

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

|                           |   |                              |
|---------------------------|---|------------------------------|
| Dominic G. Canale, Jr.,   | : |                              |
| Petitioner                | : |                              |
|                           | : |                              |
| v.                        | : | No. 1549 C.D. 2012           |
|                           | : | Submitted: November 21, 2012 |
| Unemployment Compensation | : |                              |
| Board of Review,          | : |                              |
| Respondent                | : |                              |

BEFORE: HONORABLE DAN PELLEGRINI, President Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: January 4, 2013**

Dominic G. Canale, Jr. (Claimant), representing himself, petitions for review of an order of the Unemployment Compensation Board of Review (Board). The Board denied Claimant benefits for willful misconduct under Section 402(e) of the Unemployment Compensation Law<sup>1</sup> (Law) on the ground Claimant violated a known work rule. In this appeal, Claimant contends his conduct does not amount to willful misconduct because his employer, Aetna Life Insurance Company (Employer), failed to establish a clear work rule. Alternatively, Claimant asserts Employer did not uniformly enforce the work rule and discharged Claimant for other reasons. Discerning no error, we affirm the Board's order.

Claimant worked as a full-time customer service representative for Employer for 22 years until his last day of work on March 1, 2012. Employer

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. 2397 (1927), as amended, 43 P.S. §802(e).

discharged Claimant for violating its policy prohibiting internet and email use for personal purposes. Following his separation from employment, Claimant applied for unemployment compensation benefits, which the local service center denied. Claimant appealed.

At the referee's hearing, Employer presented two witnesses: Wendy Callan, supervisor (Supervisor); and Ina Ritter, manager. Employer also presented several exhibits, including Employer's Code of Conduct Handbook (Code), final warning letter, termination letter, and various emails supporting a violation of the policy. Claimant, represented by counsel, testified on his own behalf.

Based on the testimony and evidence presented, the referee made the following findings. Employer had a policy prohibiting internet and email use for personal purposes, while on the job. Claimant had ongoing issues violating Employer's internet and email use policy. Employer warned Claimant against personal use of internet and email in the workplace in 2010 and 2011. On February 3, 2012, Employer issued Claimant a final warning for his continued violation of Employer's internet and email use policy. On February 15, 2012, Claimant admitted using Employer's internet and email resources for personal use. Claimant explained he used Employer's internet and email resources because he does not have a computer at home. On March 1, 2012, Employer discharged Claimant.

The referee determined Employer established willful misconduct based on the violation of a work rule. The referee affirmed the service center's determination of ineligibility and denied benefits.

Claimant appealed to the Board. The Board adopted and incorporated the referee's findings and conclusions in their entirety. Additionally, the Board concluded Claimant failed to show that the other employees who used the internet were on a final warning as he was, or that they were searching for other employment while on company time. Ultimately, the Board affirmed the referee's decision and denied benefits under Section 402(e) of the Law.<sup>2</sup> Claimant now petitions for review.<sup>3</sup>

First, Claimant contends Employer did not meet its burden of proving willful misconduct because Employer failed to articulate a precise rule Claimant violated.

The Board is the ultimate fact-finder in unemployment compensation matters and is empowered to resolve all conflicts in evidence, witness credibility, and weight accorded to the evidence. Ductmate Indus., Inc. v. Unemployment

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<sup>2</sup> On June 6, 2012, the Board entered an order affirming the referee and denying benefits. Claimant requested reconsideration. The Board granted reconsideration and vacated the June 6, 2012, order to allow Claimant the opportunity to file a brief. Following reconsideration, the Board reinstated its June 6, 2012, order.

<sup>3</sup> 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. Spence v. Unemployment Comp. Bd. of Review, 29 A.3d 117 (Pa. Cmwlth. 2011).

Comp. Bd. of Review, 949 A.2d 338 (Pa. Cmwlth. 2008). It is irrelevant whether the record contains evidence to support findings other than those made by the factfinder; the critical inquiry is whether there is evidence to support the findings actually made. Id. Where substantial evidence supports the Board's findings, they are conclusive on appeal. Id.

Section 402(e) of the Law provides, “[a]n employe shall be ineligible for compensation for any week ... [i]n which his unemployment is due to his discharge ... from work for willful misconduct connected with his work ... .” 43 P.S. §802(e). “Willful misconduct” is “behavior evidencing a wanton or willful disregard of the employer’s interests; a deliberate violation of the employer’s work rules; a disregard of standards of behavior the employer can rightfully expect from its employee; [or], negligence indicating an intentional disregard of the employer’s interest or an employee’s duties or obligations.” Dep’t of Corr. v. Unemployment Comp. Bd. of Review, 943 A.2d 1011, 1015 (Pa. Cmwlth. 2008).

The employer bears the initial burden of proving a claimant engaged in willful misconduct. Ductmate. When asserting discharge due to a violation of a work rule, an employer must establish existence of the rule, the reasonableness of the rule, the claimant’s knowledge of the rule, and its violation. Id.

Once an employer meets this burden, a claimant may then prove he had good cause for his actions. Dep’t of Corr. A claimant can establish good cause by showing his actions were justifiable or reasonable under the circumstances. Id. Whether a claimant’s actions constitute willful misconduct and

whether a claimant proved good cause are both questions of law fully reviewable by this Court. Id.

Here, Employer presented its Code, which provides “[Employer’s] resources are intended for [Employer] business only. . . . Resources include time, equipment and supplies, documents, and the information in our computing and communications systems.” Certified Record (C.R.), Item No. 9, Ex. 2, at 22. The Code further provides the failure to follow the Code or other Employer policies may lead to discipline or termination of employment. Id. at 12. Claimant acknowledged he received the Code. C.R., Item No. 9, Ex. 1; Notes of Testimony (N.T.), 4/20/12, at 5-6.

Additionally, Supervisor testified Employer’s internet and email use policy prohibits employees from using company resources for personal purposes on company time. N.T. at 8. Supervisor testified an employee can use the internet and email for personal use if the employee is on break, at lunch, or has a manager’s pre-approval. Id. at 8, 19.

Supervisor explained if an employee violated the policy, Employer would issue a warning before termination. Id. at 7. Employer previously warned Claimant regarding his improper use of the internet and email in 2010 and 2011. Id. at 10, 13. On February 3, 2012, Employer issued Claimant a final, written warning for his continued violation of Employer’s internet and email policy. C.R., Item No. 9, Ex. 3. The warning clearly advised Claimant any further violations of the policy would lead to his immediate discharge. Id. We conclude substantial

evidence supports the Board's finding that Employer had a clear policy prohibiting internet and email use for personal purposes while on company time.

Substantial evidence also supports the Board's finding that Claimant violated the work rule. Employer presented evidence that Claimant exchanged personal emails and attempted to access a prohibited internet site after the issuance of the final warning. N.T. at 9; C.R., Item No. 9, Ex. 4. Claimant admitted he used Employer's computer resources for personal reasons, namely to look for other employment, because he did not have a computer at home. N.T. at 14-15, 17. Claimant further admitted he did not have the authorization of his superiors. Id. at 17.

This Court has held, "[u]sing computers for personal, non-work purposes after being instructed not to do so amounts to willful misconduct." Pettyjohn v. Unemployment Comp. Bd. of Review, 863 A.2d 162, 165 (Pa. Cmwlth. 2004) (citing Baldauf v. Unemployment Comp. Bd. of Review, 854 A.2d 689 (Pa. Cmwlth. 2004)). Furthermore, "it is contrary to reasonable standards of behavior for an employee to use company property for personal activities without authorization, even absent a rule prohibiting such conduct." Id. (quoting Smith v. Unemployment Comp. Bd. of Review, 508 A.2d 1281, 1283 (1986)). We, therefore, conclude Employer met its initial burden of proving Claimant engaged in willful misconduct.

We now turn to whether Claimant established good cause for his conduct. Claimant contends Employer did not uniformly enforce the rule. On this

basis, Claimant argues his violation of the policy should not bar him from collecting benefits.

In support of this position, Claimant relies on City of Beaver Falls v. Unemployment Compensation Board of Review, 441 A.2d 510 (Pa. Cmwlth. 1982). In Beaver Falls, the City of Beaver Falls (City) discharged two claimants for their failure to comply with a municipal ordinance requiring employees to reside within the City. The Board affirmed a referee's decision awarding benefits upon concluding the claimants' actions did not evidence a disregard of the employer's interests so as to constitute willful misconduct because the City did not uniformly enforce the residency ordinance. Id.

In upholding the Board's order on appeal, we stated:

Where a discharge based on the violation of such an ordinance has been established, we believe that the burden then shifts to the claimant to prove both that the ordinance was not enforced uniformly and that a violation thereof was not an act which was contrary to a reasonable standard of behavior which an employer could expect of an employee.

Id. at 512. We concluded the claimants met their dual burden of proving both the lack of uniform enforcement and their conduct was not contrary to reasonable standards of behavior that an employer could expect of an employee. Id.

This case is readily distinguishable. Here, Claimant did not establish Employer failed to enforce the policy uniformly. At the hearing, Claimant testified he witnessed Supervisor using the internet for personal purposes while at work.

N.T. at 15. However, Supervisor credibly testified she used the computer for such purposes with the authorization of her manager. Id. at 19. Claimant also testified other employees used the internet during work hours for personal use. Id. at 14-15. However, Claimant failed to provide the names and dates of the employees who allegedly used the internet for personal purposes. There is no evidence these employees used the internet in violation of Employer's policy, that is, without permission during working hours, rather than during personal breaks or lunch. There also is no evidence these employees were searching for other employment while on company time. Moreover, there is no evidence Employer issued a final warning to any of these other employees. We therefore conclude Claimant did not produce sufficient evidence to warrant a conclusion of selective enforcement of Employer's internet/email policy to justify its violation.

Lastly, Claimant contends Employer terminated his employment for other reasons. Claimant testified he believed Employer discharged him because of his age, his refusal to accept early retirement, and general downsizing. N.T. at 15-16. However, the Board did not credit this testimony. Instead, the Board credited Employer's testimony and evidence supporting a termination of employment for a violation of Employer's internet/email policy. As the fact-finder, the Board was free to accept Employer's testimony and evidence as credible and persuasive. See Ductmate.

In short, there is substantial competent evidence demonstrating the existence of Employer's policy prohibiting the personal use of internet and email while on duty, the reasonableness of the policy, Claimant's awareness of the



policy, and the fact of its violation. Employer expressly warned Claimant if he violated Employer's internet/email policy again, he would be discharged. Claimant failed to heed this warning and continued to use the internet and email in violation of Employer's policy. Claimant failed to offer sufficient evidence to support a finding of good cause for his actions. Accordingly, the Board did not err in determining Claimant's conduct constitutes a violation of Employer's policy rendering him ineligible for benefits pursuant to Section 402(e) of the Law. For these reasons, we affirm the Board's order.

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ROBERT SIMPSON, Judge

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| Unemployment Compensation | : |                    |
| Board of Review,          | : |                    |
| Respondent                | : |                    |

**ORDER**

**AND NOW**, this 4<sup>th</sup> day of January, 2013, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

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ROBERT SIMPSON, Judge