

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph P. Rodney, :  
Petitioner :  
 :  
v. :  
 :  
Unemployment Compensation :  
Board of Review, : No. 392 C.D. 2011  
Respondent : Submitted: August 26, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McGINLEY

FILED: November 17, 2011

Joseph P. Rodney (Claimant) challenges the Order of the Unemployment Compensation Board of Review (Board) which affirmed the Referee's denial of benefits under 402(e) and affirmed a non-fault overpayment pursuant to Section 804(b) of the Unemployment Compensation Law (Law).<sup>1</sup>

The facts, as initially found by the Referee and confirmed by the Board, are as follows:

1. The claimant last worked for Defense Support Services [Employer] from December 17, 2007, until August 12, 2010.
2. The claimant was employed as a sheet metal mechanic on a full time basis at \$21.80 per hour.

---

<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §§802(e) and 874(b).

3. The claimant works in an area that has a high noise level, and OSHA requires hearing exams periodically.
4. The employer scheduled hearing exams for employees on July 21, 2010, but the nurse could not stay to complete all of them.
5. On July 27, 2010, the nurse returned to the employer's to complete the tests, but, in the meantime, Pocono Medical Center had established a new release form, which the claimant refused to sign because of its language.
6. The nurse could not proceed with the claimant's hearing test without a signed consent and authorization form.
7. The employer rescheduled the claimant to have the hearing exam on August 6, 2010 at Pocono Medical Center.
8. The claimant refused again to sign the release form.
9. The claimant told the employer that he felt the form was illegal and objected that information may be re-disclosed and no longer protected by law.
10. The employer sent legal counsel to establish with Pocono Medical Center an altered form solely for the claimant to sign.
11. The claimant again refused to sign the authorization form.
12. The employer could not accept a hearing test that the claimant had taken at an alternate location because the employer needs to have standardized tests for their [sic] several hundred employees.

13. The employer discharged the claimant because he refused to fulfill his obligation and complete the OSHA required audiometric exam.

14. The claimant received UC benefits to which he was not entitled.

Referee's Decision (Decision), November 5, 2010, Findings of Fact Nos. 1-14 at 1-2.

The Referee determined:

[T]he claimant's actions in refusing to sign an authorization form because of perceived illegalities not based in fact, and, thus, refusing to submit to the employer's required audiometric exam do rise to the level of willful misconduct, as contemplated in Section 402(e) of the Pennsylvania Unemployment Compensation Law. Therefore the claimant is ineligible under Section 402(e) of the Law.

....

The claimant received \$2,100 in UC benefits to which he was not entitled for the claim weeks ending August 21, 2010 through and including September 11, 2010 through no fault of his own, and, thus, as provided in Section 804(b) of the Pennsylvania Unemployment Compensation Law, the claimant is ineligible for benefits.

Decision at 2-4.

The Board affirmed.

Claimant argues<sup>2</sup> that he did not comply with Employer's rule because he believed such information could result in identity theft.<sup>3</sup>

Whether a Claimant's conduct rises to the level of willful misconduct is a question of law subject to this Court's review. Lee Hospital v. Unemployment

---

<sup>2</sup> This Court's review in an unemployment compensation case is limited to a determination of whether constitutional rights were violated, errors of law were committed, or findings of fact were not supported by substantial evidence. Lee Hospital v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994).

<sup>3</sup> Additionally, Claimant asserts that Employer failed to make a reasonable accommodation regarding the language in the authorization form and therefore his privacy and identity theft concerns established good cause.

Claimant cites Statler v. Unemployment Compensation Board of Review, 728 A.2d 1029, 1031-1032 (Pa. Cmwlth. 1999) as authority for what constitutes a reasonable accommodation. A review of the record reveals that in Claimant's appeal from the Referee's Decision to the Board, Claimant raised the following:

Reason #1 Employer was 20 minutes late demonstrating their [sic] irresponsibility[.]

#2 Employer states authorization form was changed solely for me. Pocono Medical states that authorization form was changed for a previous employee who sued due to Pocono Medical Center [sic] irresponsibility of personal information.

#3 Employer states they [sic] sent legal counsel solely on my behalf. (see Reason #2). Also See Referee's Decision Order page 2 line #10 [sic][.]

#4 I was told not to report to work on August 13, 2010 by Dan Hopkins (management) until I submit a hearing test. I did submit a hearing test which I was told to be unacceptable because it is handwritten. How many different versions of audiometric exam is [sic] there ? Is Pocono Medical Center OSHA certified?

Rule 1551 of the Rules of Appellate Procedure states that "[r]eview of quasijudicial orders shall be conducted by the court on the record made before the government unit. No question shall be heard or considered by the court which was not raised before the government unit..." Since Claimant failed to preserve the issue of whether Employer made a reasonable accommodation, it is waived.

Compensation Board of Review, 589 A.2d 297 (Pa. Cmwlth. 1991). Willful misconduct is defined as conduct that represents a wanton and willful disregard of an employer's interest, deliberate violation of rules, disregard of standards of behavior which an employer can rightfully expect from the employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer's interest or employee's duties and obligations. Frick v. Unemployment Compensation Board of Review, 375 A.2d 879 (Pa. Cmwlth. 1977). The employer bears the burden of proving that it discharged an employee for willful misconduct. City of Beaver Falls v. Unemployment Compensation Board of Review, 441 A.2d 510 (Pa. Cmwlth. 1982). The employer bears the burden of proving the existence of the work rule and its violation. Once the employer establishes that, the burden shifts to the Claimant to prove that the violation was for good cause. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985).

Here, Tara Petroski (Ms. Petroski), the human resources representative for Employer, testified that OSHA required that Employer provide audiometric testing to all employees exposed to "high noise." Ms. Petroski explained that Employer attempted to alleviate Claimant's concerns about the language in the authorization form.

As a result of a Disciplinary Review Board, the company made a reasonable accommodation for you in an attempt to return you to work. Our legal department, in collaboration with the Internal Audit and Compliance department at [Pocono Medical Center], modified the consent form used by their occupational medical facilities. The changes that were made addressed the language which described the possible re-disclosure of

the information. It is my understanding that these changes are still unacceptable to you.

In an attempt to resolve this issue on your own, you have gone to a physician that is not part of our medical monitoring program. Thus, the results of your audiometric exam are inconclusive and unacceptable. **It is a condition of employment to be in compliance with federal regulations; therefore, you are required to have this audiometric exam completed.** The company is allowing you 48 hours upon receipt of this letter to schedule the audiometric exam at a Pocono Occupation Medical facility.

Letter from Ms. Petroski to Claimant, September 24, 2010, at 1. (emphasis in original.)

Ms. Petroski stated that Claimant “was discharged due to the fact that he did not take an OSHA required audio exam” and that Claimant was aware that failure to comply with this requirement would result in termination. Notes of Testimony November 4, 2010, (N.T. 11/4/10), at 9.

Claimant testified that he would “be glad to submit to a hearing test, but I am not going to submit my information insecurely anywhere. I’m already having identity issues that I’m dealing with, and I certainly don’t want to add to it by giving permission to spread my personal information insecurely.” N.T. 11/4/10 at 13. Claimant further explained his identity theft concerns:

I have someone every year- - when I receive my tax bills, I receive one for Derrick Magedley [ph]... I have notified the tax people and the Post Office, and this person is untraceable. But I have found out that he or she is donating to my Social Security Number. I also have three fictitious addresses that I have no idea where they

came from... So I have been chasing these fictitious people for several years by notifying several authorities... But I need to just worry about trying to maintain my privacy... And watching these shows like 20/20 or 60 Minutes, where the Tanzanians gather personal identities and they sell them for a fee to someone who wants to buy- - I'm sure I could even buy some identities if I have an interest, but I don't, and I'm just trying to keep my life as it is, mine, not everyone's... I'm more than willing to participate in any tests, et cetera, that they want to apply, but it must be in a secure environment and kept secure, not released insecurely to a third party.

N.T. 11/4/10 at 14.

Employer established that OSHA required audiometric testing of all employees exposed to high noise levels. The Board determined that “[w]hile the Claimant clearly had subjective concerns... the employer’s directive to the claimant was reasonable and the claimant failed to [provide] justification or that his multiple, continual refusals to comply with the employer’s directive was reasonable.” Board’s Opinion, December 30, 2010, at 1. This Court agrees that Claimant did not have good cause to refuse to sign Pocono Medical Center’s authorization form.

Accordingly, the decision of the Board is affirmed.

---

BERNARD L. MCGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph P. Rodney,	:
	:
Petitioner	:
	:
v.	:
	:
Unemployment Compensation	:
Board of Review,	:
	:
Respondent	:

No. 392 C.D. 2011

**ORDER**

AND NOW, this 17th day of November, 2011, the Order of the Unemployment Compensation Board of Review in the above captioned matter is affirmed.

---

BERNARD L. MCGINLEY, Judge





termination. The claimant still refused, and the employer terminated his employment for willful misconduct. However, this court held that the claimant's reliance on his federal right to privacy was good cause for his refusal to complete the medical disclosure form. *Id.* at 410.

This case is no different. Defense Support Services (Employer) required Claimant to complete an OSHA hearing exam for his job. To do so, Claimant had to complete a release form. Claimant refused, relying on his federal right to privacy under the Health Insurance Portability and Accountability Act (HIPAA), 29 U.S.C. §1181. Employer then terminated Claimant for willful misconduct. However, under *Duquesne*, Claimant's reliance on his federal right to privacy was good cause for his refusal to complete the medical release form.

Accordingly, I would reverse.

---

ROCHELLE S. FRIEDMAN, Senior Judge