

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard W. Laubenstein, :
Petitioner :
v. :
Unemployment Compensation :
Board of Review, : No. 1329 C.D. 2012
Respondent : Submitted: December 28, 2012

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: January 30, 2013

Richard W. Laubenstein (Claimant) petitions *pro se* for review of the Order of the Unemployment Compensation Board of Review (Board) that affirmed the Referee's denial of benefits to Claimant under Section 402(e) of the Unemployment Compensation Law.¹

The facts, as initially found by the Referee and adopted by the Board are as follows:

1. The claimant was employed by KESK Corporation as a supervisor/construction estimator with a final salary of \$75,000 per year on a full time basis having begun his employment at the end of February 2011.
2. The claimant was discharged on December 9, 2011 concerning an alleged incident at the Veterans

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

Administration Medical Center in Wilkes-Barre, Pennsylvania, in which the employer alleged the claimant was arguing with the Veterans Administration Project Manager, Kevin O'Hearn in a manner which was disrespectful to Mr. O'Hearn and contrary to the interest of KESK Corporation.

3. The claimant was also discharged for leaving the work site without permission on December 9, 2011.

4. The claimant did not submit a written request for the afternoon of December 9, 2011 off.

5. The claimant did not call his supervisor the president of KESK Corporation Kevin Zurawa to advise Mr. Zurawa that he was either leaving early because he was sick or because he wanted to take personal time.

6. The claimant knew or should have known he was required to notify the company president when he was going to take time off suddenly due to illness or taking personal time.

7. Either reason for discharge alone would be sufficient to discharge the claimant.

8. The claimant did not have good cause for not calling the employer or to advise the employer he was leaving work.

9. The claimant did receive \$2,820 in unemployment compensation benefits to which he was not entitled.

10. Although the claimant advised the service center he was separated due to a lack of work, the claimant was confused because the company president had indicated that he would review the claimant's separation again in two weeks to see if the decision would remain final or be changed which the claimant thought meant he was initially being separated due to lack of work.

Referee's Decision, March 14, 2012, (Decision), Findings of Fact Nos. 1-10 at 1-2.

The Referee determined:

At hearing, the employer presented hearsay testimony concerning the conversation between the company president and a contract representative of the Veterans Administration Kevin O'Hearn. Although the employer also offered an eye witness to a conversation between the claimant and the contract representative Kevin O'Hearn, the referee is not satisfied that the claimant's actions in a meeting with the Veterans Administration contract officer rises to the level of willful misconduct and accordingly any alleged argument or disagreement between the claimant and the Veterans Administration contract officer cannot be a basis for a finding of willful misconduct. However, the referee is satisfied that the employer has established the existence of a rule or policy requiring employees to notify the company president if they are leaving work early due to illness or taking personal time and the referee resolves the issue of credibility concerning whether or not the claimant requested time off in advance in favor of the employer and concludes the claimant did not request time off in advance nor did the claimant contact the employer prior to leaving work to advise the employer he would be leaving for the day. Accordingly, the referee finds and concludes the claimant's actions of leaving without permission constitutes willful misconduct for which no good cause has been given and benefits must therefore be denied under Section 402(e) of the Pennsylvania Unemployment Compensation Law.

Decision, Reasoning, at 2.

The Board affirmed.

Claimant essentially contends² that the Board erred when it determined that Claimant was discharged for willful misconduct because he left work early without obtaining written or verbal authorization from the company president or calling Kesck Corporation's (Employer) office.

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).

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).

Claimant argues that his verbal request for time off was sufficient to fulfill Employer's policy.

In the present case, Employer established that it had a policy which required employees to inform Employer of time requested off. Kevin Zurawa (Mr. Zurawa), president of Employer, testified that Claimant was terminated because he left a "job site for the rest, the remainder of the day without a call in to the office whatsoever, or call to my personal cell." Notes of Testimony, March 13, 2012, (N.T.), at 4. Mr. Zurawa described Claimant as "key personnel" who has "some latitude" with regard to taking time off "but they still need notification. If it's a last minute thing a phone call to the office is all that's really required or asked." N.T. at 20.

Claimant testified that on December 5, 2011, he requested time off for December 9, 2011. N.T. at 16. However, Mr. Zurawa testified that he "heard no such request." N.T. at 8.

The Board determined that Claimant acted contrary to Employer's policy when he took personal leave time on December 9, 2011, without notifying Employer. In unemployment compensation proceedings, the Board is the ultimate fact-finding 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).

The findings of fact challenged by Claimant are supported by substantial evidence. Employer established that it had a rule, that Claimant was aware of the rule, and that Claimant broke the rule. Claimant did not provide any argument that he had good cause to violate the rule.³

Accordingly, the decision of the Board is affirmed.

BERNARD L. MCGINLEY, Judge

³ Claimant also argues that he was entitled to a warning before being discharged for this incident.

This Court finds no error in the Board's determination that Claimant was ineligible for benefits because Claimant left work early without proper authorization. A claimant that leaves work early without advising employer and without good excuse may be found guilty of willful misconduct and barred from compensation even absent a prior warning. *Lynch v. Unemployment Compensation Board of Review*, 359 A.2d 834, 835 (Pa. Cmwlth. 1976).

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ORDER

AND NOW, this 30th day of January, 2013, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

BERNARD L. MCGINLEY, Judge