watching television while at work, sleeping on the job, and smoking on district property.

The second requirement of Employer's prima facie case is to show that Claimant was or should have been aware of these rules. Debra Savage, Employer's Director of Human Resources, testified that the rule prohibiting use of tobacco on district property is not only a rule of Employer but is a law, and it is posted throughout the district. (*Id.* at 20a.) Also, Principal Robbins testified that

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<sup>6</sup> The signal was later turned back on due to the high cost of this procedure; however, custodians were still prohibited from watching the television.

he reviewed the rules prohibiting custodians from watching television and sleeping on the job at a meeting, during the first week of September 2009. (*Id.* at 13a.) Additionally, Claimant himself testified that he was aware that he was not supposed to smoke on school property, watch television while on the job, and sleep during his shift. (*Id.* at 23a-24a.) Based on the testimony discussed above, the Board found that Claimant was made aware or should have been aware of these work rules.

Additionally, Employer must establish the third requirement of its prima facie case by showing that Claimant violated Employer's policy. Principal Robbins testified that around 4:18 a.m., on the day in question, he witnessed Claimant in a classroom in a reclining position with the television on. (*Id.* at 12a.) Principal Robbins testified that Claimant did not move or acknowledge in any way his presence in the room. (*Id.*) Principal Robbins left and came back into the room a short while later, again observing Claimant in the same position, sleeping. (*Id.* at 12a, 17a.) Principal Robbins testified that around 4:50 a.m., Claimant exited the classroom and another custodian witnessed Claimant smoking a cigarette. (*Id.* at 18a.) Additionally, Claimant himself testified that he smoked a cigarette, fell asleep on the job, and had the television on in the classroom.<sup>7</sup> (*Id.* at 23a-24a.) As

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<sup>7</sup> Claimant testified that "if [he] was watching television, how was [he] sleeping (R.R. at 24-a.)". Claimant also testified that he did not intentionally "doze off" and that he turned on the television to watch during his break. (*Id.*) Claimant's testimony is inconsistent, because he



the Board found this testimony of Principal Robbins and Claimant credible, the Board did not err in concluding that Employer satisfied its burden to prove that Claimant violated the policy.

Second, we address Claimant's argument that he had good cause for his violation of Employer's work rule of sleeping on the job because he unintentionally dozed off after he became light-headed and dizzy from a heart-condition. Because Employer satisfied its burden of proof, the burden then shifts to Claimant to prove that he had good cause for violating Employer's policies. *Walsh*, 942 A.2d at 370. If the claimant can show good cause for the violation—*i.e.*, “that the actions which resulted in the discharge were justifiable and reasonable under the circumstances,”— then there should be no finding of willful misconduct. *Id.*, 942 A.2d at 370. The Board may either accept or reject a witness's testimony, whether or not it is corroborated by other evidence of record. *Peak v. Unemployment Comp. Bd. of Review*, 509 Pa. 267, 276, 501 A.2d 1383, 1388 (1985). Here, the Board found Claimant's testimony not credible regarding his alleged reason for dozing off and concluded that Claimant failed to establish

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attempted to provide many justifications for why he did these things. This inconsistent testimony, however, does not negate his affirmative testimony that he smoked a cigarette on school grounds, that the television was on in the classroom he was in, and that he fell asleep while at work.

good cause for falling asleep.<sup>8</sup> (Petitioner’s Brief, Appendix “A”.) Based on the facts here, we agree with the Board that Claimant failed to meet its burden to establish good cause to justify his violation of three Employer policies.

Accordingly, the order of the Board is affirmed.

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P. KEVIN BROBSON, Judge

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<sup>8</sup> Even if we were to accept Claimant’s argument that he had good cause for falling asleep on the job, Claimant offered no proof to support he had good cause for violating the other Employer policies.

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Unemployment Compensation Board	:	
of Review,	:	
Respondent	:	

***ORDER***

AND NOW, this 22nd day of December, 2010, the order of the Unemployment Compensation Board of Review is hereby **AFFIRMED**.

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P. KEVIN BROBSON, Judge