

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ahmed Mansour, :
Petitioner :
v. :
Unemployment Compensation :
Board of Review, : No. 1221 C.D. 2009
Respondent : Submitted: January 8, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: February 25, 2010

Ahmed Mansour (Claimant) petitions for review from the order of the Unemployment Compensation Board of Review (Board) which affirmed the referee's denial of benefits under Section 402(e) of the Unemployment Compensation Law (Law).¹

Claimant worked as a depack chemist for Cycle Chem (Employer). On November 1, 2008, Claimant, as directed by the operations manager, Thomas Thompson (Thompson), placed waste powdered aluminum in two sludge barrels. Powdered aluminum is normally disposed of by placing it in oil because it will combust on contact with water. One of the sludge barrels apparently contained water and ignited. The fire lasted for approximately two minutes and caused no damage.

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

After the fire, Thompson met with Claimant and a supervisor and informed them that he thought Employer was discriminating against him and would discharge him if Employer discovered he was responsible for the fire. Thompson asked Claimant to fabricate a story and state that he, Claimant, did not follow Thompson's instructions to place the powdered aluminum in oil. As coached, Claimant stated he was operating a fork lift and struck the bucket containing the powdered aluminum which spilled into the sludge barrel and ignited. Claimant consistently maintained this fabrication when questioned by the facility manager and investigators from the Department of Environmental Protection.

On December 10, 2008, Employer discharged Claimant:

On November 1st, 2008 you were involved in an incident in the depack area. This incident has been investigated by our Compliance Officer Ryan Miller and the PADEP. Their determination is this incident was preventable.

The investigation has concluded that while packing a drum, you failed to put material under oil as instructed, then several hours later you knocked this drum into another drum containing sludge while operating a forklift. This action resulted in a fire, threatening not only property damage, but other employees as well.

Due to carelessness, refusal to follow instructions in a timely manner, and a general disregard for safety I am forced to terminate your employment with Cycle Chem, Inc. effective immediately.

Letter from Joseph A. Theis, Facility Manager, and Thomas E. Thompson, Operations Manager, December 10, 2008, at 1.

Following his discharge, Claimant contacted Employer's human resources department and admitted to the facility manager, Joseph A. Theis (Theis), that he lied about the fire. On December 17, 2008, Theis informed the Unemployment Compensation Service Center that Claimant was terminated for failing to follow Thompson's instructions, for his failure to admit to not following instructions and for not being truthful about the incident, his failure to be truthful during the investigation, and for his carelessness.

At hearing before the referee on March 11, 2009, Claimant maintained his recantation of his initial description of the fire:

The story . . . in the letter of what happened because Mr. Thompson, he was screaming that, the company's being discriminating against him because of whatever they're saying and . . . I told him that Mr. Thompson is on the phone with this. Do you want to fire him? So we had to come up with a story that it was an incident, I was backing out with the forklift and it was on top of the drums. None of this happened.

Notes of Testimony, March 11, 2009, (N.T.) at 24.

On cross-examination, Claimant reiterated that he initially lied about the fire:

I was doing what exactly as I was told by the operations manager. He told me to . . . say that so . . . I can cover for him if . . . he know [sic] that he's the one who told me to do this, they were going to fire him. They was [sic] looking for way to fire him. And . . . he's been generous with me so many times, I said no problem. I'll go with that. And he . . . assured me nothing is going to happen to you. . . . [T]hat's why I agreed with the story. And then when he gave me . . . the letter of termination, I was furious. I said why did you sign it? You know the story.

You know that this is not what happened. I was not backing up. I did not bump into a drum. And . . . the supervisor by the names [sic] of Danny, he knows that, that the . . . foreman . . . he knows that I was not backing up.

N.T. at 27-28.

After the hearing the referee determined that Claimant committed willful misconduct:

In this case, the claimant admitted to conspiring with Mr. Thompson, the operations manager and another supervisor in creating a false report regarding the circumstances that occurred on Saturday, November 1, 2008, which resulted in a fire involving aluminum powder. The claimant furthered this deception on Monday, November 3, when he met with the facility manager, another management employee and an investigator from DEP regarding the chemical fire. Instead of telling the truth, that the claimant was only following his supervisor's instructions and allowing the employer to establish where blame should be placed, the claimant continued to perpetuate the false story created by his operations manager; by not telling the truth regarding the incident to the investigating parties. As such, based on the claimant's own admission, the claimant's conduct does demonstrate a disregard of the standards of behavior that an employer has the right to expect of an employee. Such conduct is considered willful misconduct within the meaning of the provisions of Section 402(e) of the Law.

Referee's Decision, March 19, 2009, at 4. The referee determined that although Employer listed "failure to follow a supervisor's instructions" as a reason for termination, the evidence of record and Claimant's credible testimony established that Claimant was never directed to place the powdered aluminum under oil until

after the fire occurred. Also, the referee determined that Claimant's carelessness which resulted in the fire did not rise to the level of willful misconduct.

In its opinion dated May 27, 2009, the Board agreed with the referee and determined "[t]he claimant knew or should have known that lying to the employer, as well as a DEP investigator was inimical to the employer's interest." Board Opinion, May 27, 2009, at 1.

Claimant contends that the Board mischaracterized his conduct and there was no evidence that Claimant's actions were inimical to Employer's interest.²

Whether a claimant's conduct rises to the level of willful misconduct is a question of law subject to this Court's review. Lee Hospital v. Unemployment Compensation Board of Review, 589 A.2d 297 (Pa. Cmwlth. 1991). Willful misconduct is defined as conduct that represents a wanton and willful disregard of an employer's interest, deliberate violation of rules, disregard of standards of behavior which an employer can rightfully expect from the employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer's interest or employee's duties and obligations. Frick v. Unemployment Compensation Board of Review, 375 A.2d 879 (Pa. Cmwlth. 1977). The employer bears the burden of proving that it

² This Court's review in an unemployment compensation case is limited to a determination of whether constitutional rights were violated, errors of law were committed, or findings of fact were not supported by substantial evidence. Lee Hospital v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994).

discharged an employee for willful misconduct. City of Beaver Falls v. Unemployment Compensation Board of Review, 441 A.2d 510 (Pa. Cmwlth. 1982). The employer bears the burden of proving the existence of the work rule and its violation. Once the employer establishes that, the burden then shifts to the claimant to prove that the violation was for good cause. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985). However, a “specific work rule is not necessary where the standard of behavior is obvious and the employee’s conduct is so inimical to the employer’s interests that discharge is a natural result. . . .” Orend v. Unemployment Compensation Board of Review, 821 A.2d 659, 663 (Pa. Cmwlth. 2003).³

Claimant maintains that the determination that he lied to Employer was not supported by substantial evidence in spite of Claimant’s own admissions at the hearing, and on review the Board found Claimant credible.

In unemployment compensation proceedings, the Board is the ultimate factfinding body empowered to resolve conflicts in evidence, to determine the credibility of witnesses, and to determine the weight to be accorded evidence. Unemployment Compensation Board of Review v. Wright, 347 A.2d 328 (Pa. Cmwlth. 1975). Findings of fact are conclusive upon review provided that the record, taken as a whole, provides substantial evidence to support the findings.

³ This Court disagrees with the Board that Claimant’s conduct which led to the fire did not constitute willful misconduct. His actions led to the fire which could have caused considerable damage to Employer’s facility. He did not check the sludge barrel to see if it contained water. However, because the Board found other conduct by Claimant amounted to willful misconduct, this Court will review that determination.

Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977).

Claimant's recantation in his telephone conversation with Employer's representative and in his testimony before the referee established that he lied to Employer concerning the fire. This Court notes that Employer did not become aware of Claimant's fabrication until after Employer terminated Claimant. The Board, however, relied on this fabrication when it determined that Claimant committed willful misconduct. In PrimePay, LLC v. Unemployment Compensation Board of Review, 962 A.2d 684 (Pa. Cmwlth. 2008), this Court held that an employer satisfies its burden of proving willful misconduct by evidence discovered after the termination of the employee if it establishes that the willful misconduct was concealed and it would have terminated the employee had it been aware of the concealed misconduct.

Here, the aluminum ignited on November 1, 2008. After the fire, Claimant participated in a fabrication. He maintained the deception with Employer's personnel and with the Pennsylvania Department of Environmental Protection. On December 10, 2008, Employer discharged Claimant for carelessness, refusal to follow instructions in a timely manner, and a general disregard for safety. After he was discharged Claimant informed Employer of the fabrication. On December 17, 2008, Employer listed the fabrication as a reason for the discharge in the letter to the Service Center as well as before the referee. Although Employer was unaware of the fabrication when it discharged Claimant, this did not foreclose the referee or the Board from finding that this after

discovered conduct amounted to willful misconduct. PrimePay. In any event Claimant does not challenge the Board's reliance on the after discovered conduct.

Claimant also argues that his actions were not inimical to Employer's interests and did not constitute willful misconduct, especially since his superiors concocted the scheme. First, this Court agrees with the Board that lying about the cause of a hazardous fire to company management and then to investigators from the Department of Environmental Protection was inimical to Employer's interest. Second, even if Claimant's superior suggested he lie, that was not just cause.⁴

Accordingly, this Court affirms.

BERNARD L. McGINLEY, Judge

⁴ Similarly, in Temple University v. Unemployment Compensation Board of Review, 565 Pa. 178, 772 A.2d 416 (2001), our Pennsylvania Supreme Court found that an employee who falsified his time sheets on the instructions of his supervisor committed willful misconduct.

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ORDER

AND NOW, this 25th day of February, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

BERNARD L. McGINLEY, Judge