IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Paul M. Letteer,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 227 C.D. 2010
	:	Submitted: July 23, 2010
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	
	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: September 15, 2010

Paul M. Letteer (Claimant), *pro se*, petitions for review from the order of the Unemployment Compensation Board of Review (Board) that affirmed the referee's denial of benefits under Section 402(e) of the Unemployment Compensation Law (Law) due to Claimant's willful misconduct.[1] We affirm.

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[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:

> An employe shall be ineligible for compensation for any week-
>
> ***

Footnote continued on next page…

The facts as found by the Board are as follows:

1. The claimant was last employed as a technician by Proctor and Gamble from January 22, 2007 to July 9, 2009. His final rate of pay was $18.90 per hour.

2. The employer's policy prohibits using its email system for non-business purposes.

3. The claimant knew about the employer's policy.

4. The employer has a progressive disciplinary policy. However, the policy states that any of the steps can be skipped based on the severity of the conduct in question.

5. The claimant was on step 4 of the employer's policy based on previous discipline.

6. The claimant admitted sending 7 emails to his coworkers containing obscene or offensive jokes and pictures.

7. The emails were sexually explicit or racially offensive in nature.

8. The employer discharged twenty-eight (28) other employees who had sent the same amount of obscene or offensive emails.

9. The claimant was discharged for violating the employer's internet policy, as well as its sexual harassment policy.

(e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work, irrespective of whether or not such work is "employment" as defined in this act….

(Boards decision at 1-2.)

In concluding that Claimant engaged in willful misconduct, the Board stated in pertinent part as follows:

> [T]he Employer credibly established that its policy prohibits its employees from using its computer systems for non-business purposes. It further credibly established that after an investigation, it determined that the Claimant sent at least 7 emails containing sexually explicit pornographic or racially offensive pictures and jokes. The Claimant admitted to sending emails containing obscene or offensive material while at work.... Based on the content of the emails, that they were sent using the Employer's internet system, and the number of emails sent, the Employer discharged the Claimant.... Based on previous misconduct, the Claimant was already on step 4 of the Employer's disciplinary process. Thus, it has met its burden.

(Board's decision at 2-3.) Claimant now petitions this court for review and essentially argues that the policy he was charged with violating was not enforced on all employees. [2]

This court has defined willful misconduct under Section 402(e) of the Law as:

> [A] wanton and willful disregard of an employer's interest, a deliberate violation of rules, a disregard of standards of behavior which the employer can rightfully expect from its employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional and

[2] This court's scope of review is limited to determining whether the Board's findings of fact are supported by substantial evidence in the record, whether an error of law was committed, whether there is a violation of the Board's procedures or whether any of the parties' constitutional rights were violated. U.S. Steel Corp. v. Unemployment Compensation Board of Review, 579 Pa. 618, 631, 858 A.2d 91, 99 (2004).

> substantial disregard for the employer's interests or the employee's duties and obligations.

Brady v. Unemployment Compensation Board of Review, 544 A.2d 1085, 1086 (Pa. Cmwlth. 1988). An employer has the burden of proving that willful misconduct was committed by an employee. Hartley v. Unemployment Compensation Board of Review, 397 A.2d 477 (Pa. Cmwlth. 1979). A review of the record reveals that Employer met its burden of proving willful misconduct.

In this case, Employer established that it has a policy which requires that its electronic mail system only be used for business purposes. Employer also has a policy prohibiting sexual harassment.

Here, Employer established, and Claimant admitted, that Claimant had sent at least seven non work-related emails to co-workers. Some of the emails contained sexually explicit pictures of naked women. Other emails included racist images and jokes. Where the employer proves the existence of the rule, the reasonableness of the rule, and the fact of its violation, the burden shifts to the claimant to prove he had good cause for his actions. Gutherie v. Unemployment Compensation Board of Review, 738 A.2d 518 (Pa. Cmwlth. 1999). As an alternative to good cause, a claimant who has engaged in willful misconduct may still receive benefits if he can establish the affirmative defense of disparate treatment. Geisinger Health Plan v. Unemployment Compensation Board of Review, 964 A.2d 970, 974 (Pa. Cmwlth. 2009).

Here, Claimant asserts disparate treatment, claiming that the Employer discharged him while not firing other employees who committed the same offense. A claimant who asserts the affirmative defense of

disparate treatment must make an initial showing that: (1) the employer discharged claimant, but did not discharge other employees who engaged in similar conduct; (2) the claimant was similarly situated to the other employees who were not discharged; and (3) the employer discharged the claimant based upon improper criterion. Id. Claimant maintains that Employer did not discipline others, including management, for similar conduct. Although one hundred individuals were investigated for sending similar email communications while at work, only Claimant and twenty-eight other individuals were discharged. Claimant contends that he was specifically treated different because he was on disability.

However, Claimant failed to show that anyone, other than himself and the other twenty-eight that were discharged, actually violated the policy. Claimant failed to offer evidence that he was discharged for conduct for which other similarly situated employees were not discharged and that his discharge was based on improper criterion. Employer credibly established that its policy specifically states it can discharge an individual based on the severity of the offense. Employer testified that it discharged twenty-eight other individuals, three of which were management, for similar misconduct.

A similar case is Geisinger, where the claimant also raised the argument of disparate treatment. The employer had an electronic communications policy stating that access to pornography was prohibited and grounds for termination, and the claimant knew or should have known employer's electronic communication policy. The claimant failed to show that he was similarly situated to other employees who were not terminated.

Id. at 976. Two of the emails at issue were received by the claimant from two other Geisinger employees, each employee sending the claimant one email. However, the claimant neither testified nor presented evidence that either of the other employees forwarded as many inappropriate emails as he did, or that their emails were as inappropriate as some of the emails that the claimant sent. Therefore, the claimant failed to carry his burden of showing that he was similarly situated and was, consequently, denied benefits. Id.

Here, like the claimant in Geisinger, Claimant failed to establish that he was similarly situated to other employees who allegedly violated the policy but were not fired. Claimant never specifically identified any other employee who sent one of the emails as a co-worker, that they had a similar disciplinary history, and that they sent the same amount of sexually or racially offensive emails without receiving the same punishment. The Board did not err in determining that Claimant failed to prove disparate treatment.

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

JIM FLAHERTY, Senior Judge

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Respondent	:	
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O R D E R

AND NOW, this 15th day of September, 2010 the order of the Unemployment Compensation Board of Review, in the above-captioned matter, is affirmed.

JIM FLAHERTY, Senior Judge