**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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| Cablenet Services Unlimited, Petitioner | : | |
| v. | : | No. 1245 C.D. 2008 |
| Unemployment Compensation Board of Review, Respondent | : | Submitted: October 24, 2008 |

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION**
**BY JUDGE SIMPSON** **FILED: December 17, 2008**

Cablenet Services Unlimited (Employer) petitions for review of an order of the Unemployment Compensation Board of Review (Board) that granted benefits to Naeem Waters (Claimant). The Board determined Employer discharged Claimant, and Employer did not prove Claimant committed willful misconduct. Employer argues the Board erred in determining it discharged Claimant. Employer also asserts that Claimant committed willful misconduct. Discerning no merit in these assertions, we affirm.

Claimant worked as a full-time installation technician for Employer. He initially worked at Employer's South Philadelphia location, but subsequently transferred to the Northeast Philadelphia location for an opportunity to increase his income. At the Northeast location, co-workers subjected Claimant and other minorities to racial slurs. Claimant complained three times about the situation to

Employer's director of operations; on the third occasion, Claimant complained to the director in front of the director's superior, which angered the director. Subsequently, Employer took no steps to redress Claimant's complaints, and the racial slurs continued.

After an argument between Claimant and the director of operations regarding time sheets, Employer transferred Claimant back to the South Philadelphia location. Following the transfer, Claimant worked a few days at the South Philadelphia location before requesting time off to address childcare arrangements for his children. After completing the necessary childcare arrangements, Claimant called the director of operations to inform him he was ready to return to work. The director told Claimant he did not think it was a good idea for Claimant to come back because he was causing commotion in the office.

Claimant subsequently filed for unemployment compensation benefits, which were denied by the local service center. On Claimant's appeal, a referee affirmed, finding Claimant voluntarily left his employment without a necessitous and compelling reason. Claimant appealed to the Board. The Board reversed the referee and granted benefits, concluding Employer discharged Claimant, and Claimant did not commit willful misconduct. Employer now appeals to this Court.

On appeal,[1] Employer argues the Board erred in capriciously disregarding evidence that Claimant voluntarily quit his position. Specifically, Employer contends the Board failed to credit testimony that Claimant voluntarily quit to return to school. Next, Employer argues that Claimant is ineligible for benefits because he committed willful misconduct by often voicing his discontent through loud, angry and disruptive outbursts.

The Board is the ultimate fact-finder in unemployment compensation cases. Hessou v. Unemployment Comp. Bd. of Review, 942 A.2d 194 (Pa. Cmwlth. 2008). "[T]he weight to be given the evidence and the credibility to be afforded the witnesses are within the province of the Board as finder of fact …." Peak v. Unemployment Comp. Bd. of Review, 509 Pa. 267, 272, 501 A.2d 1383, 1386 (1985). "The Board's findings are conclusive on appeal so long as the record, taken as a whole, contains substantial evidence to support those findings." Hessou, 942 A.2d at 198. The fact that one party may view testimony differently than the Board is not grounds for reversal if the facts found are supported by substantial evidence. Daniels v. Unemployment Comp. Bd. of Review, 755 A.2d 729 (Pa. Cmwlth. 2000). Further, we must "examine the testimony in the light most favorable to the party in whose favor the fact-finder has ruled, giving that party the benefit of all logical and reasonable inferences from the testimony …." Penn Hills

[1] Our review is limited to determining whether the necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review, 949 A.2d 338 (Pa. Cmwlth. 2008).

Sch. Dist. v. Unemployment Comp. Bd. of Review, 496 Pa. 620, 630, 437 A.2d 1213, 1218 (1981).[2]

Employer first contends Claimant voluntarily quit his position and is therefore ineligible for unemployment benefits. We disagree.

A claimant is ineligible for compensation when his "unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature …." Section 402(b) of the Unemployment Compensation Law (Law).[3] "Whether an employee's conduct constitutes voluntary termination is a question of law to be determined by examining the findings of fact made by the Board." Fishel v. Unemployment Comp. Bd. of Review, 674 A.2d 770, 772 (Pa. Cmwlth. 1996) (citations omitted). For an employer's statement to be interpreted as a discharge, the "language must possess the immediacy and finality of firing." Id. Statements such as "pick up your pay," "turn in your key," "pull your time card," "turn in your uniform," and "there's the door" possess the finality of a firing.

[2] We also note our Supreme Court's decision in Leon E. Wintermyer, Inc. v. Workers' Comp. Appeal Bd. (Marlowe), 571 Pa. 189, 203, 812 A.2d 478, 487 (2002), holding that "review for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in every case in which such question is properly brought before the court." However, "where there is substantial evidence to support an agency's factual findings, and those findings in turn support the conclusions, it should remain a rare instance in which an appellate court would disturb an adjudication based upon capricious disregard." Id. at 204, 812 A.2d at 488, n.14. Capricious disregard is a deliberate disregard of competent evidence that one of ordinary intelligence could not possibly avoid in reaching the result. Remaley v. Workers' Comp. Appeal Bd. (Turner Dairy Farms, Inc.), 861 A.2d 405 (Pa. Cmwlth. 2004).

[3] Section 402(b) of the Law, Act of December 5, 1936, Second Ex. Sess. P.L. (1937) 2897, as amended, 43 P.S. §802(b).

Rizzitano v. Unemployment Comp. Bd. of Review, 377 A.2d 1060 (Pa. Cmwlth. 1977). In contrast, where an employer's statement presents a claimant with the option of maintaining the employment relationship, this Court does not find a termination. See Keast v. Unemployment Comp. Bd. of Review, 503 A.2d 507 (Pa. Cmwlth. 1986) (holding employer's statement, "how would you like to leave," lacked the immediacy and finality of a firing); Lawlor v. Unemployment Comp. Bd. of Review, 391 A.2d 8 (Pa. Cmwlth. 1978) (holding employer's advice to claimant that he either change his attitude toward his supervisor or make a decision as to what he was going to do, lacked the immediacy and finality of a firing).

Claimant testified he did not voluntarily quit, but was fired by Employer during a phone conversation where Employer told Claimant he did not think it was a good idea for Claimant to come back because of the commotion Claimant was causing in the office. Employer's witness denied making the statement and testified Claimant voluntarily quit for the purpose of returning to school. Claimant and Employer's witness provided conflicting testimony regarding the phone conversation that precipitated the separation from employment. In resolving this conflict, the Board reasoned:

> Here, the [C]laimant testified that the director of operations told him that it was not a good idea for the [C]laimant to come back to work because of the commotion he was causing in the office; the director of operations testified that the [C]laimant quit his employment, telling him that he was going back to school and wanted to do something different with his life. The Board resolves the conflict in testimony in favor of the [C]laimant and finds that the [C]laimant did not intend to quit his employment. Rather, the director's language possessed the immediacy and finality of a

> firing. Accordingly, the [C]laimant cannot be denied benefits pursuant to Section 402(b) of the Law.

Bd. Op. at 2-3 (emphasis added). Substantial evidence supports the Board's conclusion that Claimant did not voluntarily quit. See Reproduced Record (R.R.) at 24a. The Board expressly resolved credibility issues in Claimant's favor, and we cannot disturb these determinations. Peak. Further, Employer's statement gave Claimant no option to continue his employment but instead possessed the immediacy and finality of a termination. Fishell; Rizzitano. Therefore, we discern no error in the Board's ultimate determination that Employer discharged Claimant.

Next, Employer argues Claimant's disruptive behavior constituted willful misconduct rendering him ineligible for benefits. Again, we disagree.

A claimant is not entitled to unemployment compensation benefits when he is discharged for willful misconduct connected with his work. Section 402(e) of the Law, 43 P.S. §802(e). Willful misconduct can consist of "[a]n employee's use of abusive, vulgar or offensive language evidenc[ing] a disregard of standards that an employer can rightfully expect of its employees." Leone v. Unemployment Comp. Bd. of Review, 885 A.2d 76, 81 (Pa. Cmwlth. 2005).

Here, one of Employer's witnesses testified Claimant "flipped out" on him and "was very disruptive in the office, being loud and very angry …." R.R. at 32a. However, the Board was unpersuaded by this testimony. It stated (with emphasis added):

> The Board resolves the conflicts in testimony in favor of the [C]laimant and finds insufficient evidence that the [C]laimant was causing a commotion in the office by complaining about racial slurs. The [E]mployer's testimony that the [C]laimant was loud and disruptive is rejected as not credible. Accordingly, the Board concludes that the [E]mployer has failed to prove that the [C]laimant was terminated from employment due to willful misconduct.

Bd. Op. at 3. The Board expressly resolved issues of credibility and evidentiary weight in Claimant's favor; we cannot disturb these determinations. Peak. Because the Board rejected Employer's witness's testimony, Employer did not establish Claimant committed willful misconduct. Therefore, the Board did not err in concluding Claimant did not commit willful misconduct.

Based on the foregoing, we affirm.

ROBERT SIMPSON, Judge

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**O R D E R**

AND NOW, this 17th day of December, 2008, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge