IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Paul Katrencik,	:	
Petitioner	:	
v.	:	No. 156 C.D. 2011
	:	Submitted: July 1, 2011
Unemployment Compensation Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** September 15, 2011

Petitioner Paul Katrencik (Katrencik) petitions for review of an order of the Unemployment Compensation Board of Review (Board). The Board denied Katrencik's appeal from an Unemployment Compensation Referee's (Referee) decision denying Katrencik unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law)[1] based upon his conclusion that Katrencik's conduct constituted willful misconduct. We affirm.

Friendship Village of South Hills (Employer) terminated Katrencik from his employment on July 30, 2010, for acting in a confrontational manner toward another employee. Katrencik applied for unemployment compensation benefits. On September 8, 2010, the Indiana Unemployment Compensation Service Center (Service Center) issued a determination finding that Employer

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

failed to demonstrate that Katrencik had engaged in willful misconduct. Employer appealed that determination, and the Referee conducted a hearing.

Employer presented the testimony of three of its employees. The first witness, Brinda McKivitz, is one of Employer's drivers. Ms. McKivitz testified that she and Employer's transportation coordinator, David Walsh, were sitting in Employer's transportation office during the afternoon of July 28, 2010. (Reproduced Record (R.R.) at 60a.) Ms. McKivitz stated that she and Mr. Walsh were discussing the fact that hubcaps on Employer's buses had been damaged from high curbs on streets in downtown Pittsburgh. (*Id.*) At some point in their conversation, Katrencik, "turned around and came in front of [McKivitz] and said, it's not the high curbs. You keep saying high curbs, it's not the high curbs, it's the stupid drivers here." (*Id.*). Ms. McKivitz testified that Katrencik was "standing over" her about a foot away, and that his voice was "between yelling and screaming." (R.R. at 62a.) Further, Ms. McKivitz testified that Katrencik held his hands in an open position and that "[h]is face was red, and like his veins were sticking out in his face." (*Id.*) Ms. McKivitz stated that she did not feel at any time that Katrencik would hit her, but that she felt very uncomfortable and left the room. (*Id.*)

Employer's Director of Human Resources, Kathy Havel, testified regarding the reason Employer terminated Katrencik. Ms. Havel offered Employer's Employee Manual into the record, identifying several types of conduct described in the manual that may result in "accelerated disciplinary action," including acting in a confrontational manner and behaving in an offensive manner. (*Id*. at 66a-68a, 163a.) Ms. Havel also introduced into the record an "Employer Counseling Report" (the Counseling Report), dated April 27, 2010. The

Counseling Report identified "Insubordination" as a work rule Katrencik previously violated. (R.R. at 162a.) The Counseling Report also identified Katrencik's improper conduct as "[b]ehavior that is unprofessional and creates a hostile work environment." (*Id.*) The Counseling Report included a recommendation for correction of behavior as follows: "Appropriate interactions with residents and employees . . . Exhibiting a professional and positive attitude and work relationships." (*Id.*) It also advised that "[f]urther violations will result in immediate termination." (*Id.*)

Claimant testified that, contrary to Ms. McKivitz's testimony, he was sitting in the room, not standing. Katrencik described the conversation concerning the hubcaps as follows:

> [S]he was going on about the high curbs in Pittsburgh. And she was going on and on. And I said, Brinda, it's not the high curbs, it's the drivers. I said a good driver would not hit the curb. She said, but it's the high curb, it's the high curbs. I said, if the curbs was four feet high you wouldn't drive into the curb if it was four feet high. I says, besides, there's a lower part of the steps that come out, it would hit the curb. It's the drivers, not the curbs. And then she says, well you're telling me—she says, if I hit the curb then you consider me a bad driver. And I says, well, if you know it's a high curb and you hit the curb, then you're a bad driver. And she got real quiet after she—you know, after she said that. And she sat down there for a while and she got up and walked out the door . . . . And Dave never turned around and said anything. He never turned around once. And if I was hollering at her, he would have turned around and said hey, you're hollering, you know, but nothing was said.

(*Id.* at 74a-76a.) Katrencik denied standing or speaking in an unusually loud voice. (*Id.* at 76a.)

Employer also presented the testimony of David Walsh, Employer's transportation director, in rebuttal. Mr. Walsh testified that he and Ms. McKivitz were both sitting in the transportation room, discussing where they could purchase replacement hubcaps. Ms. Walsh testified that, if Katrencik had been sitting initially, "he got right up, because my back was turned, but I can, you know, I can hear him right behind me, the office is so small, speaking in an elevated voice." (*Id.* at 80a.) Mr. Walsh testified that Katrencik was standing "in the middle of the office right between my chair and Brinda's chair." (*Id.*) Mr. Walsh described Katrencik's behavior as being "adamant," speaking in a "tone of voice [louder than normal] with his hands raised with open palms." (*Id.* at 82a.) Further, Mr. Walsh expressed his opinion that the interaction between Katrencik and Ms. McKivitz was "outside of a normal business relationship" and "a little more aggressive." (*Id.*)

The Referee issued a determination in which he found Employer's witnesses to be credible. Based upon the testimony, the Referee concluded that Katrencik's conduct amounted to willful misconduct under Section 402(e) of the Law, thus rendering Katrencik ineligible for unemployment compensation benefits. Katrencik appealed to the Board, which, in addition to finding Employer's witnesses credible, identified two bases supporting Employer's termination of Katrencik: (1) the existence of Employer's policy allowing accelerated discipline for acting in a confrontational manner with another employee; and (2) the April 27, 2010 counseling report that advised Katrencik that any additional improper behavior would result in discharge.

In its legal analysis, the Board concluded that Employer had established the existence of its policy permitting accelerated discipline for

confrontational conduct with another employee. Further, the Board accepted the evidence demonstrating that Employer had issued a warning to Katrencik that any additional misconduct would result in his termination. That warning included a list of conduct that could give rise to immediate termination. The list included conduct that is confrontational. Based upon these facts, the Board concluded that Katrencik's conduct rose to the level of willful misconduct and that he had not established good cause for his behavior. In his appeal to this Court, Katrencik contends that some of the Board's factual findings are not supported by substantial evidence. Further, Katrencik argues that the Board erred as a matter of law in concluding that Katrencik's conduct constituted willful misconduct because the earlier suspension and warning Katrencik received as a result of previous conduct was insufficient for Employer to satisfy its burden of proof as to willful misconduct.

We begin by addressing Katrencik's argument that substantial evidence does not support some of the Board's necessary factual findings. Substantial evidence is defined as relevant evidence upon which a reasonable mind could base a conclusion. *Johnson v. Unemployment Comp. Bd. of Review*, 502 A.2d 738, 740 (Pa. Cmwlth. 1986). In determining whether there is substantial evidence to support the Board's findings, this Court must examine the testimony in the light most favorable to the prevailing party, giving that party the benefit of any inferences that can logically and reasonably be drawn from the evidence. *Id*. A determination as to whether substantial evidence exists to support a finding of fact can only be made upon examination of the record as a whole. *Taylor v. Unemployment Comp. Bd. of Review*, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). The Board's findings of fact are conclusive on appeal only so long as the record taken as a whole contains substantial

evidence to support them. *Penflex, Inc. v. Bryson*, 506 Pa. 274, 286, 485 A.2d 359, 365 (1984). In an unemployment case, the Board is the ultimate fact finder and is, therefore, entitled to make its own determinations as to witness credibility and evidentiary weight. *Peak v. Unemployment Comp. Bd. of Review*, 509 Pa. 267, 272, 501 A.2d 1383, 1386 (1985). The Board is the also empowered to resolve conflicts in the evidence. *DeRiggi v. Unemployment Comp. Bd. of Review*, 856 A.2d 253, 255 (Pa. Cmwlth. 2004).

Katrencik first argues that several of the Board's factual findings, Nos. 2-6 and 10-13, are not supported by substantial evidence. Finding of Fact No. 2 is that Employer has a policy providing for accelerated discipline when an employee acts in a confrontational manner with another employee. Employer submitted its Employee Manual, which includes a section pertaining to "more serious issues." (R.R. at 148a.) One page in that section is captioned as "Conduct Resulting in Accelerated Disciplinary Action." (R.R. at 152a.) This page acknowledges that Employer generally applies a progressive discipline process, but notes that certain conduct "is deemed to be very serious and is therefore prohibited," and may "result in discipline up to and including immediate discharge." Among the conduct identified as being subject to such action is "acting in a confrontational manner with any . . . member of staff." (*Id.*) Thus, there is substantial evidence supporting the Board's factual finding regarding Employer's accelerated discipline policy.

Katrencik also asserts that substantial evidence does not support the Board's Finding of Fact No. 3 that Katrencik "was or should have been aware of" Employer's accelerated discipline policy. Katrencik points out that the Employee Manual employer submitted contains an un-signed acknowledgment page.

Katrencik argues that there is no evidence to support the Board's finding that he was or should have been aware of the accelerated discipline policy. Although there is no direct evidence Employer provided Katrencik with a copy of the Employee Manual, the record includes other evidence indicating that Katrencik should have been aware of the pertinent provisions of the Employee Manual.

The Counseling Report directs the person who completes the form to identify the type of work rule violation that gave rise to the issuance of the Counseling Report. The Counseling Report directs the writer to use the back of the form to identify a violation that may result in accelerated discipline.[2] In this case, the writer identified "insubordination," from the list, and modified that term by adding the following language: "Behavior that is unprofessional and creates a hostile work environment." Whether or not the writer properly classified Katrencik's behavior giving rise to the Counseling Report as insubordination, the writer's description of the improper behavior provided Katrencik with notice that unprofessional behavior or behavior that creates a hostile work environment violated Employer's work policy and could lead to termination. Further, the list attached to the Counseling Report, identifying all types of conduct that could result in accelerated discipline certainly, is sufficient to demonstrate that Katrencik knew or should have been aware that confrontational conduct directed toward another employee constituted a violation of Employer's rules. Thus, we cannot conclude that the Board's Finding of Fact No. 3 is not supported by substantial evidence. The Counseling Report also supports the Board's Findings of Fact Nos. 4, 5, and 6, which describe the substance of the April 27, 2010 Counseling Report.

[2] The back of the Counseling Report appears to consist of a copy of the page of the Employee Manual that lists conduct that may result in accelerated discipline. (R.R. at 163a.)

Katrencik also asserts that the Board's Findings of Fact Nos. 10 through 13 are not supported by substantial evidence. We disagree. Those findings summarize the Board's view of the evidence regarding the ultimate incident that lead Employer to discharge Katrencik, including his physical posturing, the substance of his statements, and his physical characteristics and mannerisms, including gesticulations, the tone and level of his voice, and the coloring of his face. Although Katrencik is correct in commenting that Mr. Walsh testified that he, at most, had turned his body in the direction of Katrencik and Ms. McKivitz and was not directly watching them, he testified regarding what he heard and also stated, with regard to his confirmation of Katrencik's hand motions, that he could see a reflection in his computer monitor. Thus, based upon the Board's credibility determinations in favor of Employer, we conclude that these factual findings are supported by substantial evidence.

We next consider whether the Board's factual findings are sufficient to support the Board's legal conclusion that Katrencik's conduct constituted willful misconduct under Section 402(e) of the Law.[3] Section 402(e) of the Law provides, in part, that an employee shall be ineligible for compensation for any week in which "his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work." The employer bears the burden of proving that the claimant's unemployment is due to the claimant's willful misconduct. *Walsh v. Unemployment Comp. Bd. of Review*, 943 A.2d 363, 369 (Pa. Cmwlth. 2008). The term "willful misconduct" is not defined by statute. The courts, however, have defined "willful misconduct" as:

[3] Whether or not an employee's actions amount to willful misconduct is a question of law subject to review by this Court. *Nolan v. Unemployment Comp. Bd. of Review*, 425 A.2d 1203, 1205 (Pa. Cmwlth. 1981).

> (a) wanton or willful disregard of employer's interests, (b) deliberate violation of the employer's rules, (c) disregard of 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 and obligations.

Grieb v. Unemployment Comp. Bd. of Review, 573 Pa. 594, 600, 827 A.2d 422, 425 (2003).

Willful misconduct includes an employee's deliberate violation of an employer's rule and an employee's disregard of the standard of behavior expected by an employer. *Kentucky Fried Chicken of Altoona, Inc. v. Unemployment Comp. Bd. of Review*, 309 A.2d 165, 168 (Pa. Cmwlth. 1973). An employer seeking to establish willful misconduct based on the violation of a work rule must demonstrate the existence of the rule, the reasonableness of the rule, and that the employee was aware of the rule. *Williams v. Unemployment Comp. Bd. of Review*, 926 A.2d 568, 571 (Pa. Cmwlth. 2007), *appeal denied*, 596 Pa. 712, 940 A.2d 368 (2007). If, however, the claimant can show good cause for the violation, then there should be no finding of willful misconduct. *Id.* A single incident of misconduct may support a denial of benefits. *Jones v. Unemployment Comp. Bd. of Review*, 373 A.2d 791, 792 (Pa. Cmwlth. 1977).

In this case, Employer, in its April 27, 2010 Counseling Report, provided Katrencik with notice that conduct that is unprofessional and that creates a hostile work environment is impermissible and that any additional violation of work rules identified on the back of the Counseling Report could result in termination. Katrencik later interacted with another driver, Ms. McKivitz, and engaged in a conversation above normal conversational limits, with a red face, using his hands to express himself, and stating to Ms. McKivitz that other drivers (which would necessarily include Ms. McKivitz) caused the hubcap damage and

were "stupid." We do not believe that the Board erred in concluding that these facts support a conclusion that Katrencik's conduct fell within the warning Employer gave him in the Counseling Report. The back of the Counseling Report informed Katrencik that confrontational conduct directed toward another staff member is a type of conduct that could result in immediate discharge. The Board's findings of fact are supported by substantial evidence and in turn support the Board's legal conclusion that Katrencik's conduct constituted a deliberate violation of Employer's work rule. Katrencik offered no evidence suggesting that he had good cause for violating Employer's work rule.[4]

Accordingly, we affirm the Board's order denying Katrencik's appeal.

P. KEVIN BROBSON, Judge

[4] Katrencik asserts that the Board's reliance upon the Counseling Report is insufficient to establish Katrencik's awareness of the consequences of his actions based upon the alleged vagueness of the term "insubordination." Although Katrencik may be correct that the term may be subject to various interpretations, the question of whether Employer's issuance of the Counseling Report sufficiently identified the improper conduct giving rise to that warning is not material to the question of whether Katrencik was aware of the accelerated discipline policy and the various types of conduct that could lead to termination following the issuance of the Counseling Report. Thus, we find Katrencik's reliance on *Unemployment Compensation Board of Review v. Dravage*, 353 A.2d 88 (Pa. Cmwlth. 1976), a decision setting forth the proposition that a finding that an employee was "insubordinate" provided an insufficient factual basis for concluding that the employee's conduct constituted willful misconduct, is misplaced.

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	:	
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Respondent	:	

O R D E R

AND NOW, this 15th day of September, 2011, the order of the Unemployment Compensation Board of Review is AFFIRMED.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Paul Katrencik,	:	
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	:	
v.	:	No. 156 C.D. 2011
	:	Submitted: July 1, 2011
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Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE PELLEGRINI FILED: September 15, 2011

The central issue in this appeal is whether Paul Katrencik's (Claimant) conduct constituted willful misconduct, making him ineligible for unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law).[1] Because I do not believe Claimant's heated interaction with a co-worker rose to the level of willful misconduct, I respectfully dissent.

The incident in question involved a discussion among co-workers as to what was causing damage to the hubcaps on Employer's buses. Claimant's co-

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

worker repeatedly stated that the high curbs in Pittsburgh were responsible for the damage. Claimant adamantly disagreed and told his co-worker, admittedly in a raised voice, that the damage was caused by the drivers.

Claimant's co-workers merely testified that he was speaking loudly and that his face became red. The co-worker stated that Claimant had his palms turned upward and while she became very uncomfortable and left the room, she did not feel at any time that Claimant would hit her. There is no evidence that Claimant used any foul or threatening language or did anything that would rise to the level of creating a hostile workplace; he simply expressed his opinion.

Merely engaging in a heated debate with a fellow co-worker, especially when that co-worker admits that she never felt threatened, does not rise to the level of willful misconduct. For this reason, I would reverse the Board and respectfully dissent.

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DAN PELLEGRINI, JUDGE