IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Arthur W. Diehl,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1118 C.D. 2010
	:	
Unemployment Compensation Board of Review,	:	Submitted: November 12, 2010
	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER[1] **FILED: March 23, 2011**

Arthur W. Diehl (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board), which affirmed the decision of an Unemployment Compensation Referee (Referee) to deny benefits because Claimant committed disqualifying willful misconduct under Section 402(e) of the

[1] The majority opinion was reassigned to the authoring judge on December 15, 2010.

Unemployment Compensation Law (Law).[2] The Board found Claimant ineligible for benefits because he violated Accellent's (Employer) anti-harassment policy.

Claimant applied for unemployment compensation benefits after becoming separated from his employment with Employer. The Unemployment Compensation Service Center (Service Center) issued a determination finding Claimant ineligible for benefits under Section 402(e) of the Law. Claimant appealed the Service Center's determination and the Referee conducted an evidentiary hearing, at which Claimant and two witnesses for Employer appeared and testified. Following the hearing, the Referee affirmed the Service Center's determination, and Claimant appealed to the Board. The Board affirmed the Referee's decision and found Claimant ineligible for benefits pursuant to Section 402(e). The Board made the following findings of fact:

> 1. The claimant was last employed as a production operator by Accellent from November 2003 at a final rate of $18.00 per hour and his last day of work was November 9, 2009.
>
> 2. The employer has an anti-harassment policy that prohibits epithets, slurs, negative stereotyping, or threatening, intimidating or hostile acts that relate to race.
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> 3. On January 21, 2008, the claimant was given a written warning for unacceptable conduct in the workplace and was provided with a copy of the employer's anti-harassment policy.
>
> 4. The written warning specifically advised that further unacceptable conduct could result in discharge.

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

5. On June 7, 2009, the employer provided the claimant with a performance improvement plan advising him to refrain from making sarcastic remarks or using potentially demeaning phrases.

6. On November 8, 2009, the claimant was discussing with a coworker a Christmas ornament depicting President Barrack [sic] Obama and the claimant remarked: "I guess it's okay to hang them from trees now."

7. The coworker reported the incident to the employer and the employer questioned the claimant on November 9, 2009.

8. The claimant admitted making the comment and stated that he meant it to be a joke.

9. The employer discharged the claimant for violating its anti-harassment policy.

(Board Findings of Fact (FOF) ¶¶ 1-9.) In support of its decision, the Board set forth the following explanation:

> The employer established a reasonable policy prohibiting employees from making *racially offensive remarks*. The claimant was aware of the policy. The Board credits the employer's testimony that when confronted, the claimant admitted to making the *comment* and asserted that it was meant to be a joke. Even if it was merely meant in jest, the *remark* was still clearly offensive and in violation of the employer's policy. The claimant has not established good cause for violating the employer's policy.

(Board Decision at 2 (emphasis added).) Claimant now petitions this Court for review.[3]

[3] "Our scope of review is limited to determining whether the Claimant's constitutional rights were violated, whether an error of law was committed, or whether substantial evidence supports the findings of fact. Whether a Claimant's conduct constitutes willful misconduct is a question of law subject to our review." Williams v. Unemployment Compensation Board of Review, 926 A.2d 568, 571 n.4 (Pa. Cmwlth. 2007) (citation omitted).

On appeal, Claimant argues that: (1) his "due process rights were violated by the conduct of the Referee," (Claimant's Br. at 8); and (2) the finding that he was discharged for willful misconduct is not supported by substantial evidence.[4]

We first address Claimant's argument that he was denied due process because the "Referee 'crossed the line' and acted as an agent of the Employer," (Claimant's Br. at 9), when "with a hostile attitude, he aggressively and unfairly cross-examined [Claimant]," (Claimant's Br. at 8). However, Claimant does not cite to any portion of the transcript where the Referee was allegedly unfair, hostile, or aggressive. In unemployment compensation proceedings, a referee must afford the parties due process of law. Hall v. Unemployment Compensation Board of Review, 584 A.2d 1097, 1101 (Pa. Cmwlth. 1990). This Court has thoroughly reviewed the transcript and record, and we conclude that the Referee did not exhibit conduct that would deprive Claimant of his due process right to a fair and impartial hearing. Claimant was represented by counsel at the hearing, had every opportunity to present his case, and to question Employer's witnesses. Although the Referee did ask Claimant questions, we note that the Referee also questioned Employer's witnesses in an effort to understand the circumstances surrounding Claimant's termination. There is no place in the transcript that suggests the Referee was hostile or aggressive toward Claimant. As such, Claimant's assertion that his due process rights were violated is without merit.

[4] We note that in Claimant's "Statement of Questions Involved," he alleges that his "freedom of speech" was violated. However, in the argument portion of his brief, he does not cite any legal authority or offer any argument to support his general statement that his freedom of speech was violated. As such, this issue is waived for failure to brief it. Tyler v. Unemployment Compensation Board of Review, 591 A.2d 1164, 1167-68 (Pa. Cmwlth. 1991).

Next, Claimant argues that the *Referee's* finding of willful misconduct was not supported by substantial evidence. However, we note that the Referee is not the final fact-finder in unemployment compensation cases; the Referee acts merely as the representative or agent of the Board. The resolving of conflicts in the evidence, the determination of credibility, the weighing of the evidence, and the drawing of inferences therefrom are matters for the Board in its capacity as the ultimate fact-finder. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 269-70, 276-77, 501 A.2d 1383, 1385, 1388 (1985).

Claimant argues that there is not substantial evidence to support the finding that he violated Employer's anti-harassment policy by telling a racial joke, thereby committing willful misconduct, because Employer's anti-harassment policy does not specifically prohibit the telling of racial jokes or define such action as misconduct that could result in termination.

Section 402(e) provides that a claimant will not be eligible for unemployment compensation when "his unemployment is due to his discharge . . . from work for willful misconduct connected with his work." 43 P.S. § 802(e). Although the Law does not define the term "willful misconduct," the courts have defined it as follows:

> a) wanton or willful disregard for an 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 or an employee's duties or obligations.

Caterpillar, Inc. v. Unemployment Compensation Board of Review, 550 Pa. 115, 123, 703 A.2d 452, 456 (1997) (emphasis added). Where a claimant's willful misconduct is alleged to be the result of a violation of a work rule, the burden is on the employer

to prove that the claimant was made aware of the existence of the work rule and that the claimant violated the rule. Bishop Carroll High School v. Unemployment Compensation Board of Review, 557 A.2d 1141, 1143 (Pa. Cmwlth. 1989). Once the employer meets its burden of showing willful misconduct, the burden then shifts to the claimant to establish good cause for his actions. Id. "A claimant has good cause if his . . . actions are justifiable and reasonable under the circumstances." Docherty v. Unemployment Compensation Board of Review, 898 A.2d 1205, 1208-09 (Pa. Cmwlth. 2006).

Claimant contends that Employer terminated him for "telling a 'racial joke'" and that Employer's anti-harassment policy "only lists 'sexual jokes'" as prohibitive. (Claimant's Br. at 12.) He contends that:

> The detailed Company's anti-harassment Policy lists over one hundred and fifty (150) prohibited acts specifying penalties including immediate termination. Claimant was terminated for telling a "racial joke." "[R]acial joke" is not listed as a prohibited act in the Employer's Policy. Expressio unius est exclusio alter. The Employer must prove that the rule allegedly violated actually exists (racial joke) and that the Employee broke it. Arbster v. [Unemployment Compensation Board of Review], 690 A.2d 805 ([Pa. Cmwlth.] 1997).

(Claimant's Br. at 14.)

Employer has an "Anti-Harassment; Non-Discrimination; and Sexual Harassment" Policy (Policy). (Policy, Hr'g Tr. Ex. 9, R.R. at 30a.) Of relevance, the Policy provides:

> Accellent desires to provide a positive and productive work environment. To that end, Accellent is committed to providing a work

> environment that is free of discrimination and harassment, and to provide a means of dealing with such incidents should they occur.
>
> Discrimination in any form, and specifically in the form of harassment, will not be tolerated at Accellent. This includes harassment or other discrimination based upon a person's . . . color [or] race . . . . This policy applies to all employees . . . . If, after appropriate investigation, the Company finds that any form of discrimination has taken place, Accellent will take action necessary to end the discrimination, including termination of the offending employee.
>
> *Harassment is* non-verbal, *verbal* or physical *conduct that denigrates or shows hostility or aversion toward an individual because of his/her . . . color [or] race* . . . or any characteristic protected by law, or that of his/her relatives, friends, or associates, *and that:*
>
> *1.* *Has the purpose or effect of creating* an intimidating, hostile, or *offensive work environment.*

(Policy, Hr'g Tr. Ex. 9, R.R. at 30a (emphasis added).) The record clearly indicates that Claimant was aware of this Policy because he signed the acknowledgment form outlining the Policy. (Hr'g Tr. at 5-6, 8, R.R. at 15a-16a, 18a.) Further, on January 21, 2008, Claimant received and signed a "Final Written Warning" regarding his workplace conduct and anti-harassment issues. (Hr'g Tr. Ex. 8, R.R. at 33a.) On June 7, 2009, Employer issued Claimant a performance improvement plan for, among other things, "[m]aking negative or sarcastic remarks or repeating potentially demeaning phrases from comedy programs." (Hr'g Tr. Ex. 10, R.R. at 27a.) Accordingly, the record makes clear that Claimant was fully aware of Employer's Policy and that any more violations of the Policy by him would result in his termination.

Claimant argues that he did not commit willful misconduct because he was terminated for telling a racial joke, which the Policy does not prohibit. However, although Ronald L. Evans, Jr., Production Supervisor for Employer, stated at the hearing, that Claimant was terminated for violating the Policy by making a "joke,"

(Hr'g Tr. at 5, R.R. at 15a), the record as a whole establishes that Claimant was terminated for violating the anti-harassment section of the Policy for making an offensive racial remark. Employer's claim documents provide that Claimant was terminated because Claimant "violated company policy – specifically our anti-harassment policy." (Employer Separation Information, TALX e-mail, Nov. 23, 2009, at 2, R.R. at 25a.) Moreover, Mr. Evans also specified that Claimant was discharged for "violating company policy, specifically the anti-harassment policy [for making] *[r]acial remarks*, specifically joke." (Hr'g Tr. at 5, R.R. at 15a (emphasis added).) Employer submitted into evidence the Policy which prohibits making a *remark or comment* that denigrates or shows hostility towards a person based on his or her race[5] and that creates an offensive work environment. It appears that Mr. Evans may have mistakenly noted the sexual harassment portion of the Policy, which prohibits "suggestive jokes," instead of the prohibition against making denigrating racial remarks. (Hr'g Tr. at 5, R.R. at 15a.)[6] Notwithstanding this reference, the

[5] "Denigrate" is defined as "to cast aspersion on the character or reputation of" or to "belittle maliciously." Webster's Third New International Dictionary 602 (2002). "Hostile" is defined as "marked by antagonism or unfriendliness." Id. at 1094.

[6] The Policy discusses sexual harassment after it sets out the prohibition against making denigrating racial remarks. Specifically, the Policy provides:

> While harassment based on any of the factors listed above will not be tolerated, sexual harassment requires particular attention. Sexual harassment includes unwelcome sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature. . . .
>
> *Inappropriate harassment can occur intentionally or unintentionally. Some examples of conduct prohibited by this policy are listed below. Please note that these are not the only acts that may constitute sexual harassment.*
>
> - *Epithets, slurs, negative stereotyping, or threatening, intimidating or hostile acts that relate to . . . color [or] race[;]*
>
> . . .

(Continued…)

credited testimony establishes that, on November 8, 2009, Claimant was having a discussion with two co-workers about a President Obama Christmas ornament being sold at Wal-Mart, wherein Claimant remarked, "I guess it's okay to hang them from trees now a days." (Hr'g Tr. at 6, R.R. at 16a.) Mr. Evans testified that the co-workers reported this incident to him because they were offended by Claimant's statement. (Hr'g Tr. at 6, R.R. at 16a.) Although Claimant denied making this remark at the hearing, Mr. Evans credibly testified that he discussed this incident in person with Claimant and that Claimant admitted to him that he said it and that "it could have been taken in a prejudice way," but he "intended it to be a joke and be funny." (Hr'g Tr. at 7, R.R. at 17a.)[7] Regardless of whether Claimant meant for this

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- *Use of offensive words of a sexual nature describing body parts or the sexual act, telling "suggestive" jokes or stories, and conversations about sexual exploits, sexual preference and desires or suggestive or sexist remarks about a person's clothing or body.*

(Policy, Hr'g Tr. Ex. 9, R.R. at 30a-31a (emphasis added).) It appears from the transcript that Mr. Evans referred to the emphasized portion of the Policy above in describing Employer's decision to terminate Claimant. Even if the prohibition against telling suggestive jokes relates to jokes of a sexual context, not a racial context, which is not clear, it is worth noting that within this list of conduct, the Policy also includes "Epithets, slurs, negative stereotyping, or threatening, intimidating or hostile acts that relate to . . . *color [or] race*. . . ." (Policy, Hr'g Tr. Ex. 9, R.R. at 30a (emphasis added).)

[7] Claimant also asserts that the Board relied on hearsay evidence to support its decision that Claimant committed disqualifying misconduct by making an offensive racial comment to a "white co[-]worker" because the co-worker "was not called by the Employer as a witness" before the Referee. (Claimant's Br. at 13.) The transcript indicates that Claimant's counsel objected to the testimony of Mr. Evans (EW1) when he was explaining the racial comment that was reported to him by the co-workers. However, it seems that Employer's second witness, Shannon M. Maroney-Garrett (EW2), Employer's Human Resource Manager, interrupted Mr. Evans' testimony at this point in the hearing and so the objection was never qualified by Claimant's counsel or addressed by the Referee. We note that, after Mr. Evans was questioned, Ms. Maroney-Garrett testified without objection as to Claimant's admission for which she was present. The transcript of their testimony provides in relevant part:

(Continued…)

R And would you recall what the joke was?

EW1 Yes, it was about a Barak Obama and Christmas ornaments and I guess it's okay to hang them now a days.

R I'm sorry.

EW1 I guess it's – they were – he was in Wal-Mart and they saw a Christmas ornament of Barak Obama hanging from a Christmas tree. He made the comment I guess it's okay to hang them from trees now a days. And it offended a couple co-workers.

CL *I object to that . . .*

R Excuse me [Ms. Maroney-Garrett/EW2], you can't do that.

EW2 I'm sorry.

R You're not allowed to -- if you do that then I might not find [Mr. Evans/EW1] to be credible. I might think he's . . .

EW2 Okay.

R I'll get to you and you can say whatever you want to say.

EW2 Thank you.

R Okay, Now you said when you spoke to [Claimant] he admitted to making that joke?

EW1 He admitted – yes. And he also admitted that it was on – it could have been taken in a prejudice way.

R And who did he make this joke in front of?

EW1 A too[l] maker – specific names?

R No, just – these were co-workers?

EW1 Co-workers in his area, yes.

CL I'm going to object to characterization. I don't know that it is a joke.

R Okay. Well you can question him about that. Okay, now did [Claimant] say why he made the comment?

. . .

R All right. Now Ms. [Maroney-]Garrett, you can speak without (inaudible) due process.

EW2 Thank you very much.

. . .

EW2 I just wanted to actually recite the joke that was told . . .

R Um-hum.

EW2 . . . I think it's relevant to the situation. The joke that [Claimant] acknowledged in front of [Mr. Evans] and I that he actually said was did you hear about Wal-Mart, they have a new Christmas ornament of Barak Obama, I guess it's okay to hang them from trees now. And then after he acknowledged that he actually said the statement he said that he knew that the jokes about Barak Obama could be considered racial and he admitted that the joke might potentially be inappropriate.

(Continued…)

statement to be taken as a "racial joke," the Board characterized his statement as a "comment" and "remark" that was "clearly offensive" to Claimant's co-workers; the Board did not make a finding characterizing this statement as a "racial joke." (Board Decision at 2; Hr'g Tr. at 6, R.R. at 16a.) In fact, Claimant affirmatively testified that he would consider this statement a "racial statement" when questioned by the Referee. (Hr'g Tr. at 10-11, R.R. at 20a-21a.) Claimant's "racial statement" regarding the President Obama ornament and hanging "them," presumably African-Americans, from trees, appears to be a thinly veiled reference to lynching, certainly conduct that can be characterized as being denigrating or hostile towards a person, or

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> He said he didn't want it to come across in a prejudice way but he knew it was probably inappropriate. I just wanted to clarify that. I believe that's Exhibit 6 of your file. That was it, thank you very much.

(Hr'g Tr. at 6-8, R.R. at 16a-18a (emphasis added).) Assuming Claimant's counsel intended to qualify his objection to Mr. Evans' testimony as a hearsay objection, we note that a finding of willful misconduct in an unemployment case cannot be based solely on hearsay evidence. Orloski v. Unemployment Compensation Board of Review, 415 A.2d 720, 721 (Pa. Cmwlth. 1980). Although the statements of the co-workers to Mr. Evans were hearsay because the co-workers were not called as witnesses at the hearing, any error in relying on these statements was harmless. It was harmless error because both Mr. Evans and Ms. Maroney-Garrett credibly testified that Claimant admitted he made the statement about President Obama that was reported by the co-workers. Mr. Evans credibly testified that he personally met with Claimant and Claimant admitted that he made the remark which "could have been taken in a prejudice way." (Hr'g Tr. at 7, R.R. at 17a.) Mr. Evans' testimony was corroborated by Ms. Maroney-Garrett, who also testified that Claimant admitted to making the statement that the co-workers reported. "An admission is a voluntary acknowledgment made by a party of the existence of the truth of facts which are inconsistent with his claim in an action. As such, admissions possess high evidentiary value and are received on the theory that one would not say anything against his own interest unless it was true." Louk v. Unemployment Compensation Board of Review, 455 A.2d 766, 768 n.4 (Pa. Cmwlth. 1983). "As an admission of a party it fell within an exception to the hearsay rule and was therefore competent testimony" to be relied on by the Board. Wright v. Unemployment Compensation Board of Review, 465 A.2d 1075, 1076 (Pa. Cmwlth. 1983). Because this credible testimony was sufficient to support the Board's findings, even if Claimant's objection had been a hearsay objection, which was not acted upon, any potential error in this regard would have been harmless.

group of people, based on their race.[8] Accordingly, we, like the Board, conclude that such conduct violates Employer's Policy and constitutes willful misconduct.

Because Employer met its burden of showing willful misconduct and, in light of the fact that Claimant has failed to show good cause for his actions, we affirm the order of the Board.

RENÉE COHN JUBELIRER, Judge

[8] In the Referee's decision finding Claimant ineligible for benefits, he states that Claimant's racial statement "was clearly referring to the dark era of American history when blacks were being hanged from trees as a form of terrorizing the black population." (Referee's Decision at 2.)

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Petitioner	:	
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	:	
Unemployment Compensation Board of Review,	:	
	:	
Respondent	:	

O R D E R

NOW, March 23, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

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RENÉE COHN JUBELIRER, Judge