IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Wilfred Dobson,	:	
Petitioner	:	
	:	
v.	:	No. 379 C.D. 2011
	:	Submitted: January 6, 2012
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI[1] FILED: January 27, 2012

Wilfred Dobson (Claimant) petitions *pro se* for review of the order of the Unemployment Compensation Board of Review (Board) affirming the decision of the Unemployment Compensation Referee (Referee) finding him ineligible for benefits under Section 402(e) of the Unemployment Compensation Law[2] (Law)

[1] This case was assigned to the opinion writer prior to January 7, 2012, when Judge Pellegrini became President Judge.

[2] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e). That section provides in pertinent part:

An employe shall be ineligible for compensation for any week –

(Footnote continued on next page…)

because his actions amounted to willful misconduct. Finding no error in the Board's decision, we affirm.

Claimant was employed full-time as a security officer with Allied Barton Security Service (Employer) from April of 2002 until June 17, 2010. Employer has a policy which states that employees may not utilize cellphones while on duty unless they obtain prior approval from a supervisor, and then cellphones may only be used in emergency circumstances. However, on June 17, 2010, Claimant was observed playing a video game on his cellphone while on duty and his employment was immediately terminated for violation of Employer's cellphone policy.

(continued…)

> (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.

While the term "willful misconduct" is not specifically defined in the Law, the Supreme Court of Pennsylvania has provided the following definition:

> (a) wanton or willful disregard for an employer's interests; (b) deliberate violation of an employer's rules; (c) disregard for standards of behavior which an employer can rightfully expect of an employee; or (d) negligence indicating an intentional disregard of the employer's interest or an employee's duties or obligations.

Grieb v. Unemployment Compensation Board of Review, 573 Pa. 594, 600, 827 A.2d 422, 425 (2003) (citing *Navickas v. Unemployment Compensation Review Board*, 567 Pa. 298, 787 A.2d 284, 288 (2001)). To show willful misconduct, an employer must present evidence that the employee's conduct was intentional and deliberate, not just that the employee committed a negligent act. *Grieb*, 573 Pa. at 600, 827 A.2d at 426. The court must consider all the facts and circumstances when making this determination, including the employee's proffered reasons for noncompliance.

Claimant filed an unemployment compensation claim alleging he did not violate Employer's cellphone policy and, alternatively, disparate treatment. The Department of Labor and Industry's Office of Unemployment Compensation Benefits found Claimant eligible for benefits under Section 402(e) of the Law because Employer did not provide information to prove that Claimant violated its cellphone policy. Employer appealed this determination.

The Referee granted Claimant a continuance of the initial hearing in order to obtain counsel. Claimant's counsel then requested another continuance in order to allow time to exchange information with Employer.[3] The Referee denied this second request for a continuance, explaining to counsel:

> The proceedings are somewhat informal and there is no period of discovery for the parties. You will be allowed to question the employer witness at the hearing and will be allowed to review any documents the employer presents at the hearing.

(Referee's October 6, 2010 Continuation Denial Notice). Claimant's counsel then requested that the Referee issue a subpoena to Employer to provide Claimant with

[3] Claimant sent a "request for information" to Maura McNamara (Ms. McNamara), Employer's representative, seeking, *inter alia*, a copy of Employer's employee handbook, the rules which Claimant allegedly violated, Employer's written procedure regarding discipline, and Claimant's work record, commendations, and hourly rate of pay. This request for information also included questions for Ms. McNamara, such as: why was Claimant summarily fired instead of being given a warning, and had any other security officers been fired for their first violation of Employer's cellphone policy.

certain documents and information prior to the hearing. The Referee refused to issue a subpoena and Claimant filed a formal objection to the hearing being held.

Before the Referee, Allen Watson (Mr. Watson), Employer's Account Manager, testified that he prepared a memo which Employer distributed on January 24, 2008, titled Telephone and Cell Policies which states, "no security officer is to be on their [sic] cell phone while on duty at their [sic] post. Security Officers are not allowed to use a client phone for anything other than business purposes." (Hearing Transcript at 10). This memo also contained the section of Employer's employee handbook titled Internet, Telephone and Electronic Usage which states that use of phones "for personal reasons is strictly prohibited unless approved by your District Manager on a case-by-case basis," and "cell phones are not permitted to be used while on duty except in an emergency." (Employer's Exhibit 1). Every employee receives a copy of the handbook on his or her first day of employment and Mr. Watson produced an acknowledgement form signed by Claimant on April 9, 2002, indicating that he received a copy of the employee handbook.

Mr. Watson testified that on June 17, 2010, he was informed by Site Supervisor Melissa Brotschul (Supervisor Brotschul) that Claimant was using his cellphone at his security post in clear view of visitors and was not paying attention to the individuals coming and going through the doors at his post. Mr. Watson then proceeded to a balcony located approximately 15 feet above Claimant's post and witnessed Claimant playing a video game on his cellphone for 15 minutes. During this time, Claimant ignored staff members and visitors as they entered and exited the building and did not lower his phone, even when visitors spoke to him.

After witnessing these actions, Mr. Watson informed Claimant that his employment was being terminated for violation of Employer's cellphone policy.

Regarding discipline, Mr. Watson testified that Employer has a four-step process including: verbal warning, first written warning, final written warning, and termination. This process is contained in the employee handbook. Employer also utilizes a disciplinary matrix (Matrix) which indicates what type of discipline should be imposed for a particular infraction.[4] However, the employee handbook states:

> These steps will be used in a progressive manner consistent with the severity of the policy violation and/or performance problem. However, [Employer] reserves the right to skip any step, in whole or in part, and move immediately to any further step, including termination after suspension and investigation, as it deems necessary. Consequently, no employee may rely on these guidelines as "promises" or "agreements" by [Employer] to impose the discipline contained in the guidelines in any situation or prior to termination. Termination may occur without use of progressive discipline and without prior notice.

(Employer Exhibit 3 at 14).

Mr. Watson further testified that Claimant was issued a verbal warning on May 12, 2010, for failure to perform assigned tasks at designated times when he locked a door which should have remained open during an event. That same day Claimant was also issued a final written warning for insubordination for

[4] A copy of this disciplinary Matrix was entered into evidence.

failure to follow his supervisor's instructions. According to Employer's disciplinary Matrix, an insubordination offense automatically results in a final written warning. Therefore, Claimant was on final written warning status when the incident at issue occurred. On cross examination, Mr. Watson stated that he disciplines every employee that he sees utilizing a cellphone when they are not on a personal or lunch break.

Claimant testified that while he was on duty on June 17, 2010, his cellphone rang repeatedly and he was simply trying to turn it off. However, he had difficulty doing so given the fact that there were a lot of people coming in and out of the building and he had to respond to and deal with these individuals. Claimant stated that it took him approximately two to five minutes to turn off his cellphone. Later that evening, Mr. Watson informed Claimant that his employment was being terminated for using his cellphone while on duty without supervisory approval. Claimant did not explain himself or his actions to Mr. Watson at that time because he was too upset about being discharged. Claimant admitted to receiving the final written warning from Employer on May 12, 2010, and this warning indicated that any further violation of Employer's policies could result in termination. However, he claims he was not aware of Employer's cellphone policy, even though he admittedly received a copy of the employee handbook.

The Referee found Mr. Watson to be credible, resolved all conflicts in testimony in favor of Employer, and found that Employer proved both the existence of a cellphone policy and the fact that Claimant violated this policy. This policy states that employees may not use cellphones while on duty unless there is prior supervisory approval, and then only in emergency circumstances. The

Referee determined that Claimant was ineligible for benefits under Section 402(e) of the Law because his violation of Employer's cellphone policy constituted willful misconduct and he failed to establish good cause for his actions. While Employer has a progressive disciplinary process, the Referee also found that Employer "has the discretion to skip different levels of the disciplinary process depending on the offense or the violation." (Referee's October 14, 2010 Decision at 1). Claimant appealed to the Board, which affirmed both the determination regarding benefits and the Referee's refusal to issue a subpoena. The Board specifically stated that Claimant's request for a subpoena "fails to raise an issue that would lead to relevant and probative testimony." (Board's December 20, 2010 Order at 1). The Board denied Claimant's request for reconsideration and this appeal followed.[5]

On appeal,[6] Claimant argues that the Board's finding of willful misconduct is not supported by substantial evidence.[7] However, the crux of this argument appears to rely upon Claimant's own testimony and version of the events, which the Board did not find to be credible. We have repeatedly stated that the Board is the ultimate finder of fact in unemployment compensation proceedings, empowered to resolve all conflicts in the evidence and determine the

[5] The Court's scope of review in this matter is limited to determining whether there was a constitutional violation or 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).

[6] Apparently Claimant is no longer represented by counsel.

[7] Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a finding of fact." *Seton Co. v. Unemployment Compensation Board of Review*, 663 A.2d 296, 299 n.3 (Pa. Cmwlth. 1995).

credibility of witnesses. *Maher v. Unemployment Compensation Board of Review*, 983 A.2d 1264, 1268 n.3 (Pa. Cmwlth. 2009), *appeal denied*, 606 Pa. 674, 996 A.2d 493 (2010); *Brannigan v. Unemployment Compensation Board of Review*, 887 A.2d 841 (Pa. Cmwlth. 2005). The Board found Mr. Watson to be credible and resolved all conflicts in the evidence in favor of Employer, and we will not disturb these determinations on appeal.

It is well-settled that in unemployment compensation cases the burden of proving willful misconduct is on the employer. *Guthrie v. Unemployment Compensation Board of Review*, 738 A.2d 518, 521 (Pa. Cmwlth. 1999) (citing *Sacks v. Unemployment Compensation Board of Review*, 459 A.2d 461 (Pa. Cmwlth. 1983)). In willful misconduct cases involving violation of a work rule, the employer bears the burden of proving the existence of a reasonable work rule and the fact that the claimant violated the rule. *Guthrie*, 738 A.2d at 521; *Brunson v. Unemployment Compensation Board of Review*, 570 A.2d 1096, 1098 (Pa. Cmwlth. 1990). Once these elements have been established, the burden then shifts to the claimant to prove he had good cause for his actions, meaning that his actions were justified or reasonable under the circumstances. *Guthrie*, 738 A.2d at 522 (citing *Frumento v. Unemployment Compensation Board of Review*, 466 Pa. 81, 87, 351 A.2d 631, 634 (1976)).

Employer clearly established the existence of a work rule prohibiting the use of cellphones by security officers while on duty given Mr. Watson's testimony and the introduction into evidence of Employer's employee handbook and Mr. Watson's memo dated January 24, 2008. The Board credited Mr. Watson's testimony that Supervisor Brotschul witnessed Claimant using his

cellphone while on duty and that Mr. Watson personally witnessed Claimant playing a video game on his cellphone for approximately 15 minutes, neglecting his security duties during this time period. Claimant should have been aware of the existence of Employer's cellphone policy because he signed acknowledgement forms indicating he received both the employee handbook and Mr. Watson's memo. This amounts to substantial evidence to support the Board's conclusion that Claimant violated Employer's cellphone policy. The burden then shifted to Claimant who failed to establish good cause for his actions.

Claimant repeatedly asserts that his actions cannot be deemed to constitute willful misconduct because he was not aware of Employer's rule regarding the escalation of disciplinary procedures. However, this is not the work rule which is at issue in this case; the relevant work rule is Employer's cellphone policy. In addition, the Board found that Employer has the discretion to skip different levels of the disciplinary process depending on the employee's offense or the violation and this provision is clearly stated in the employee handbook. Claimant was on final warning status at the time of the incident in question given his insubordination offense and Employer's policy clearly states that insubordination automatically results in a final written warning.

Finally, Claimant argues that the Board abused its discretion and deprived him of his due process rights by affirming the Referee's denial of his request for a subpoena. Claimant focuses on Employer's disciplinary Matrix, a document which indicates what type of discipline should be imposed for a particular infraction. According to Claimant, this document was crucial to his case, Employer relied upon it in carrying out his discipline, and the refusal to issue

a subpoena to obtain this document prior to the hearing violated Claimant's due process rights. However, despite Claimant's arguments to the contrary, the Matrix document was not relevant to the issue of whether Claimant violated Employer's cellphone policy or whether Employer had the discretion to skip different levels in the disciplinary process. As was pointed out to Claimant and his prior counsel, the process of unemployment compensation cases is rather informal and the regulations do not provide for the extensive pre-discovery methods Claimant was attempting to utilize. The regulations governing the Department of Labor and Industry provide for the issuance of subpoenas as follows:

> The issuance of subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda and other records and documents, *may* be obtained on application to the Board, referee, or at any local employment office.

34 Pa. Code §101.31. (Emphasis added). *See also* Section 506 of the Law, 43 P.S. §826. The issuance of a subpoena is not mandatory but rather a matter of discretion. *Flores v. Unemployment Compensation Board of Review*, 686 A.2d 66, 76 (Pa. Cmwlth. 1996). However, the Board has an obligation to issue a subpoena when the issuance would lead to relevant and probative testimony. *Hamilton v. Unemployment Compensation Board of Review*, 532 A.2d 535, 537 (Pa. Cmwlth. 1987). We agree with the Board that Claimant's subpoena request failed to raise an issue that would lead to relevant and probative testimony and, therefore, was properly denied. Regardless, the Matrix document Claimant sought was admitted into evidence, Claimant and his counsel were given the opportunity to review the document at the hearing, and were permitted to cross-examine Employer's witness

regarding the document. Given all of these facts, the Board did not commit an abuse of discretion or error of law and Claimant's due process argument must fail.

Accordingly, the order of the Board is affirmed.

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DAN PELLEGRINI, Judge

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Unemployment Compensation Board of Review, Respondent	:	

O R D E R

AND NOW, this 27th day of January, 2012, the order of the Unemployment Compensation Board of Review, dated December 20, 2010, is affirmed.

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DAN PELLEGRINI, Judge