

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Marvin M. Markovitz,	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation Board	:	
of Review,	:	No. 1639 C.D. 2007
Respondent	:	Submitted: November 16, 2007

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge *
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
SENIOR JUDGE COLINS**

FILED: March 3, 2008

Marvin M. Markovitz (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) denying benefits under Section 402(e) of the Unemployment Compensation Law (Law),¹ which provides in pertinent 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...”²

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

² The term “willful misconduct” has been defined as the wanton and willful disregard of the employer’s interests; the deliberate violation of rules; the disregard of standards of behavior which an employer can rightfully expect of its employee; or negligence which manifests culpability, wrongful intent, evil design or intentional and substantial disregard for the

* The decision in this case was reached after the date that Judge Colins assumed the status of senior judge.

From June 6, 2006 through April 29, 2007, Claimant was employed as a meat cutter for Giant Eagle (Employer) with a final pay rate of \$11.70 per hour. Employer had a rule stating that gross insubordination or refusal to follow a supervisor's orders may be cause for immediate termination.

In December 2006, Claimant, after a verbal confrontation with a co-worker, was removed from the schedule. After filing a second level grievance, Claimant signed a last chance agreement and was placed back on the work schedule. On April 26, 2007, Claimant had a verbal confrontation with a co-worker concerning the location of his knives used at the worksite. At the time of this altercation, Claimant and his co-worker were within earshot of customers and other co-workers.

On April 29, 2007, the meat manager and the grocery co-manager met with Claimant in order to discuss the incident that occurred on April 26, 2007. During this meeting, Claimant's voice was elevated to point where he was asked "at least five times" to refrain from yelling and to lower his voice. Claimant refused to lower his voice, trying to "tell his side of the story," and the grocery co-manager indicated that he might have to call for security to end the meeting. Before management called for security, Claimant left the meeting.

Thereafter, Claimant was removed from the work schedule as a result of having violated company policy with respect to insubordination and having violated the last chance agreement that Claimant had signed in 2007.

Claimant was denied unemployment compensation benefits and appealed this determination. After a hearing conducted on June 28, 2007, and attended by Claimant, Employer, and Employer's representative, the Referee, on June 29,

employer's interests or the employee's duties and obligations. *Navickas v. Unemployment Compensation Board of Review*, 567 Pa. 298, 787 A.2d 284 (2001).

2007, found that Claimant was ineligible for benefits because of willful misconduct pursuant to Section 402(e) of the Law. On August 22, 2007, the Board affirmed the Referee's order and this appeal followed.³

On appeal, Claimant contends that the Board erred in affirming the Referee's determination and avers that the evidence of record does not support its finding that his behavior constituted willful misconduct so as to preclude the award of benefits pursuant to Section 402(e) of the Law. In support of this argument, Claimant contends that, although admittedly his voice was elevated during his meeting with management, as described during his hearing before the Referee, the latter did not find that his conduct involved physical violence, threats, profanity, vulgarity, or verbal abuse. Claimant avers that he simply became upset and in no way willfully disregarded or deliberately violated Employer's policies, or acted negligently so as to indicate an intentional disregard of Employer's interest. Finally, it is Claimant's position that the fact that he was on a "last chance agreement" does not alter the meaning of willful misconduct and/or its required burden of proof.

Upon review, we conclude that the Board did not err in affirming the Referee's decision that Claimant's behavior constituted willful misconduct. Willful misconduct within the meaning of Section 402(e) includes behavior that evinces a wanton and willful disregard of the employer's interests, deliberate violation of the employer's work rules, disregard of standards of behavior that the

³ When reviewing decision of the Unemployment Compensation Board of Review, this Court's standard of review is limited to determining whether an error of law was committed, constitutional rights were violated, or necessary findings of fact are supported by substantial evidence. *Graham v. Unemployment Compensation Board of Review*, 840 A.2d 1054 (Pa. Cmwlth. 2004).

employer can rightfully expect from its employees, or negligence indicating an intentional disregard for the employer's interest or the employee's duties or obligations. *Grieb v. Unemployment Compensation Board of Review*, 573 Pa. 594, 827 A.2d 422 (2003). The employer bears the burden of proving that a claimant engaged in willful misconduct for purposes of determining the claimant's eligibility for unemployment compensation. *Burger v. Unemployment Compensation Board of Review*, 569 Pa. 139, 801 A.2d 487 (2002). Once the employer establishes a prima facie case of willful misconduct, the burden shifts to the claimant to prove that his actions were justified or reasonable under the circumstances. *Kelly v. Unemployment Compensation Board of Review*, 747 A.2d 436 (Pa. Cmwlth. 2000). Whether a claimant's actions rise to the level of willful misconduct is a question of law. *Burger*.

When a charge of willful misconduct is based on the violation of a work rule, the employer must prove the existence of the rule, the reasonableness of the rule, and the fact of its violation. *Eshbach v. Unemployment Compensation Board of Review*, 855 A.2d 943 (Pa. Cmwlth. 2004). The employer must also present evidence that the employee deliberately violated the rule. *Id.* The ultimate determination requires consideration of all the circumstances, including the reasons for the employee's noncompliance. *Id.*

In determining whether substantial evidence, that is, relevant evidence upon which a reasonable mind could base a conclusion, supports the Board's affirmance of the Referee's decision, the Court must view the evidence in the light most favorable to the prevailing party. *Feinberg v. Unemployment Compensation Board of Review*, 635 A.2d 682 (Pa. Cmwlth. 1993), *petition for allowance of appeal denied*, 539 Pa. 670, 652 A.2d 840 (1994). It is also well-established that

the Board is the ultimate fact finder, with the authority to resolve evidentiary conflicts and to make credibility determinations.

In the present matter, the Referee's findings indicate that Employer had a rule stating that gross insubordination or refusal to follow a supervisor's orders may be cause for immediate termination. The record is clear that on April 26, 2007, Claimant had a verbal confrontation with a co-worker which argument was well within earshot of store customers and other co-workers, and that on April 29, 2007, during a meeting between Claimant and management to discuss the April 26th incident, Claimant was repeatedly told by management to lower his voice which admonition he ignored. During his hearing before the Referee, Claimant did not deny that he failed to lower his voice when asked to do so by management. Unarguably, the Board properly affirmed the Referee's determination that substantial evidence supports the conclusion that Employer met its burden of establishing the existence of its work rule and its violation by Claimant. See *Guthrie v. Unemployment Compensation Board of Review*, 738 A.2d 518 (Pa. Cmwlth. 1999).

Once the employer meets its burden of establishing willful misconduct on the part of claimant, as in the present matter, the burden then shifts to claimant to establish good cause for his behavior. Our review of the record does not indicate that Claimant was able to proffer any reasonable explanation or psychological/medical explanation for his refusal or inability to lower his voice during his meeting with management, other than his desire to "tell his side of the story." Claimant's failure to comply with repeated directives from his supervisors to lower his voice during their meeting unarguably constitutes a violation of Employer's work rule.

Accordingly, based upon the foregoing discussion, we conclude that substantial evidence of record supports the Board's affirmance of the Referee's determination that Claimant's conduct amounted to willful misconduct.

JAMES GARDNER COLINS, Senior Judge

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ORDER

AND NOW, this 3rd day of March 2008, the order of the Unemployment Compensation Board of Review in the above-captioned matter is AFFIRMED.

JAMES GARDNER COLINS, Senior Judge