

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jimmy J. Pack, Jr., :
Petitioner :
 :
v. :
 :
Unemployment Compensation :
Board of Review, : No. 1243 C.D. 2009
Respondent : Submitted: October 16, 2009

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: December 4, 2009

Jimmy J. Pack, Jr. (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

The relevant facts, as initially found by the referee and confirmed by the Board, are as follows:

1. The Chestnut Hill Community Association ('Association') owns the Chestnut Hill Local ('Local'), a community newspaper.
2. The claimant was employed as a full time Assistant Production Manager with the Local earning \$19.25 per

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

hour. The claimant began employment in March 1998 and was last employed on December 14, 2008.

3. On November 19, 2008, a Board meeting of the Association was held which the claimant attended.

4. During the Board meeting, changes were proposed to the Local, which the claimant disagreed with.

5. After the Board meeting, the claimant approached three separate Board members: questioning the first Board member (Keintz) about what the Board member was doing; was sarcastic toward the second Board member (Piotrowski); and approached the third Board member (Remus) and stated 'Nice report, asshole.'

6. The claimant and Remus engaged in a verbal exchange wherein the claimant repeated, 'Nice report, asshole,' asked Remus to hit him in front of witnesses so he could sue, and refused the Board members directive to leave stating that he was a reporter.

7. After the exchange in the parking lot with the claimant, Remus contacted the claimant's supervisor at the Local requesting a meeting with the claimant's supervisor and the claimant.

8. Neither the claimant nor his superiors would meet with Remus.

9. At the next Board meeting the Board voted to discharge the claimant for a confrontational behavior.

10. The claimant was on vacation between December 14, 2008, and December 29, 2008.

11. Upon the claimant's return from vacation, the Vice President of Operations attempted to inform the claimant he was being discharged, to which the claimant responded, 'Fuck you.'

12. The employer did not have to the opportunity to inform the claimant of the basis for why he was being

discharged, as the claimant refused the Vice President of Operations the opportunity to do so.

Referee's Decision (Decision), March 16, 2009, Findings of Fact Nos. 1-12 at 1-2.

The referee determined:

Here, the Referee recognizes a conflict in the testimony presented by the parties relative to the incident which led to the claimant's discharge from employment. The employer presented testimony at the hearing from Remus who testified that the claimant, at the conclusion of the Board Meeting, approached Remus in the parking lot and stated, 'Nice report asshole.' Remus also testified the claimant became combative, asking Remus to hit him in front of witnesses so he could sue. While the claimant in this matter contended he did in fact approach Remus at the conclusion of the meeting and stated something to the effect that Remus did a 'Great job at that ad hoc committee, and thanks for talking to the staff,' the claimant also presented evidence that he did in fact make a statement to Remus to the effect, 'Go ahead, beat me up.' Because of the admissions made by the claimant in his evidence that he approached Remus, and in some parts corroborated Remus' testimony, the Referee resolves the conflict based upon the statements presented as testimony by the parties in favor of the employer, and finds the employer's testimony credible related to the actual exchange which occurred between the claimant and Remus.

In addition, the claimant does not contest that he approached two other Board members in the parking lot and made comments, some of which were of a sarcastic nature to the Board members.

The Referee also finds the Vice President of Operations testimony credible and competent, inasmuch as when the claimant returned from vacation and the Vice President attempted to discharge the claimant from employment, the claimant did not permit her to do so and rather used additional vulgarities toward the Vice President by

stating ‘Fuck you.’ As noted in the Court holdings above, a single incident of abusive or offensive language constitutes a disregard of a reasonably expected standard of behavior. The Referee finds of particular import, the claimant made such vulgar statements to two separate Board members on two separate occasions. The Referee also wishes to note the Referee rejects the claimant’s contention as incredible that Remus provoked him by making inflammatory and inappropriate comments regarding the claimant’s sexuality.

In sum, the Referee finds the claimant’s use of abusive and offensive language towards members of the Board of the Association, which operate the paper for which the claimant was employed, to rise to the level of willful misconduct in connection with the work as defined in the Law and in the Courts, and therefore benefits are denied to the claimant under Section 402(e) of the Law.

Decision at 2-3.

The Board affirmed.

Claimant contends that the Chestnut Hill Local/Chestnut Hill Community Association (Employer) did not follow proper procedures when it terminated him, that the Board of Employer lacked the authority, pursuant to Employer’s bylaws, to discharge Claimant, and that Employer did not maintain an employee file which contained a report of the events described at his hearing. And, if there was a report, it was not signed. Claimant also contends that the referee completely discounted his assertion that he was threatened by Remus, that he was within his legal rights to criticize a board member of a quasi-governmental

organization, and that he was prejudiced because he had a hostile relationship with a director, Dina Hitchcock, which predated her appointment to Employer's Board.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 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). This Court has determined that the use of language by a claimant which is abusive, vulgar or offensive constitutes willful misconduct unless the claimant was provoked or the

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).

language was *de minimis*. Cundiff v. Unemployment Compensation Board of Review, 489 A.2d 948 (Pa. Cmwlth. 1985).

The first two issues raised in Claimant's Statement of Questions Involved concern, first, whether Employer followed proper procedures when it terminated him and, second, whether Employer's Board of Directors could terminate him under its bylaws. These issues are not addressed in the argument section of his brief. Accordingly, these issues are waived. See Pa.R.A.P. 2116(a); County of Venango v. Housing Authority of Venango, 868 A.2d 646 (Pa. Cmwlth. 2005); Van Duser v. Unemployment Compensation Board of Review, 642 A.2d 544 (Pa. Cmwlth. 1994) (Issues not briefed are waived.).

Regarding Claimant's challenges to the credibility of Employer's witnesses and the quality of Employer's evidence, Claimant is essentially attacking the factfinding and the weight accorded the evidence by the Board. Claimant simply asks this Court to adopt his version of the events. This Court will not do so. 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. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829

(1977). This Court will neither reweigh the evidence nor accept a version of the facts which the Board rejected.³

Accordingly, this Court affirms.

BERNARD L. McGINLEY, Judge

³ Claimant also contends that he is within his legal rights to criticize a board member of a quasi-governmental organization without having his job at risk. This issue is irrelevant to the matter before this Court. The Board determined that Claimant was terminated because of his confrontational behavior to the members of Employer's Board of Directors not because he disagreed with Employer's policies.

