IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Silgan White Cap Americas LLC, Petitioner	:	
v.	:	No. 1596 C.D. 2009 Submitted: January 15, 2010
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: March 5, 2010

Silgan White Cap Americas LLC, (Employer) petitions for review from an order of the Unemployment Compensation Board of Review (Board) which reversed the determination of a referee and concluded that Gary W. Burczy (Claimant) did not commit willful misconduct under Section 402(e) of the Unemployment Compensation Law (Law), and therefore eligible for benefits.[1] We affirm.

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 802(e) of the Law, provides that an employee shall be ineligible for compensation for any week:

> (e) In which his unemployment is due to his willful discharge or temporary suspension from work for willful misconduct connected with his work ….

Claimant's last day of work with Employer was on November 12, 2008, and his request for unemployment compensation was denied by the job center, which concluded that Claimant engaged in willful misconduct. Claimant appealed and a hearing was conducted before a referee. Based on the testimony presented, the referee made two findings. The first identified Claimant's last day of work and the second finding stated:

> 2. During an investigation concerning harassment charges filed by the claimant, it was discovered that the claimant had in the past used abusive and/or threatening language towards other employees in violation of the employer's policy and a last chance agreement and due to this the claimant was discharged from work with the employer.

(Referee's decision at p. 1.)

Based on the above, the referee concluded that Claimant was discharged for willful misconduct in connection with his work under Section 402(e) of the Law and denied benefits.

Claimant appealed to the Board, which made the following findings of fact:

> 1. The claimant worked for Silgan White Cap Americas LLC as a maintenance specialist and his last day of work was November 12, 2008.
>
> 2. The claimant was employed with the employer since 1975.
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> 3. In February 2001, the claimant entered into a perpetual last chance agreement (LCA).

4. A condition of the LCA was that the claimant would not engage in any threatening behavior towards co-workers or risk immediate discharge.

5. In the spring and summer of 2008, the claimant repeatedly complained to the employer about the mistreatment he received at the hands of co-workers in his department.

6. The employer took remedial actions which satisfied the claimant until August 2008, when vulgar, sexually explicit graffiti was found written on the walls of a bathroom which disparaged the claimant.

7. The claimant was very upset over this and he filed a formal complaint of harassment.

8. The employer began an extensive investigation that included hundreds of interviews with employees, and the hiring of a handwriting expert.

9. This investigation cost the employer about six thousand dollars.

10. During the investigation, multiple employees who the claimant accused of mistreating him, raised accusations or [sic] their own against the claimant.

11. These individuals, as well as another employee, accused the claimant of engaging in threatening or intimidating behavior in multiple incidents over the past several years.

12. These incidents, if true, would have occurred after February 2001, and would have arguably been in violation of the LCA.

13. These allegations, some of which were several years old, and all of which were well over a year old, were never raised until the claimant filed his formal harassment complaint.

> 14. The employer found these allegations by the claimant's co-workers credible and discharged the claimant for engaging in threatening and intimidating behavior in violation of the LCA.
>
> 15. Theses [sic] incidents did not, in fact, occur.

(Board's decision at p. 1, 2.)

Based on the above, the Board determined that Employer failed to meet its burden of proving that Claimant engaged in willful misconduct. "The Board finds no credible evidence in support of the [E]mployer's assertion that the [C]laimant repeatedly violated the terms of the last chance agreement signed back in February 2001." (Board's decision at p. 3.) The Board observed that all of the allegations against Claimant were years old and that such did not surface until Employer began an investigation based on Claimant's harassment complaint. Coincidentally, many of the employees who Claimant alleged harassed him, were the ones who maintained that Claimant harassed them in the past. The Board, however, did not find any of the employees' allegations worthy of belief and, therefore, granted benefits. This appeal followed.[2]

On appeal, Employer argues that the Board's finding that none of the incidents alleged by Claimant's co-workers against him actually occurred, is not supported by substantial evidence. Employer points to the testimony of Mr. Connors, Mr. Fulton, Mr. Ziller, Mr. George and Mr. Kisenwether, who testified that Claimant made threats against them.

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[2] This court's review is limited to determining whether constitutional rights were violated, whether an error of law was committed and whether necessary findings of fact are supported by substantial evidence. Kirkwood v. Unemployment Compensation Board of Review, 525 A.2d 841 (Pa. Cmwlth. 1987).

Employer also argues that the co-workers testimony was uncontradicted because Claimant did not testify and Claimant's only other witness testified only as to what happened during the interview of Mr. George, during the investigation into Claimant's complaint.

Based on the testimony of its witnesses, Employer argues that Claimant's actions rose to the level of willful misconduct. In Andrews v. Unemployment Compensation Board of Review, 633 A.2d 1261, 1263 (Pa. Cmwlth. 1993), this court stated:

> It is well established that threats of harm toward a supervisor or co-worker constitute conduct below the standards of behavior which an employer has the right to expect from an employee …. Such conduct creates discord and interrupts the employer's operation.

According to Employer, Claimant's action of harassing his co-workers amounted to willful misconduct and the Board erred when it rejected the testimony of Claimant's co-workers regarding his misconduct.

Here, Employer's substantial evidence argument essentially attacks the credibility determination of the Board and focuses on its preferred version of the facts instead of the facts as found by the Board. As stated in Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985), credibility issues and evidentiary weight are within the discretion of the Board. Further, this court may not reweigh evidence in reviewing factual findings of the Board. Fitzpatrick v. Unemployment Compensation Board of Review, 616 A.2d 110, 111 (Pa. Cmwlth. 1992). Nonetheless, Employer argues that the Board "is not free to ignore overwhelming evidence in favor of a contrary result not supported by

the evidence." Treon v. Unemployment Compensation Board of Review, 499 Pa. 455, 460, 453 A.2d 960, 962 (1982).

We observe that in Treon, the only testimony presented was that of the claimant, which was consistent and uncontradicted. Based on the claimant's testimony, the referee made four findings of fact. On appeal, the Board adopted three of the referee's findings without explaining why it failed to adopt the fourth finding. The Supreme Court reiterated that the Board has the right to disbelieve a party's testimony, even though that testimony was uncontradicted. Id. at 460, 453 A.2d at 962. "If particular findings are inconsistent, incredible or unsupported by the evidence, the Board must so indicate. The Board may not, however, simply disregard findings made by the referee which are based upon consistent and uncontradicted testimony without stating its reasons for doing so." Id. at 461, 453 A.2d at 962.

In this case, the Board specifically found that the allegations made by Claimant's co-workers did not occur. In its discussion, the Board stated that it found no credible evidence to support Employer's contention that Claimant repeatedly violated the last chance agreement signed in 2001. The Board found that the allegations against Claimant, some of which were several years old, and all of which were well over a year old, were never raised until Claimant filed his formal harassment claim. Coincidentally, several of the individuals who Claimant alleged harassed him, were the same individuals who alleged that Claimant harassed them.

In this case, the Board rejected the testimony of Employer's witnesses as not worthy of belief, and as previous stated, such credibility

determinations are within the province of the Board. Given that the Board explained that it rejected the uncontradicted testimony based on the fact that all of the allegations made against Claimant were years old, that the co-workers allegations only surfaced once Claimant filed his harassment complaint and that coincidentally the co-workers who Claimant stated harassed him were some of the same individuals who were now alleging that Claimant had harassed them in the past, we find no error in the Board's decision.

In accordance with the above, the decision of the Board is affirmed.

JIM FLAHERTY, Senior Judge

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Unemployment Compensation Board of Review,	:	
Respondent	:	

ORDER

Now, March 5, 2010, the order of the Unemployment Compensation Board of Review, in the above-captioned matter, is affirmed.

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JIM FLAHERTY, Senior Judge