IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brian Gmuca,	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation Board of Review,	:	No. 1367 C.D. 2009
Respondent	:	Submitted: December 18, 2009

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: January 7, 2010

Brian Gmuca (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) affirming the decision of the Unemployment Compensation Referee (Referee) finding him ineligible for benefits under Section 402(e) of the Unemployment Compensation Law[1] because

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e). That section provides in pertinent part:

> An employee shall be ineligible for compensation for any week –
>
> (e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work,

(Footnote continued on next page…)

his actions amounted to willful misconduct. Discerning no error, we affirm the Board.

Claimant was employed as a busboy with Cracker Barrel (Employer) from December 5, 2001, until February 8, 2009, with a final rate of pay of $10.20 per hour. On February 6, 2009, Employer's general manager, Eric Bartholomew (Mr. Bartholomew), distributed a memo to his employees along with their paychecks indicating that consuming food without first paying for it was a

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> irrespective of whether or not such work is "employment" as defined in this act.

While the term "willful misconduct" is not specifically defined in the Law, the Supreme Court of Pennsylvania has 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.

Grieb v. Unemployment Compensation Board of Review, 573 Pa. 594, 827 A.2d 422 (2003) (citing *Navickas v. Unemployment Compensation Review Board*, 567 Pa. 298, 787 A.2d 284 (2001)). To demonstrate willful misconduct, an employer cannot merely show its employee committed a negligent act; rather, the employer must present evidence that the employee's conduct was intentional and deliberate. *Grieb*, 573 Pa. at 600, 827 A.2d at 426. An employee's negligence only constitutes willful misconduct when "it is of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer." *Id.* (citing *Myers v. Unemployment Compensation Board of Review*, 533 Pa. 373, 625 A.2d 622 (1993)). In order to make such a determination, you must consider all of the facts and circumstances, including the employee's reasons for noncompliance.

violation of company policy and would result in termination, no matter how big or small the infraction. Claimant received a copy of this memo. However, on February 8, 2009, Claimant was observed taking and drinking a beverage from Employer's fountain soda machine without having paid for it and his employment was immediately terminated for theft/misuse of company property.

Claimant filed an unemployment compensation claim alleging discrimination because his employer terminated him for violation of a work rule despite the fact that he had a learning disability resulting in poor short and long-term memory. The Department of Labor and Industry's Office of UC Benefits issued a determination on March 5, 2009, finding Claimant was discharged for theft because he drank a soda without paying for it first. They determined that his actions showed a willful disregard of Employer's interests and that he did not show good cause for his actions. Therefore, he was ineligible for benefits under Section 402(e). Claimant appealed that determination.

Before the Referee, Claimant testified that he saw the memo outlining Employer's new policy regarding food consumption but he did not read it before he was fired. When confronted about the incident by Mr. Bartholomew, he testified that he admitted that the soda was from Employer's soda fountain and that he had not paid for it. Mr. Bartholomew allegedly told Claimant at first that he would "let it slide," but then told Claimant he would have to let him go. Claimant testified that he offered to pay for the soda and that he did not think he was doing anything wrong or that he was stealing. Claimant stated that he had taken soda from the fountain on other occasions and had never gotten in trouble for such behavior before. Claimant testified that he had a learning disability, i.e., that he had a problem understanding when he reads.

Claimant's mother, Ms. Gmuca, also testified. She indicated that both she and her husband were present during Claimant's initial job interview with Employer. At that time, they explained to Employer that Claimant had a learning disability and had difficulty remembering and "keeping things in his mind." Ms. Gmuca went on to state that Claimant is neurologically and perceptually impaired, he does not comprehend written language, sometimes he does not comprehend what is said to him, and when last tested he was reading on a fourth grade level. Ms. Gmuca admitted that none of these specific details were related to Employer during Claimant's initial interview or at anytime thereafter.

On behalf of Employer, Mr. Batholomew testified that the restaurant received a failing rating in the category of food cost as their numbers were not where the company expected them to be. Because he needed to lower those costs, he testified that on February 6, 2009, he sent a memo to all of his employees with their paychecks outlining the company policy and indicating that management was not going to turn their backs anymore on employees breaking the rules no matter how big or small the violation. The memo contained the following language:

> Finally, as you all know we have a policy that states … "You are not to consume any food item without a proper employee meal ticket." Let me define "You are not to consume Any Food." You are not entitled to a cracker, biscuit, crouton, French fry, cup of soup, etc.. It does not matter the size of the food item you are consuming, if you have not paid for it, then it is theft.
> **PLEASE UNDERSTAND IF YOU ARE CAUGHT DELIVERING FOOD THAT IS NOT ON A GUEST CHECK OR YOU CONSUME FOOD WITHOUT A VALID**

EMPLOYEE MEAL TICKET (PAID FOR WITH MANAGEMENT SIGNATURE) YOU ARE STEALING AND IN DIRECT VIOLATION OF RULE #17 IN OUR RULES OF CONDUCT WHICH STATES, "YOU MUST FOLLOW THE EMPLOYEE MEAL POLICY." ALSO, RULE #32 STATES YOU MUST COMPLY WITH CRACKER BARREL'S ASSET PROTECTION POLICY, THE RESULTING ACTION <u>WILL BE TERMINATION.</u>

Mr. Bartholomew also testified that copies of this memo were displayed throughout the store, including on the soda machine, office window, employee time clocks, and on the employee restroom doors.

Mr. Bartholomew testified that just two days after this memo was distributed, he witnessed Claimant drinking a fountain soda while working. He called Claimant into his office, at which time Claimant allegedly admitted that he was drinking the soda, that he had not yet paid for it, and that he knew this was against policy as employees were supposed to use the vending machine in the back of the restaurant. When Mr. Bartholomew asked Claimant if he received a letter in his most recent paycheck regarding the new employee food consumption policy, Claimant stated that he had and that he read and understood the letter. Mr. Bartholomew testified that he asked Claimant if he understood that drinking a soda without paying for it first was a terminable offense, and that Claimant said yes. Mr. Bartholomew then told Claimant he had no option but to end his employment, that he could not make an exception even though Claimant was a long-time

employee, and that he terminated another employee earlier that same day for a similar infraction.

On cross-examination, Mr. Bartholomew admitted that Claimant had never previously been reprimanded for theft. When questioned about Claimant's learning disability, Mr. Bartholomew stated that he perceived Claimant as a little bit slower and that he had to repeat things to him sometimes, but that he was not aware of a specific learning disability and there was no documentation of any learning disability in Claimant's personnel file. But he also testified that as a part of his employment, Claimant was required to take multiple personal achievement responsibility (PAR) tests wherein he was required to read information on the computer and then answer 50 questions. Employees had to score 90% on PAR three and 95% on PAR four to pass. Claimant passed both tests and, according to Mr. Bartholomew, approximately 40% of Employer's employees did not pass these tests.

The Referee found Claimant ineligible for benefits under Section 402(e) of the Law because his behavior amounted to willful misconduct and he did not establish good cause for his actions. He found that the Employer notified its employees that it intended to enforce the employee food consumption policy by attaching memos to all of their paychecks and by placing notices prominently throughout the establishment. Claimant admitted that he poured and drank a soda from Employer's fountain machine without having paid for it first and that he was aware that this was a violation of company policy. While Claimant's parents told Employer about his learning disability during the initial job interview, the Referee noted that at no point thereafter did they give any additional or more specific information to Employer and that Mr. Bartholomew was not aware of a specific

diagnosis at the time Claimant's employment was terminated. Also, Claimant was able to perform well enough to pass his PAR tests involving reading comprehension, despite the fact that almost 40% of Employer's employees failed these particular tests. Based upon these reasons, the Referee determined that Claimant violated Employer's rules and his learning disability was not enough to establish good cause for his actions. Therefore, he was ineligible for benefits under Section 402(e). Claimant appealed to the Board which affirmed the Referee's decision. This appeal followed.[2]

On appeal, Claimant first argues that his violation of the work rule was not intentional and deliberate because he was not aware of Employer's policy against employee food consumption prior to payment due to his neurological and perceptual impairment. While "an employee is only guilty of willful misconduct when he is, or should be, under the circumstances, conscious that his actions are inimical to the interests of his employer," *MacFarlane v. Unemployment Compensation Board of Review*, 317 A.2d 324 (Pa. Cmwlth. 1974); *James v. Unemployment Compensation Board of Review*, 429 A.2d 782 (Pa. Cmwlth. 1981), the Board found that Claimant understood and was aware of Employer's policy. That finding was based on Mr. Bartholomew's testimony that when he confronted Claimant about his actions, he admitted that he received a copy of the memo, understood it, and understood that drinking a fountain soda without first paying for it was a violation of policy for which he could be terminated. While there was no

[2] The Court's scope of review in this matter is limited to determining whether there was a constitutional violation or error of law, whether any practice or procedure of the Board was not followed, and whether the necessary findings of fact are supported by substantial evidence. *Procito v. Unemployment Compensation Board of Review*, 945 A.2d 261 (Pa. Cmwlth. 2008).

dispute that Claimant had a learning disability, Mr. Bartholomew's testimony constitutes substantial evidence for the Board's finding that Claimant's learning disability did not prevent him from understanding the policy and the consequences for violating that policy.

Claimant also argues that the Board erred in finding that the Referee properly limited testimony from Ms. Gmuca to what she told Employer about her son's disability during the initial job interview but excluding testimony regarding the general nature and specifics of his disability. Despite being limited, the Referee did permit testimony that Claimant had a learning disability, had difficulty remembering and "keeping things in his mind," is neurologically and perceptually impaired, does not comprehend written language, sometimes he does not comprehend what is said to him, and when last tested he was reading on a fourth grade level. Based on what was allowed in evidence, the Board did not err in finding that there was no abuse of its discretion by not allowing further testimony regarding the general nature and specifics of Claimant's disability.[3]

Finally, Claimant argues that even if his actions were knowingly counter to Employer's policy, they were too minor to rise to the level of willful misconduct. However, this Court has held that where an employee has violated an employer's work rule, even if it is for a minor infraction, the action amounts to willful misconduct and the employee may be terminated. In *Wright v.*

[3] Claimant also argues in his brief that the Referee improperly excluded medical evidence of his disability because it had not been submitted prior to the hearing in accordance with the regulations regarding telephonic hearings. Because Claimant failed to raise this issue in his initial appeal to the Board, it is waived. *Reading Nursing Center v. Unemployment*
(Footnote continued on next page…)

Unemployment Compensation Board of Review, 465 A.2d 1075 (Pa. Cmwlth. 1983), an employee took her employer's trash bags and toilet paper and was terminated for willful misconduct because the employer had a specific work rule about stealing. In that case, the employee argued that her conduct was de minimus. We pointed out that unlike the employee in *O'Keefe v. Unemployment Compensation Board of Review,* 333 A.2d 815 (Pa. Cmwlth. 1975), who was terminated for willful misconduct when caught eating his employer's stale pastry but was granted benefits because he did not violate a work rule, the *Wright* employee had violated the employer's work rule about stealing.

Accordingly, because the Board did not err in finding Claimant guilty of willful misconduct, the order of the Board is affirmed.

DAN PELLEGRINI, Judge

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Compensation Board of Review, 663 A.2d 270 (Pa. Cmwlth. 1995) (citing *Tri-State Scientific v. Unemployment Compensation Board of Review,* 589 A.2d 305 (Pa. Cmwlth. 1991)).

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O R D E R

AND NOW, this 7th day of January, 2010, the order of the Unemployment Compensation Board of Review, dated June 17, 2009, is affirmed.

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DAN PELLEGRINI, Judge