IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas J. Simmons, Petitioner	:	
v.	:	No. 909 C.D. 2010
Unemployment Compensation Board of Review, Respondent	:	Submitted: October 22, 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 20, 2011

Thomas J. Simmons (Claimant), pro se, petitions for review of the order of the Unemployment Compensation Board of Review (Board) affirming the decision of a Referee that Claimant is 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) of the Law 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

(Continued....)

Claimant filed a claim for unemployment compensation benefits upon the termination of his employment as a default collector with the PHEAA (Employer). The Lancaster UC Service Center representative concluded that Claimant had been discharged for reasons that constitute willful misconduct under Section 402(e) of the Law. As a result, unemployment compensation benefits were denied.

Claimant appealed this determination and a hearing was conducted before a Referee. See N.T. 1/6/10[2] at 1-42. On January 14, 2010, the Referee issued a decision disposing of the appeal in which he determined that Claimant had been discharged for reasons that constitute willful misconduct under Section 402(e) of the Law. As a result, the Referee issued an order affirming the Service Center's determination that Claimant was not entitled to receive benefits pursuant to Section 402(e) of the Law.

On January 22, 2010, Claimant appealed the Referee's decision to the Board. On March 25 2010, the Board issued a decision in which it made the following relevant findings of fact: (1) Claimant was last employed as a full-time default collector for Employer; (2) the telephone contacts made by default collectors are recorded both visually and by sound for quality control purposes and are routinely reviewed by Employer's default collection manager to ensure conformity with Employer's standards; (3) Claimant was assigned to contact seriously delinquent borrowers and to select the appropriate prerecorded message when reaching an answering machine or someone other than the borrower; (4)

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connected with his work, irrespective of whether or not such work is "employment" as defined in this act.

[2] "N.T. 1/6/10" refers to the transcript of the hearing conducted before the Referee on January 6, 2010.

Claimant was an experienced employee with satisfactory performance ratings who had received all required training and was conversant in Employer's system and procedures; (5) Claimant was also attending school part-time; (6) Employer informed Claimant that his class schedule would be accommodated as long as he worked 40 hours per week; (7) Claimant was unable to work 40 hours per week because he was taking an additional course; (8) Claimant was covering the hours that he could not work with scheduled and unscheduled leave time; (9) on September 15, 2009, Claimant requested an additional 90 hours of leave time due to his class schedule; (10) Claimant's request was denied because Employer needed Claimant to work a 40 hour week; (11) on September 15, 2009, Employer offered Claimant a part-time position, and indicated that they would discuss the offer on September 17, 2009; (12) Claimant's manager audited Claimant's calls for September 16 and 17, 2009, and found thirty calls in that time period during which Claimant either selected an inappropriate pre-recorded message or pulled out of the connection altogether; (13) Claimant's manager met with him after reviewing the calls, and Claimant was sarcastic and denied that he failed to follow procedures on the calls; (14) Claimant did not inform the manager that he was suffering from any distractions that may have resulted in him making the mistakes; (15) on September 22, 2009 a fact finding meeting was held in which Claimant did not offer any reason for mishandling the calls; and (16) Claimant was terminated for mishandling the telephone calls and because he did not provide a reason for doing so. Board Decision at 1-2.

Based on the foregoing, the Board concluded:

> In this case, the employer offered credible testimony that on September 16 and September 17, 2009, the claimant mishandled telephone calls by pulling out of the connection altogether or selecting an inappropriate

> prerecorded message. This happened after the claimant's request to take more time off had been denied. The employer credibly testified that the claimant offered no explanation for his actions. Therefore, the Board concludes that the reasonable inference to be drawn is that the claimant intentionally failed to perform his job duties after being denied time off. As a result, the Board rejects the claimant's testimony that his mistakes were the result of stomach problems or ordinary mistakes. Accordingly, benefits are denied under Section 402(e) of the Law.

Board Decision at 3. Accordingly, the Board issued an order affirming the Referee's decision and denying Claimant benefits. Id. Claimant then filed the instant petition for review.[3]

In this appeal, Claimant contends the Board erred in denying Claimant benefits pursuant to Section 402(e) of the Law. More specifically, Claimant asserts: (1) the Board erred in relying upon uncorroborated hearsay evidence; (2) the Board erred in determining that Claimant's conduct constituted willful misconduct; and (3) the Board's determination that Claimant engaged in willful misconduct is not supported by substantial evidence.

As noted above, pursuant to Section 402(e) of the Law, an employee is ineligible for unemployment compensation benefits when he had been discharged from work for willful misconduct connected with his work. Guthrie v. Unemployment Compensation Board of Review, 738 A.2d 518 (Pa. Cmwlth. 1999). The burden of proving willful misconduct rests with the employer. Id.

[3] This Court's scope of review in an unemployment compensation appeal is limited to determining whether an error of law was committed, whether constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704; Hercules, Inc. v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992).

Whether an employee's conduct constitutes willful misconduct is a question of law subject to this Court's review. Id.

Although willful misconduct is not defined by statute, it has been described as: (1) the wanton and willful disregard of the employer's interests; (2) the deliberate violation of rules; (3) the disregard of standards of behavior that 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. Id. (citing Kentucky Fried Chicken of Altoona, Inc. v. Unemployment Compensation Board of Review, 309 A.2d 165, 168-169 (Pa. Cmwlth. 1973)).

Claimant first asserts that the Board erred in relying upon uncorroborated hearsay evidence in determining that he engaged in willful misconduct. More specifically, Claimant contends that the testimony of his manager regarding the manager's audit of Claimant's calls for September 16 and 17, 2009[4] constitutes impermissible hearsay upon which a finding of willful misconduct cannot be based.

Rule 802 of the Pennsylvania Rules of Evidence[5] provides that "[h]earsay is not admissible except at provided by these rules, by other rules

[4] As noted above, the Board found as fact that "Claimant's manager audited claimant's calls for two days (September 16, and 17) and found on the respective days 17 calls and 13 calls which the claimant either pulled out of the connection [altogether] or selected an inappropriate prerecorded message." Board's Decision at 1.

[5] It must be noted that the Pennsylvania Rules of Evidence are not applicable to hearings conducted before a Referee. Section 505 of the Law, 43 P.S. § 825; Section 505 of the Administrative Agency Law, 2 Pa.C.S. § 505; Rue v. K-Mart Corporation, 552 Pa. 13, 713 A.2d 82 (1998). Nevertheless, it is well settled that, standing alone, uncorroborated and properly objected to hearsay evidence is not competent to support a finding of fact of the Board. Walker v. Unemployment Compensation Board of Review, 367 A.2d 366 (Pa. Cmwlth. 1976).

prescribed by the Pennsylvania Supreme Court, or by statute." Pa.R.E. 802. In turn, Rule 801(c) provides, in pertinent part, that "'hearsay' is a statement, other than one made by the declarant while testifying at the … hearing, offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801(c). Thus, for purposes of the hearsay rule, a "statement" is an oral or written assertion or nonverbal conduct that is intended as an assertion. Pa.R.E. 801(a).

However, it is clear that the testimony of Claimant's manager regarding the statements that were made during the monitored telephone calls was not introduced for the truth of the matters asserted therein. Rather, the manager's testimony in this regard was merely admitted to show the willful misconduct underlying the termination of Claimant's employment, i.e., Claimant's selection of inappropriate pre-recorded messages or his inappropriate termination of telephone calls. As a result, the manager's testimony in this regard was not hearsay subject to exclusion under the hearsay rule. See, e.g., Salvati v. Berks County Board of Assistance, 474 A.2d 399, 402 n. 3 (Pa. Cmwlth. 1984) (citations omitted) ("[T]he evidence of telephone calls from patrons of the Board of Assistance was introduced not to prove the truth of the substance of the telephone conversations but to prove that the calls were made and were received by Mr. Rightmire and that he acted properly in disciplining the petitioner for conduct tending to bring the Commonwealth into disrepute. As the Superior Court explained[:] 'Testimony as to an out of court statement, written or oral, is not hearsay if offered to prove, not that the content of the statement was true, but that the statement was made. Furthermore, when the question is 'whether a person acted in good faith and with reasonable cause, the information on which he acted is competent evidence even though it consists of declarations made by third persons, and regardless of whether such declarations were in fact true or false.'").

In addition, Claimant's selection of inappropriate pre-recorded messages or his inappropriate termination of telephone calls, is nonassertive conduct. As a result, the testimony of Claimant's manager regarding such nonassertive conduct is likewise not hearsay subject to exclusion under the hearsay rule. See, e.g., Commonwealth v. Lewis, 623 A.2d 355, 357 (Pa. Super. 1993) ("[I]n the instant case, the alleged 'declaration' is the conduct of Appellant as recorded on the video tape. Since Appellant's actions do not fall within the category of assertive conduct, i.e., conduct which is intended to convey a message, neither the hearsay rule nor the hearsay exception of the admission of a party-opponent is applicable. Instead, the facts in the instant case warrant an analysis under the best evidence rule."). Based upon the foregoing, it is clear that Claimant's assertion that the Board erred in relying upon uncorroborated hearsay evidence in determining that he engaged in willful misconduct is patently without merit.[6]

[6] As a corollary to this allegation of error, in his appellate brief, Claimant also asserts that his supervisor's testimony regarding the content of the audited calls violates the "best evidence" rule. However, such a claim is not fairly comprised within the Statement of Questions Involved portion of Claimant's appellate brief. See Brief for Petitioner at 8. As a result, any allegation of error in this regard has been waived for purposes of appeal. See Pa.R.A.P. 2116(a) ("[N]o question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby…."); G.M. v. Department of Public Welfare, 954 A.2d 91, 93 (Pa. Cmwlth. 2008) ("[H]owever, because Petitioner failed to include this issue in the Statement of Questions Involved portion of his brief, this issue is waived….") (citations omitted).

In addition, to the extent that any allegation of error in this regard has been properly preserved for our review, it is patently without merit. Rule 1002 of the Pennsylvania Rules of Evidence provides, in pertinent part, that "[t]o prove the content of a … recording …, the original … recording … is required, except as otherwise provided … by statute." Pa.R.E. 1002. As indicated above, Section 505 of the Law and Section 505 of the Administrative Agency Law specifically provide that the Pennsylvania Rules of Evidence are not applicable to hearings conducted before a Referee. Rue. Thus, the "best evidence" rule is a technical rule of evidence not generally applicable to administrative proceedings. DiLucente Corporation v.

(Continued....)

Claimant next asserts that the Board erred in determining that his conduct constituted willful misconduct. We do not agree.

As indicated above, although willful misconduct is not defined by statute, it has been described as, inter alia: the wanton and willful disregard of the employer's interests; the disregard of standards of behavior that an employer can rightfully expect from his employee; or 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. Guthrie. In addition, "[w]e have previously recognized that a single act of misconduct by even a long-term employee may constitute willful misconduct which would preclude his receipt of unemployment compensation benefits. *Food Fair Stores, Inc. v. Unemployment Compensation Board of Review*, [314 A.2d 528 (Pa. Cmwlth. 1974)]…." Meneely v. Unemployment Compensation Board of Review, 369 A.2d 506, 509 (Pa. Cmwlth 1977).

In this case, the Board found as fact that Claimant either selected an inappropriate pre-recorded message or inappropriately disconnected telephone calls on thirty separate occasions after Employer had denied his request for leave time. In addition, when his manager met with him after reviewing the calls, Claimant was sarcastic and denied that he failed to follow procedures on the calls. Moreover, Claimant did not inform his manager that he was suffering from any distractions that may have resulted in him making the mistakes and, in a subsequent fact finding meeting, he did not offer any reason for mishandling the calls.

Pennsylvania Prevailing Wage Board, 692 A.2d 295 (Pa. Cmwlth. 1997). In short, Claimant's allegation of error in this regard is likewise patently without merit.

Clearly, the foregoing conduct supports the Board's determination that Claimant engaged in willful misconduct. See, e.g., Gardner v. Unemployment Compensation Board of Review, 454 A.2d 1208, 1209 (Pa. Cmwlth. 1983) ("[W]illful misconduct is established when action or inaction by the claimant amounts to conscious disregard of the interests of the employer or constitutes behavior contrary to that which an employer has a right to expect from an employee. Poor work performance reflecting an unwillingness to work to the best of one's ability is indicative of a disregard for the standard of conduct an employer has a right to expect and may rise to the level of willful misconduct….") (citations omitted); Astarb v. Unemployment Compensation Board of Review, 413 A.2d 761, 763 (Pa. Cmwlth. 1980) ("It is true, as Claimant points out, that poor attitude *per se* cannot usually rise to the level of willful misconduct; however, poor attitude coupled with specific conduct adverse to an employer's interest or resulting in a detriment to an employer can justify a finding of willful misconduct. Further, this Court has held that where an employee had previously performed satisfactory work (as did Claimant herein) a decline in work performance can be 'construed as conduct showing intentional and substantial disregard of the employer's interest or the employee's duties and obligations, i.e., willful misconduct.'") (citations omitted); Markley v. Unemployment Compensation Board of Review, 407 A.2d 144, 146 (Pa. Cmwlth. 1979) ("Finally, the Board concluded that the claimant's quality of work did not improve after he received the first letter. While it is true that mere incompetence, inexperience or inability which may well justify discharge, will not constitute willful misconduct so as to render an employee ineligible for benefits, the Board obviously concluded that the claimant's poor quality of work was the result of his unwillingness to work to the best of his ability. Such unwillingness undoubtedly evidences a disregard for the standards of

service which an employer has the right to expect.") (citations omitted). In short, the Board did not err in determining that its findings support the conclusion that Claimant engaged in willful misconduct, and Claimant's assertion to the contrary is without merit.

Finally, Claimant contends that the Board's determination the Claimant engaged in willful misconduct is not supported by substantial evidence. Again, we do not agree.

It is well settled that the Board is the ultimate finder of fact in unemployment compensation proceedings. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985); Chamoun v. Unemployment Compensation Board of Review, 542 A.2d 207 (Pa. Cmwlth. 1988). Thus, issues of credibility are for the Board which may either accept or reject a witness' testimony whether or not it is corroborated by other evidence of record. Peak; Chamoun. 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). This Court must examine the evidence in the light most favorable to the party who prevailed before the Board, and to give that party the benefit of all inferences that can be logically and reasonably drawn from the testimony. Id.

As outlined above, the Board found as fact that Claimant either selected an inappropriate pre-recorded message or inappropriately disconnected telephone calls on thirty separate occasions after Employer had denied his request for leave time. In addition, when his manager met with him after reviewing the calls, Claimant was sarcastic and denied that he failed to follow procedures on the calls. Moreover, Claimant did not inform his manager that he was suffering from any distractions that may have resulted in him making the mistakes and, in a

subsequent fact finding meeting, and he did not offer any reason for mishandling the calls.

When viewed in a light most favorable to Employer, our review of the certified record demonstrates that all of the foregoing findings are amply supported by substantial evidence. See N.T. 1/6/10 at 7-16, 20-21, 25. More specifically, the testimony of Claimant's manager supports the Boards findings in this regard. Id.

As noted above, the Board was free to credit the foregoing evidence regarding Claimant's willful misconduct and to discredit evidence to the contrary. Peak; Chamoun. In addition, the Board's findings are conclusive on appeal as they are supported by the foregoing substantial evidence. Taylor. Moreover, although Claimant may have presented evidence which contradicts the Board's determinations with respect to his willful misconduct, this does not compel the conclusion that its determinations in this regard should be reversed. See, e.g., Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-1109 (Pa. Cmwlth. 1994) ("[T]he fact that Employer may have produced witnesses who gave a different version of events, or that Employer might view the testimony differently than the Board, is not grounds for reversal if substantial evidence supports the Board's Findings."). In short, Claimant's allegation of error in this regard is likewise without merit.

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

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v.	:	No. 909 C.D. 2010
Unemployment Compensation Board of Review, Respondent	:	

O R D E R

AND NOW, this 20th day of January, 2011, the order of the Unemployment Compensation Board of Review, dated March 25, 2010 at No. B-497504, is AFFIRMED.

JAMES R. KELLEY, Senior Judge