

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

James Angeleri,	:
Petitioner	:
	:
v.	: No. 442 C.D. 2012
	: Submitted: September 7, 2012
Unemployment Compensation	:
Board of Review,	:
Respondent	:

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
          HONORABLE P. KEVIN BROBSON, Judge  
          HONORABLE JAMES GARDNER COLINS, Senior Judge

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
SENIOR JUDGE COLINS**

**FILED: October 9, 2012**

James Angeleri (Claimant) petitions for review of the February 28, 2012 order of the Unemployment Compensation Board of Review (Board), affirming and adopting the decision of the referee to deny Claimant unemployment compensation benefits, except as to the finding of fact in paragraph 15 and any reasoning based thereon. The Board concluded that Claimant was ineligible for benefits because his discharge from employment by Giant Eagle - Edgewood (Employer) was due to violations of Employer's food consumption policy that amounted to willful misconduct under Section 402(e) of the Unemployment Compensation Law (Law).<sup>1</sup> We affirm.

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<sup>1</sup> 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 shall be ineligible for compensation for any **(Footnote continued on next page...)**

Following discharge from his employment, Claimant filed for unemployment compensation benefits with the Duquesne Unemployment Compensation Service Center and on November 7, 2011, Claimant's initial application was denied due to a finding of willful misconduct, making him ineligible to receive benefits under the Law. (Record Item (R. Item) 5, Notice of Determination.) Claimant appealed and a hearing was held before a referee on December 5, 2011. (R. Item 9, Referee Hearing Transcript of Testimony (T.T.)) The referee, in a December 7, 2011 decision and order, concluded Claimant was ineligible for unemployment compensation benefits under Section 402(e) of the Law, because Employer had carried its burden of demonstrating that Claimant was aware of its food storage and consumption policy and had violated the policy, and because Claimant had failed to demonstrate that the policy was not consistently enforced or that he had good cause for the violation. (R. Item 10, Referee's Decision and Order, Reasoning.)

Claimant timely appealed the referee's order to the Board. By February 28, 2012 order, the Board concluded that the referee's decision that Claimant was ineligible to receive unemployment compensation under the Law was proper, but struck the finding of fact contained within paragraph 15 and the discussion within the referee's reasoning based on the paragraph 15 finding. (R. Item 15, Board's Order.) Absent the stricken sections, the Board adopted the referee's findings and conclusions, and affirmed the referee's decision. (*Id.*) Claimant filed a request for reconsideration, which the Board denied by March 23,

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**(continued...)**

week in which his or her unemployment is due to discharge for willful misconduct connected to his or her work. 43 P.S. § 802(e).

2012 order. (R. Item 17, Board’s Ruling on Request for Reconsideration.) Claimant filed a timely appeal with this Court.<sup>2</sup>

Claimant was employed from March 20, 2007 until October 19, 2011, as a part-time cook. (R. Item 10, Referee’s Decision and Order, Finding of Fact (F.F.) ¶1; R. Item 9, T.T. at 5-6.) On October 19, 2011, Employer’s Senior Store Leader (Manager) entered the “kitchen prep area” where Claimant was working and observed Claimant take a bite from a sandwich. (R. Item 10, Referee’s Decision and Order, F.F. ¶10; R. Item 9, T.T. at 6-7.) Employer, in compliance with county health department regulations, maintained a policy against bringing into, storing, or consuming outside food in any food preparation, back rooms, or storage areas. (R. Item 10, Referee’s Decision and Order, F.F. ¶¶2-5.) Employer provided an employee handbook that alerted new employees to its policy, posted signs to remind current employees of its policy, and set aside a break room where employees could consume food in compliance with Employer’s policy. (R. Item 9, Referee Hearing Exhibits (H. E.) 1-6; R. Item 10, Referee’s Decision and Order, F.F. ¶9.)

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<sup>2</sup> In unemployment compensation appeals, this Court’s scope of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of facts are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704; *Maskerines v. Unemployment Comp. Bd. of Review*, 13 A.3d 553, 555 n.3 (Pa. Cmwlth. 2011). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *On Line Inc. v. Unemployment Comp. Bd. of Review*, 941 A.2d 786, 788 n.7 (Pa. Cmwlth. 2008). In unemployment compensation proceedings, the Board is empowered to resolve conflicts in and weigh the evidence, including determinations as to the credibility of witnesses; when supported by substantial evidence, the Board is the ultimate finder of fact, making its findings binding and conclusive on appeal. *Id.*

Prior to arriving at work, Claimant had been feeling ill with gastrointestinal distress and during the course of his job functions he had begun to feel light headed. (R. Item 10, Referee's Decision and Order, F.F. ¶¶6-8, 13; R. Item 9, T.T. at 7, 10, 22.) Claimant believed that his sudden light headedness was due to a need for sustenance and for this reason he consumed a portion of his sandwich in the kitchen prep area. (R. Item 10, Referee's Decision and Order, F.F. ¶¶7-8.) Realizing that Employer's Manager had witnessed his sandwich consumption, Claimant questioned, "Am I fired?" to which Employer's Manager responded that Claimant had to punch out and was on immediate suspension. (R. Item 10, Referee's Decision and Order, F.F. ¶¶11-12; R. Item 9, T.T. at 7, 22.) Claimant then left the kitchen prep area and proceeded to the men's room, appearing to Employer's Manager as though he was in acute gastrointestinal distress and was going to be ill. (R. Item 10, Referee's Decision and Order, F.F. ¶13; R. Item 9, T.T. at 7, 10, 22.) Claimant later returned from the men's room, collected his belongings, including "[his] little brown bag from my lunch out of my locker," and left the premises. (R. Item 10, Referee's Decision and Order, F.F. ¶13; R. Item 9, T.T. at 22.)

Employer's Manager immediately reported Claimant's food consumption in a prohibited area to Employer's Human Resources Director and on October 21, 2011, a letter was mailed to Claimant at the behest of the Human Resources Director advising Claimant that his indefinite suspension was being converted to a discharge from employment for eating in an unauthorized area in violation of Employer's policy. (R. Item 10, Referee's Decision and Order, F.F. ¶14, 16; R. Item 9, N.T. 16.)

Claimant argues on appeal that (1) the Board erred in concluding that Employer satisfied the burden of proof required to demonstrate the existence of a workplace policy, (2) the Board erred in concluding that the Claimant's conduct amounted to a deliberate violation of Employer's policy, and (3) the Board erred in concluding that the workplace policy was uniformly enforced.

Section 402(e) of the Law does not define "willful misconduct" but it has been judicially defined as the: (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). In unemployment compensation proceedings where willful misconduct is alleged for violation of a work rule, the employer bears the initial burden of proof, and must demonstrate by substantial evidence the existence of the work rule, the reasonableness of the rule, and the employee's violation of the rule. *Guthrie v. Unemployment Compensation Board of Review*, 738 A.2d 518, 522 (Pa. Cmwlth. 1999).

Before the referee, Employer produced both its employee handbook outlining the food consumption policy and a form signed by Claimant in which he acknowledged that he read, understood, and did not need clarification on the policies outlined in Employer's handbook. (R. Item 9, H.E. 1-4.) Employer also produced a copy of a sign posted to remind employees of the policy, which Claimant recalled in his testimony seeing posted on the hot foods kitchen door. (R. Item 9, H.E. 6, N.T. at 28.) Employer's Human Resources Manager testified that the food consumption policy was not only Employer's, but reflected compliance

with county health department regulations. (R. Item 9, N.T. at 15.) Employer's Manager and Claimant both testified that the Manager witnessed Claimant consuming a portion of a sandwich in the kitchen food prep area. (R. Item 9, N.T. at 7, 22.) We agree with the Board that Employer produced the evidence necessary to support the conclusion that the food consumption policy existed, the policy was reasonable and required by county health regulations, and that Claimant violated the policy.

If, as here, an employer is able to satisfy its initial burden of proof, the burden then shifts to the claimant to demonstrate that there was good cause for the violation by demonstrating that uneven enforcement has rendered a policy unreasonable or that the particular circumstances at issue justified the violation. *Chapman v. Unemployment Comp. Bd. of Review*, 20 A.3d 603, 607 (Pa. Cmwlth. 2011); *Arbster v. Unemployment Compensation Board of Review*, 690 A.2d 805, 809 (Pa. Cmwlth. 1997); *Rivera v. Unemployment Compensation Board of Review*, 526 A.2d 1253, 1255-1256 (Pa. Cmwlth. 1987).

Claimant testified that he had been ill, was experiencing gastrointestinal distress, and suddenly became light headed, which prompted him to take a bite from his sandwich to steady himself. (R. Item 10, Referee's Decision and Order, F.F. ¶¶6-12.) However, prior to being observed consuming a portion of his sandwich, Claimant did not inform his employer that he was ill or ask for an accommodation. *Compare, Jimenez v. Unemployment Compensation Board of Review*, 417 A.2d 870, 872 (Pa. Cmwlth. 1980); *Kindrew v. Unemployment Compensation Board of Review*, 338 A.2d 801, 802 (Pa. Cmwlth. 1978). In his testimony, Claimant specifically stated that he carried the sandwich from home and brought it with him into the kitchen prep area. (R. Item 9, N.T. at 22, 23.)

Claimant's testimony demonstrates that his actions were intentional and in deliberate violation of Employer's policy. Furthermore, Claimant failed to produce any medical evidence to substantiate his actions or establish a nexus between his violation of Employer's food consumption policy and his distress. *Thompson v. Unemployment Compensation Board of Review*, 723 A.2d 743, 744 (Pa. Cmwlth. 1999) Accordingly, Claimant has failed to prove that under the circumstances, his violation of Employer's policy was justified.<sup>3</sup>

Claimant also testified that consuming food in the kitchen prep area was common, as the chefs normally tasted the food to assure its quality, and that Employer's supposed policy was not enforced. (R. Item 9, N.T. at 20, 21, 25.) However, the evidence offered by Claimant conflicts with his assertions. First, Claimant testified that immediately upon being viewed by Employer's manager in the act of consumption, he asked, "Am I fired?" (R. Item 9, T.T. at 7, 22.) Claimant likewise testified that he never reported co-workers for consuming food in violation of Employer's policy because, "I'm not a rat." (R. Item 9, T.T. at 30.) Second, Claimant did not produce a single witness to corroborate his assertions that Employer's policy was not enforced and that consuming food within the kitchen prep area was common practice. Finally, the Board specifically stated that "employer's store manager credibly testified that he uniformly and consistently

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<sup>3</sup> We note that in addition to the other issues raised in Claimants brief, Claimant also alleges that the Board abused its discretion by capriciously disregarding Claimant's undisputed testimony concerning his illness as good cause for his conduct. (Claimant's Brief at 2, 10.); *see Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board*, 571 Pa. 189, 812 A.2d 478 (2002). This argument is meritless. The findings and conclusions adopted by the Board unambiguously demonstrate that the Board considered and rejected Claimant's illness as good cause for his conduct. (R. Item 10, Referee, F.F. ¶6, 7, Reasoning ("The Claimant did not tell his supervisor that he was ill or ask to be allowed to go to the break room to eat something for his light headedness."))

enforced this rule.” (R. Item 15, Board’s Order.) Credibility determinations are within the sound discretion of the Board and our appellate jurisdiction does not include the authority to re-evaluate such determinations. *Peak v. Unemployment Compensation Board of Review*, 509 Pa. 267, 277, 501 A.2d 1383, 1388 (1985). Claimant’s testimony to the contrary was not credited and he produced no other evidence to satisfy the burden of proof required to demonstrate that the policy was rendered unreasonable due to inconsistent enforcement. As a result, while Employer satisfied its burden of demonstrating willful misconduct on the part of Claimant for violation of its policy, Claimant failed to meet his burden under the Law.

For the aforementioned reasons, the Board is affirmed.

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**JAMES GARDNER COLINS, Senior Judge**



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**ORDER**

AND NOW, this 9<sup>th</sup> day of October, 2012, the final order of the Unemployment Compensation Board of Review in the above-captioned matter is AFFIRMED.

**JAMES GARDNER COLINS, Senior Judge**