IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Edward H. Thompson Jr.,	:	
Petitioner	:	
	:	
v.	:	No. 294 C.D. 2008
	:	Submitted: July 18, 2008
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: September 5, 2008

Edward H. Thompson, Jr. (Claimant) petitions for review of an adjudication of the Unemployment Compensation Board of Review (Board) holding him ineligible for unemployment compensation benefits. In doing so, the Board affirmed the decision of the Referee that Claimant was not eligible for benefits under Section 402(e) of the Unemployment Compensation Law[1] (Law),

[1] Section 402(e) of the Law, Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e), provides in relevant part:

> An employe shall be ineligible for compensation for any week –
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> ***
>
> (e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work…

43 P.S. §802(e).

because of his willful misconduct. In this appeal, we consider whether the Board erred in equating Claimant's failure to work to the best of his ability with willful misconduct. For the reasons that follow, we affirm.

Claimant was employed by Mercy Hospital of Pittsburgh (Employer) as a Housekeeping Aide since 1999. Claimant's last day of work with Employer was August 14, 2007, and he sought unemployment compensation benefits. On September 6, 2007, the Duquesne UC Service Center approved Claimant's benefits concluding that although Claimant was discharged for unsatisfactory work performance, he had worked to the best of his ability. Employer appealed on the grounds that Claimant was not discharged due to mere unsatisfactory performance. Employer asserted that Claimant was terminated for violating Employer's policy; displaying a disregard of Employer's interests; and not working to the best of his ability. A hearing was held before the Referee.

Employer presented testimony from Tony Bucci, Employer's Environmental Services Manager and Claimant's direct supervisor. Claimant was employed as a housekeeper and was responsible for cleaning the cafeteria, the serving line, the dining room, a small snack area and some restrooms. Claimant worked the night shift, doing the same job and cleaning the same area every night. Bucci explained that, at times, Claimant put forth a good effort and did an excellent job but at other times his work performance was inadequate and incomplete. When Bucci spoke to Claimant about his poor work performance "on occasion," Claimant did not offer an excuse or a reason why his work was not completed. Notes of Testimony, October 30, 2007, at 17-18 (N.T. ___). After Bucci pointed out deficiencies, Claimant would do "a super job" for a period of time and then his work would begin to deteriorate again. N.T. 17. On July 25,

2007, Bucci inspected the cafeteria area and found "deplorable, unsanitary" conditions including food, dust and dirt marks on the walls; dirt and dust on the ceiling; a dirty serving line; and dirt and debris under the mats. Certified Record Item No. 7, Employer's Exhibit 14. As a result, Bucci issued Claimant a final written warning explaining that if the situation were not corrected, Claimant's employment would be terminated. Certified Record Item No. 7, Employer's Exhibit 13.

Bucci received a complaint regarding the cleanliness of the cafeteria area on the morning of August 14, 2007, and he went to view the conditions, which were again deplorable and actually "more dramatic" that they had been in July. N.T. 17. Bucci wrote up the following list of unsanitary conditions that he observed:

> Walls – spotted and splattered with food, dust and dirty marks (food left from day before)
>
> Corners and edges – dirt buildup
>
> Under equipment – dirt and debris (left from day before)
>
> Trash container – dirty (not washed off)
>
> Ceiling – needs to be maintained (soiled and dusty)
>
> Serving line – front dirty
>
> Top of equipment – very dusty
>
> Mats – dirt and debris under mats (not lifting to scrub and clean)
>
> Sinks – need to be scoured (dirty with buildup)
>
> Dispensers – paper towels and soap not consistently restocked
>
> Doctor's dining room – floor dirty and debris
>
> Doctor's restroom (2) – toilets dirty, sinks need scoured, floors and walls marked (same condition day before).

Certified Record Item No. 7, Employer's Exhibit 12.

Employer also presented Suzanne Hale, Assistant Director of Environmental Services, to testify. Hale explained that because Claimant had performance issues, he was moved to the dietary area, which is a smaller area, in order to help him be successful in his job. Between July 25th and August 14th, Hale walked with Claimant through the cafeteria area pointing out where his work was unsatisfactory. Hale walked through the dining area with Bucci on August 14, 2007, and personally viewed the conditions documented by Bucci, which were unacceptable. As a result, Hale sent Claimant a termination letter the next day.

Finally, Employer presented the testimony of Carol Bonner, Supervisor of Employee Relations. Bonner explained that Employer has a progressive discipline policy and that Claimant was given a written warning by Bucci on May 29, 2007, and a final written warning on July 25, 2007. Bonner observed the conditions on August 14, 2007, and agreed that they were terrible, adding that there were cobwebs on the walls and that the Department of Health had instructed, the week before, that dusty french fries be removed from the floor, but they were still there. Claimant was terminated for violating Employer's Human Resource Policy 209, Category II, Section 3 "Contributing to unsanitary conditions or poor housekeeping" and Section 16 "Failure to maintain reasonable standards of work performance including the standards of values in practice." Certified Record Item No. 7, Employer's Exhibit 16, pgs. 5-6. Not until the point of discharge did Claimant suggest to Employer that his diabetes could be affecting his job performance. Employer sent Claimant to a doctor but did not receive any confirmation from the doctor that there was a medical reason for Claimant's poor performance.

Claimant testified on his own behalf and disputed the contentions that he was not cleaning properly. Claimant pointed out that he was given awards by Employer: one in 2003 called the "Putting People First Award" and one in 2006 for outstanding cleanliness. Claimant felt that his problems arose when Ms. Hale began working at the hospital in 2006, because he never had any work problems before November 2006. Claimant disagreed with the assessment that he was not doing his job; on the contrary, Claimant stated that he was getting all of his work done in a satisfactory manner and was working to the best of his ability. Claimant agreed that if the things Employer documented in his work area were true, Employer would have a right to discipline him. However, he believed that Employer's allegations were not true. Claimant also testified that he has diabetes, of which Employer was aware, and that he told Employer his diabetes was the reason he could not perform his duties to Employer's standards.

The Referee credited Employer's witnesses that Claimant's work performance was unsatisfactory. The Referee rejected Claimant's testimony on this point, noting that it was inconsistent for Claimant to assert that his work performance was satisfactory but then cite diabetes as the reason for his deficient work performance. The Referee found that Claimant was terminated for violating Employer's reasonable policy and that Claimant did not establish good cause for violating that policy. The Referee pointed out that unsatisfactory work performance can constitute willful misconduct where the claimant does not work to the best of his ability. The Referee concluded that Claimant did not do so. The Referee explained that Claimant "was capable of performing his job duties in an exemplary manner, and … he often did so, performing his job well enough to be recognized with awards. At the point at which … [C]laimant was warned that his

job was in jeopardy for unsatisfactory work performance, it became critical for him to ensure that he adhere to employer expectations and requirements, which he failed to do." Certified Record Item No. 13, Referee's Decision at 2. Determining that Claimant's actions constituted willful misconduct, the Referee reversed the decision of the UC Service Center and denied benefits.

Claimant appealed to the Board. The Board adopted the Referee's findings of fact and conclusions of law and affirmed the decision of the Referee, specifically finding that Claimant did not work to the best of his ability.[2] Claimant now petitions this Court for review.[3]

On appeal, Claimant raises three issues for our consideration. First, Claimant argues that the Referee's Finding of Fact 5, which was adopted by the Board, is not supported by substantial evidence. Second, Claimant argues that the Board erred in focusing on whether Claimant worked to the best of his ability because that is not the standard for determining whether willful misconduct occurred. Third, Claimant argues that Employer failed to prove that Claimant engaged in willful misconduct.

We turn, first, to Claimant's challenge of Finding of Fact 5. It reads:

> 5. There were numerous instances in which the claimant's work performance was substandard, in which he failed to perform the duties which were expected of him.

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[2] The Board is the ultimate fact finding body and arbiter of credibility. *Peak v. Unemployment Compensation Board of Review*, 509 Pa. 267, 276-277, 501 A.2d 1383, 1388 (1985).

[3] Our scope of review is limited to determining whether constitutional rights have been violated, errors of law were committed, or whether findings of fact are supported by substantial evidence. *Sheets v. Unemployment Compensation Board of Review*, 708 A.2d 884, 885 n.3 (Pa. Cmwlth. 1998). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Korpics v. Unemployment Compensation Board of Review*, 833 A.2d 1217, 1219 n.1 (Pa. Cmwlth. 2003).

Certified Record Item No. 13, Referee's Decision at 1. Claimant asserts that this finding is not supported by substantial evidence because during the eight years Claimant worked for Employer, there were only three documented instances of substandard work performance, *i.e.*, May 29, 2007, July 25, 2007, and August 14, 2007. This, Claimant argues, does not qualify as "numerous" instances. Claimant admits that resolution of this issue is not determinative of whether he engaged in willful misconduct, but he wishes to counter the poor impression created by this finding.

In finding "numerous instances" of poor performance, the Referee did not specify that he was referring only to the above-listed documented instances. Employer's witnesses stated that Claimant had performance issues before working in the cafeteria area, which was actually why he was moved to that area, and that he was told by Bucci and also by Hale on more than one occasion that his work performance was deficient. In any case, disagreement with the factfinder's choice of adjective is not even a substantial evidence issue but, rather, a semantic one.

We now turn to Claimant's two remaining issues, which we will address together because they both deal with the conclusion that Claimant engaged in willful misconduct. Claimant argues that the Board erred in using the standard of whether Claimant worked to the best of his ability to determine if willful misconduct occurred. Claimant argues that this standard is not contained in the Law or in this Court's decisions because not working to the best of a person's ability lacks the element of intentionality, which is the key element of willful misconduct. Claimant further asserts that Employer failed to meet its burden of proving willful misconduct because there is no evidence that Claimant's poor work performance and violation of Employer's policy were intentional.

Typically, an employee who engages in willful misconduct is ineligible for unemployment compensation benefits. The employer has the burden of proving willful misconduct on the part of a discharged employee. *Pettyjohn v. Unemployment Compensation Board of Review*, 863 A.2d 162, 164 (Pa. Cmwlth. 2004). Although not statutorily defined, the Court has defined willful misconduct as (1) the wanton and 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 has a right to expect of an employee; or (4) negligence indicating an intentional and substantial disregard of the employer's interest or an employee's duties or obligations. *Glenn v. Unemployment Compensation Board of Review*, 928 A.2d 1169, 1172 (Pa. Cmwlth. 2007). Whether a claimant's actions constitute willful misconduct, so as to disqualify him from receiving unemployment benefits, is a question of law that is fully reviewable by this Court. *Lindsay v. Unemployment Compensation Board of Review*, 789 A.2d 385, 389-390 (Pa. Cmwlth. 2001).[4]

Unsatisfactory job performance does not necessarily disqualify a claimant for benefits because incompetence, inexperience or inability to do the job does not amount to willful misconduct. *Geslao v. Unemployment Compensation Board of Review*, 519 A.2d 1096, 1097 (Pa. Cmwlth. 1987). In this regard, "a

[4] Employer discharged Claimant for violation of two work rules. With respect to a work rule violation, the employer has the burden to prove the existence of a reasonable work rule and that the claimant violated the rule, and the burden then shifts to the claimant to show that he had good cause to violate the rule. *ATM Corporation of America v. Unemployment Compensation Board of Review*, 892 A.2d 859, 865 (Pa. Cmwlth. 2006). In this case, the work rules concern poor housekeeping and failure to maintain standards of performance. This really deals with the issue of whether Claimant worked to the best of his ability; therefore, we will analyze the case under that standard.

finding that a claimant has worked to the best of his ability negates a conclusion of willful misconduct." *Norman Ashton Klinger & Associates, P.C. v. Unemployment Compensation Board of Review*, 561 A.2d 841, 843 (Pa. Cmwlth. 1989). However, contrary to Claimant's assertion, a claimant's failure to work to the best of his ability can constitute willful misconduct. Specifically, this Court has explained:

> When, however an employee's on the job performance is below the level of his or her ability and this conduct continues over a period of time despite the employee being aware of it as such, it is considered a conscious or careless disregard of the employer's interest and constitutes willful misconduct.

Younes v. Unemployment Compensation Board of Review, 467 A.2d 1227, 1228 (Pa. Cmwlth. 1983). Further, "a showing of actual intent to wrong the Employer is not required. Claimant's conscious indifference to his employment duties is enough to support a finding of willful misconduct." *Cullison v. Unemployment Compensation Board of Review*, 444 A.2d 1330, 1331 (Pa. Cmwlth. 1982).

We reject Claimant's assertion that the Board incorrectly focused on whether Claimant worked to the best of his ability. This standard has a foundation in our precedent. Not working to the best of a person's ability contains the element of intentionality that rises to willful misconduct if the person is capable of performing the job properly but does not do so.

The situation in this case is similar to that found in *McCrea v. Unemployment Compensation Board of Review*, 487 A.2d 69 (Pa. Cmwlth. 1985). There, the claimant was responsible for cleaning rooms in a hospital. The claimant received warnings under the employer's progressive discipline policy for unsatisfactory work performance, including a final warning. Subsequently, the

claimant failed to complete an assignment and was discharged. This Court affirmed the Board's denial of benefits due to willful misconduct, holding

> … Claimant's recent work performance had not been satisfactory. The record supports the conclusion that Claimant had the ability to perform her job properly. Thus, her unsatisfactory work performance cannot be attributable to mere incompetence or inability….Further, although Claimant had been warned and suspended for her job performance prior to the incident for which she was discharged, the quality of Claimant's work did not improve. Poor work performances reflect an unwillingness to work to the best of one's ability and evidence a disregard for the standard of conduct her Employer had the right to expect….

Id. at 71 (citations omitted). Another similar case is *Cullison*, where a series of mistakes led to the claimant's discharge for unsatisfactory work performance. This Court held that because the claimant had the ability to perform his job properly, his failure to return his work to a satisfactory level despite repeated warnings from his employer evidenced a conscious, careless disregard of his employment duties and his employer's interests, and amounted to willful misconduct. *Id.* at 1332.[5]

Here, Claimant's work performance was unsatisfactory, leading to his discharge.[6] The record showed that Claimant was capable of performing his job

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5 *See also Shearer v. Unemployment Compensation Board of Review*, 527 A.2d 615, 617 (Pa. Cmwlth. 1987) (where the claimant exhibited proficient work skills early in his employment but his work product later slipped drastically, his poor work performance amounted to willful misconduct); *Sacks v. Unemployment Compensation Board of Review*, 459 A.2d 461, 463 (Pa. Cmwlth. 1983) ("The many warnings Claimant had been given regarding the poor quality of his work, and his failure to improve after such warnings, reflects on his attitude toward his employment and thus adds to the willfulness of the misconduct.").

6 Although at hearing Claimant disputed that his work was unsatisfactory, he has not challenged the finding of unsatisfactory work performance on appeal. The findings of fact made by the Board are conclusive on appeal so long as the record, taken as a whole, contains substantial

(Footnote continued on the next page . . .)

extremely well. Indeed, Claimant himself described the awards he received for his outstanding work performance. Bucci confirmed that, at times, Claimant performed his work duties in an exemplary manner. Therefore, the fact that conditions in Claimant's area became "deplorable" cannot be attributed to Claimant's inability to do the job, but, rather, to Claimant's failure to work to the best of his ability.[7] *McCrea*, 487 A.2d at 71. Even after receiving a final written warning on July 25, 2007, Claimant did not improve his performance and actually allowed conditions in his assigned area to become even worse. This constitutes a conscious, careless disregard of Employer's interests and his work duties and the standard of conduct Employer had a right to expect of Claimant, and rises to the level of willful misconduct.[8] Therefore, the Board did not err in determining that Claimant did not work to the best of his ability, rendering him ineligible for unemployment compensation benefits.

(continued . . .)

evidence to support those findings. *Taylor v. Unemployment Compensation Board of Review*, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977).

[7] Claimant did not offer any credible evidence that there was a legitimate reason for his poor work performance. In addition, his testimony that he worked to the best of his ability was not accepted by the Referee or the Board.

[8] Claimant points to his work record as evidence that his poor performance was not intentional and that he showed concern, not disregard, for Employer's interests. Claimant cites his awards; a letter he wrote to Employer shortly before his termination affirming his intent to try to accomplish all of his work; testimony from Ms. Hale that Claimant never refused to do what he was told; and his testimony that he worked to the best of his ability. Despite the letter and the fact that he was not openly insubordinate, the fact remains that Claimant was not doing his job in a satisfactory manner. As noted, it is not necessary that Claimant intend to harm Employer through his conduct; his failure to perform his duties satisfactorily despite his ability to do so amounts to willful misconduct. Although Claimant testified he did the best he could, his testimony was not accepted and the Board specifically found to the contrary. Finally, the awards Claimant points to actually prove his willful misconduct because Claimant was more than capable of doing an excellent job.

Accordingly, we affirm the decision of the Board.

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MARY HANNAH LEAVITT, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Edward H. Thompson Jr., Petitioner	:	
v.	:	No. 294 C.D. 2008
Unemployment Compensation Board of Review, Respondent	:	

ORDER

AND NOW, this 5th day of September, 2008, the order of the Unemployment Compensation Board of Review in the above-captioned matter, dated January 15, 2008, is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge