IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dawn M. Fecker,	:	
Petitioner	:	
	:	
v.	:	No. 1733 C.D. 2012
	:	Submitted: January 11, 2013
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

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

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: January 30, 2013

Dawn M. Fecker (Claimant) petitions, *pro se,* for review of the order of the Unemployment Compensation Board of Review (Board) reversing the decision of a Referee and finding her ineligible for unemployment compensation benefits under Section 402(e) of the Unemployment Compensation Law (Law).[1] We affirm.

[1] 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 "[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…."

Claimant was employed as a receptionist by Elkins Crest (Employer) but was discharged for willful misconduct by committing a Class III offense by violating Employer's policy prohibiting verbal, mental, physical or sexual abuse of any resident/patient of the facility, family member, visitor or fellow employee.[2] On May 1, 2012, two new employees, Tasha Williams (Williams) and Sharon Gray (Gray), were standing near Claimant's desk following orientation while waiting for a ride. After Williams' daughter entered and asked Claimant for an application, Claimant called an assistant on the telephone and stated that "all these nig***s keep coming here to get an application. It's about to be nig***ville in here." Williams and Gray heard Claimant's remarks and Gray reported the statements to Employer. Employer conducted an investigation and obtained statements from Claimant, Williams and Gray. While Claimant denied making the remarks, she was discharged for violating Employer's policy.

[2] The burden of proving willful misconduct rests with the employer. *Guthrie v. Unemployment Compensation Board of Review*, 738 A.2d 518, 521 (Pa. Cmwlth. 1999). Willful misconduct has been defined as: (1) wanton or willful disregard for an employer's interests; (2) deliberate violation of an employer's rules; (3) a disregard for the 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. *Philadelphia Parking Authority v. Unemployment Compensation Board of Review*, 1 A.3d 965, 968 (Pa. Cmwlth. 2010). When a claimant is terminated for a work-rule violation, the employer has the burden to establish the rule existed, the claimant knew of the rule, and the claimant violated the rule. *Philadelphia Parking Authority v. Unemployment Compensation Board of Review*, 1 A.3d 965, 968 (Pa. Cmwlth. 2010). A single statement containing a racial slur may constitute willful misconduct. *See Witkowski v. Unemployment Compensation Board of Review*, 633 A.2d 1259, 1260-61 (Pa. Cmwlth. 1993) (holding that a white employee who told two black employees that their employer was "working me like a nig**r" committed willful misconduct). Whether an employee's conduct constitutes willful misconduct is a question of law subject to our review. *Grieb v. Unemployment Compensation Board of Review*, 573 Pa. 594, 599, 827 A.2d 422, 426 (2003).

The Altoona UC Service Center denied benefits under Section 402(e) of the Law and Claimant appealed. Claimant, Williams and Gray testified at the hearing before the Referee. The Referee reversed the Service Center's determination; however, on appeal, the Board reversed the Referee's decision and denied benefits, stating:

> Here, the employer has a policy which provides, in relevant part, that mental and verbal abuse is prohibited and constitutes a Class III Offense. The policy further provides that committing a Class III Offense will result in termination even for a first offense. The claimant knew of this policy and its consequences, as well as the rest of the employer's policies, as evidenced by her signature on a form acknowledging her receipt and understanding of employer's policies. Further, the claimant testified to her awareness of this particular policy.
>
> Both of the new employees who witnessed the incident appeared and credibly testified at the hearing regarding the incident. Each witness credibly testified that they heard the claimant say "all these nig***s keep coming here to get an application. It's about to be nig***ville in here." While the claimant testified that she never made such a remark, the Board, as the ultimate arbiter of credibility, accepts as credible the testimony of the employer's witnesses and resolves all conflicts in the testimony in the employer's favor.
>
> Based on the credible testimony of employer's witnesses who were present when the remarks were made, the Board finds that the claimant did, in fact, make these remarks and racial slurs and that the racial slurs were a violation of the employer's policy. As such, the employer has met its burden of establishing that the claimant violated the employer's established policy of which the claimant was aware and that the violation constitutes willful misconduct.

> By merely denying making the statements, the claimant has not justified her violation of the employer's policy. Accordingly, benefits must be denied.

(Board Decision and Order at 3.) Claimant then filed the instant appeal of the Board's order.

In this appeal,[3] Claimant contends that the Board's decision is not supported by substantial evidence because the Board erred in accepting as credible the two new employees' testimony that she made the statements because their version of what occurred kept changing; no other witnesses heard her make the statements; she never signed a written statement admitting to making the statements; and she is a kind and considerate person that has never had any discriminatory or racial incidents in her two years of employment with Employer. As a result, Claimant asserts that she did not engage in willful misconduct under Section 402(e) of the Law.[4]

[3] Our review of the Board's decision is limited to determining whether there was a constitutional violation or an error of law, whether any practice or procedure of the Board was not followed, and whether the necessary findings of fact are supported by substantial evidence. *Glenn v. Unemployment Compensation Board of Review*, 928 A.2d 1169, 1171 n.1 (Pa. Cmwlth. 2007).

[4] Claimant also asserts that Employer would not let her speak to her accusers or to tell her side of the story. With respect to Employer's actions, it is well settled that "[t]he issue in a willful misconduct case is not whether the employer had the right to discharge the employee for the conduct in question but whether the Commonwealth is justified in reinforcing that decision by denying benefits under the [Law]. *Frumento v. Unemployment Compensation Board of Review*, 466 Pa. 81, 351 A.2d 631 (1976)." *Pennsylvania State Police v. Unemployment Compensation Board of Review*, 578 A.2d 1360, 1361 (Pa. Cmwlth. 1990). Thus, the issue of whether Employer listened to Claimant in an impartial manner or permitted her to speak to the other witnesses while investigating the incident precipitating her termination is irrelevant in the context of these proceedings regarding the denial of benefits under the Law.

However, the Board is the ultimate finder of fact in unemployment compensation proceedings. *Peak v. Unemployment Compensation Board of Review*, 509 Pa. 267, 277, 501 A.2d 1383, 1389 (1985); *Chamoun v. Unemployment Compensation Board of Review*, 542 A.2d 207, 208 (Pa. Cmwlth. 1988). Issues of credibility are for the Board, which may either accept or reject a witness' testimony whether or not it is corroborated by other evidence of record. *Id*. Findings of fact are conclusive on appeal if the record contains substantial evidence to support the findings. *Taylor v. Unemployment Compensation Board of Review*, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). The fact that a witness has presented a version of the facts different from that accepted by the Board is not a basis for reversal if substantial evidence supports the Board's findings. *Tapco, Inc. v. Unemployment Compensation Board of Review*, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994). In sum, we will not disturb the Board's credibility determinations and its finding of willful misconduct is supported by substantial evidence based on the testimony of the two employees who heard Claimant make the statements.

Accordingly, the Board's order is affirmed.

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DAN PELLEGRINI, President Judge

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O R D E R

AND NOW, this 30th day of January, 2013, the order of the Unemployment Compensation Board of Review dated August 17, 2012, at No. B540645, is affirmed.

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DAN PELLEGRINI, President Judge