IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Walter F. Herzog, Petitioner	:	
	:	No. 437 C.D. 2010
v.	:	
	:	Submitted: July 16, 2010
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: October 14, 2010

Walter F. Herzog (Claimant) appeals from the February 17, 2010, order of the Unemployment Compensation Board of Review (Board), which denied Claimant benefits pursuant to section 402(e) of the Unemployment Compensation Law (Law).[1] We affirm.

Claimant worked for Encks Custom Catering (Employer) as a caterer. (Finding of Fact No. 1.) On August 24, 2009, Ken Enck, the owner of the catering company, directed his staff to make sure that everything went smoothly on an upcoming catering job. (Finding of Fact No. 2.) In response to Enck's remarks, Claimant said, "if the a..hole stays the f… away, everything will go smoothly." (Finding of Fact No. 3.) Enck asked if Claimant was referring to him, and Claimant

[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 employee is not eligible for benefits if his unemployment is due to his discharge for willful misconduct.

responded in the affirmative. (Finding of Fact No. 4.) Although profanity is occasionally spoken in Employer's workplace, such language is not used between Enck and his employees. (Board's Decision at 1.) Enck terminated Claimant's employment because of the offensive remarks. (Finding of Fact No. 5.)

The service center denied Claimant's application for benefits pursuant to section 402(e) of the Law. Claimant appealed, and the referee conducted a hearing at which Employer and Claimant presented evidence.

At the hearing, Enck testified that, after informing his employees that he wanted things to go well at a catering job, Claimant made this statement under his breath:

> [H]e said if the a--hole stays the f---- away, things will go right. That's exactly his words to me or that I overheard him. And I said are you talking to me and he said well, yeah, of course.

(Notes of Testimony (N.T.) at 6.) Enck stated that the vulgar statement was the reason that Claimant was terminated. (N.T. at 7.)

Claimant testified that he did not use profanity, but rather stated to a co-worker that "things will go smooth if Mr. Enck is not at the job site." (N.T. at 11.) Claimant stated that he had a history of conflicts with Enck, (N.T. at 12), and presented the testimony of two of his co-workers on that issue.

The referee found as fact that Claimant directed profanity at Enck and determined that Claimant engaged in disqualifying willful misconduct. The Board affirmed and adopted the referee's findings of fact and conclusions of law.

On appeal to this Court,[2] Claimant contends that the Board erred by accepting Employer's testimony as credible and by assuming that Claimant's testimony more or less corroborated Employer's testimony concerning the vulgar remarks. Claimant also contends that the Board did not take into account that he was unjustly terminated and that Employer only terminated him to avoid a layoff for lack of work.[3]

Although the Law does not define "willful misconduct," our courts have defined that term as including: (1) a wanton or 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 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.[4] Moran v. Unemployment Compensation Board of

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[2] Our scope of review is limited to determining whether constitutional rights were violated, whether errors of law were committed, or whether necessary findings of fact are supported by substantial evidence. Schneider v. Unemployment Compensation Board of Review, ___ A.2d ____ (Pa. Cmwlth., No. 2238 C.D. 2009, filed June 18, 2010).

[3] Relying on the Superior Court's opinion in Radakovich v. Radakovich, 846 A.2d 709 (Pa. Super. 2004), the Board argues that Claimant waived all of his contentions by failing to cite any legal authority to support them. In Radakovich, a party raised a complicated legal argument challenging the power of a trial court to reverse a previous decision, but provided no legal authority or discussion to support that argument. The Superior Court held that the argument was not sufficiently developed for appellate review.

In this case, we are not faced with undeveloped arguments involving complex questions of law. Rather, Claimant argues the facts and challenges the validity of the Board's findings. Radakovich did not hold that every time an appellant fails to cite legal authority the argument is waived; nor does it preclude an argument based solely on facts. Therefore, we conclude that Claimant did not waive all of his issues.

[4] The employer bears the burden of establishing that the claimant was discharged for willful misconduct, Roberts v. Unemployment Compensation Board of Review, 977 A.2d 12 (Pa. Cmwlth. 2009), and the question of whether a claimant's conduct rises to the level of willful misconduct is

(Footnote continued on next page…)

Review, 973 A.2d 1024 (Pa. Cmwlth. 2009). This Court has held that abusive language directed at a supervisor evidences a disregard of the standard of behavior that an employer expects of an employee, Allen v. Unemployment Compensation Board of Review, 638 A.2d 448 (Pa. Cmwlth. 1994), and even a single instance of vulgarity addressed to and unprovoked by a supervisor may support a finding of willful misconduct. Id. Abusive language is a species of insubordination, and we examine the language used by the claimant to determine whether it is, in modern parlance, abusive, vulgar, or offensive. Cundiff v. Unemployment Compensation Board of Review, 489 A.2d 948 (Pa. Cmwlth. 1985). If the language is found to fit within one of these categories, it constitutes willful misconduct unless provoked or de minimis in nature. Id.

In this case, the Board found as fact that, on August 24, 2009, Enck made a benign statement to his employees to make certain that things went well on a significant catering job. Claimant then made a vulgar comment regarding Enck and Claimant admitted that he directed the comment to Enck. These findings are amply supported by Enck's credible testimony. Moreover, the record reveals that Claimant's statement was not provoked, was not de minimis in nature, and that such profanity is not used between an Employer and its employees. Therefore, we conclude that Employer proved that Claimant engaged in disqualifying willful misconduct. Allen; Cundiff.

However, Claimant contends that the Board erred by accepting Enck's testimony. Relying on his own testimony, Claimant asserts that he did not use

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(continued…)

one of law subject to our review. Andrews v. Unemployment Compensation Board of Review, 633 A.2d 1261 (Pa. Cmwlth. 1993).

profanity and said nothing to Enck However, the Board is the ultimate finder of fact, and questions of credibility and evidentiary weight are matters for the Board and not this Court. Elser v. Unemployment Compensation Board of Review, 967 A.2d 1064 (Pa. Cmwlth. 2009); Stringent v. Unemployment Compensation Board of Review, 703 A.2d 1084 (Pa. Cmwlth. 1997). Therefore, the Board's decision to accept Employer's evidence as credible is conclusive on appeal. Dehus v. Unemployment Compensation Board of Review, 545 A.2d 434 (Pa. Cmwlth. 1988).

Claimant also contends that the Board made the erroneous assumption that Claimant's testimony "more or less" corroborated Employer's testimony regarding the remarks. We disagree. The referee did observe in the "reasoning" section of the decision that, "[a]lthough the claimant initially denied the remarks, his later testimony more or less corroborated them." (Referee's Decision at 2.) However, this is not an assumption, but rather an interpretation of the evidence presented at the hearing. Reading the record in the light most favorable to Employer, the party in whose favor the Board found, we cannot say the Board's interpretation of the testimony was erroneous.

Claimant also contends that the Board failed to take into account that his employment was unjustly terminated and that Employer only terminated him to avoid a layoff for lack of work. However, Claimant's contentions, in essence, invite us to exceed our scope of review and assume the role of fact finder, which, of course, we may not do. Furthermore, Claimant did not present any evidence to support his claim that Employer terminated him to evade a furlough for lack of work, and the issue here is whether Claimant engaged in willful misconduct and not whether his discharge was unjust.

Accordingly, the Board's order is affirmed.

PATRICIA A. McCULLOUGH, Judge

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ORDER

AND NOW, this 14th day of October, 2010, the February 17, 2010, order of the Unemployment Compensation Board of Review is hereby AFFIRMED.

PATRICIA A. McCULLOUGH, Judge