

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Juan Cruz, Jr., :  
Petitioner :  
 : No. 166 C.D. 2010  
v. :  
 : Submitted: June 18, 2010  
Unemployment Compensation :  
Board of Review, :  
Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

**OPINION NOT REPORTED**

MEMORANDUM OPINION  
BY JUDGE McCULLOUGH

FILED: October 14, 2010

Juan Cruz, Jr. (Claimant) appeals from the January 7, 2010, order of the Unemployment Compensation Board of Review (Board), which denied Claimant benefits pursuant to section 402(e) of the Unemployment Compensation Law (Law).<sup>1</sup> We affirm.

Claimant worked for Sands Bethworks Gaming, LLC (Employer) from January 29, 2009, through May 18, 2009. (Board's Finding of Fact No. 1.) Sometime in April 2009, Claimant notified Employer that he suffered from medical limitations stemming from hip surgery and knee problems. Employer accommodated those limitations by moving Claimant from a position as a human resources representative

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended 43 P.S. §802(e). Section 402(e) of the Law provides that an employee is not eligible for benefits if his unemployment is due to his discharge for willful misconduct.

and placing him in a valet dispatcher position, a job that allowed Claimant to sit for his entire eight hour shift, and by granting Claimant permission to use the public elevators to go to the restroom. (Board's Findings of Fact Nos. 2, 3, and 5.) Claimant's first day in the valet dispatcher position was May 18, 2009.

On May 19, 2009, Claimant informed his supervisor that he had injured his knees and was unable to work. (Board's Finding of Fact No. 4.) Claimant refused to return to work until he was examined by his treating physician, who was not scheduled to see Claimant until early June 2009. (Board's Finding of Fact No. 6.) Employer discharged Claimant for not reporting to work as scheduled. (Board's Finding of Fact No. 8.)

The local job center granted Claimant's application for benefits. Employer appealed to the referee, who conducted a hearing.<sup>2</sup> Michelle Trageser, Employer's vice-president for human resources, testified that Claimant started the valet dispatcher job on May 18, 2009, which position accommodated Claimant's physical requirements. (Notes of Testimony (N.T.) at 6.) Trageser stated that Claimant complained at the end of the shift on May 18<sup>th</sup> that he was not feeling well, and, the next day, Claimant telephoned Employer and stated that he hurt his knee and would not report back for work until he was examined by his physician sometime in June. (N.T. at 7-9.) She stated that Employer received no doctor's note or accommodation request from Claimant. (N.T. at 9.) Trageser testified that, because Claimant would not return to work until June, Employer filled his position. (Id.)

Claimant testified that he sustained a knee injury while working for Employer. (N.T. at 13.) He explained that he informed Employer on May 18, 2009,

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<sup>2</sup> Neither party was represented by a licensed attorney at the hearing. Employer was represented by a tax consultant, and Claimant was *pro se*.

that he was experiencing pain and would not report for work the next day. (N.T. at 14.) Claimant stated that he called Employer again on May 19, 2009, and was told that he was terminated. ( N.T. at 16.) Claimant further testified that he only wanted to be examined by his personal physician, that he did not want to receive treatment from another provider, and that his physician examined him on June 5, 2009. (N.T. at 17, 26.)

The referee reversed the job center, concluding that Claimant voluntarily quit his employment without good cause and was ineligible for benefits under section 402(b) of the Law, 43 P.S. §802(b). Claimant appealed to the Board, which affirmed the referee on the alternative ground that Claimant engaged in disqualifying willful misconduct.<sup>3</sup> The Board explained its decision as follows:

The employer had accommodated the claimant's physical restrictions prior to injuring his knee. The claimant would not report to work from May 18, 2009 until he saw his doctor in early June. The claimant did not establish that he

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<sup>3</sup> Although the Law does not define "willful misconduct," our courts have defined that term as including: (1) a wanton or willful disregard for an employer's interests; (2) a deliberate violation of an employer's rules; (3) a disregard for standards of behavior which an employer can rightfully expect of an employee; or (4) negligence indicating an intentional disregard of the employer's interest or an employee's duties or obligations. Moran v. Unemployment Compensation Board of Review, 973 A.2d 1024 (Pa. Cmwlth. 2009). A claimant's refusal to perform scheduled work assignments may constitute willful misconduct. New v. Unemployment Compensation Board of Review, 558 A.2d 602 (Pa. Cmwlth. 1989); Reed v. Unemployment Compensation Board of Review, 414 A.2d 172 (Pa. Cmwlth. 1980). Furthermore, the employer bears the burden of establishing that the claimant was discharged for willful misconduct, Roberts v. Unemployment Compensation Board of Review, 977 A.2d 12 (Pa. Cmwlth. 2009), and if the employer meets its burden, the burden then shifts to the claimant to demonstrate good cause for his conduct. Department of Corrections v. Unemployment Compensation Board of Review, 943 A.2d 1011 (Pa. Cmwlth. 2008). The question of whether a claimant's behavior rises to the level of willful misconduct is one of law subject to our review. Andrews v. Unemployment Compensation Board of Review, 633 A.2d 1261 (Pa. Cmwlth. 1993).

was unable to work or that the employer would not accommodate him. The employer discharged the claimant for not reporting to work. The claimant has not established good cause for not reporting to work.

(Board's Decision, January 7, 2010, p. 2.)

On appeal to this Court,<sup>4</sup> Claimant contends that the Board erred in concluding that Employer met its burden to prove willful misconduct because the record reflects that he was absent from work due to illness and such an absence is not willful misconduct. We disagree.

The Board's findings show that Claimant suffered from a knee injury and that Claimant informed Employer on May 19, 2009, that he would not return to work until he was examined by his own physician in early June of 2009. Claimant, therefore, refused to report to work for a period of at least two weeks.<sup>5</sup> Claimant testified that he would not seek care from another medical provider, insisting that he only wanted to be examined by his own physician. (N.T. at 26.)

It is true that a claimant who is ill may justifiably refuse an employer's demand to report to work. Ramsey v. Unemployment Compensation Board of Review, 427 A.2d 1249 (Pa. Cmwlth. 1981). However, Claimant did not establish that he was unable to work during this two week time period, and Claimant's desire to be examined only by a specific physician does not constitute good cause for

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<sup>4</sup> Our scope of review is limited to determining whether constitutional rights were violated, errors of law were committed, or whether necessary findings of fact are supported by substantial evidence. Schneider v. Unemployment Compensation Board of Review, \_\_\_ A.2d \_\_\_ (Pa. Cmwlth., No. 2238 C.D. 2009, filed June 18, 2010).

<sup>5</sup> Claimant testified that he was examined by his physician on June 5, 2009, which was seventeen days after May 19, 2009. (N.T. at 17.)

refusing to report for work for such an extended period of time. Furthermore, the Board found that Employer had previously accommodated Claimant's physical problems by placing him in a position where he could sit for his entire shift and use the public elevators to access the restroom. Claimant never advised Employer that he needed additional accommodations to perform his job. See New v. Unemployment Compensation Board of Review, 558 A.2d 602 (Pa. Cmwlth. 1989) (holding that a claimant's refusal to return to work, despite employer's redesign of the workspace and parking area to accommodate her physical limitations, constituted willful misconduct). For these reasons, we conclude that Claimant's refusal to return to work was unreasonable under the circumstances and rose to the level of disqualifying willful misconduct.<sup>6</sup>

Accordingly, the Board's order is affirmed.

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PATRICIA A. McCULLOUGH, Judge

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<sup>6</sup> Claimant also argues that the Board's finding that Claimant engaged in disqualifying willful misconduct is not supported by substantial evidence. However, our review of the record demonstrates that all of the Board's findings are amply supported by the record and are thus conclusive on appeal. Ductmate Industries, Inc. v. Unemployment Compensation Board of Review, 949 A.2d 338 (Pa. Cmwlth. 2008).

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**ORDER**

AND NOW, this 14th day of October, 2010, the January 7, 2010, order of the Unemployment Compensation Board of Review is hereby AFFIRMED.

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PATRICIA A. McCULLOUGH, Judge