IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Alvin A. Jackson,	:	
Petitioner	:	
	:	
v.	:	No. 457 C.D. 2009
	:	Submitted: October 30, 2009
Unemployment Compensation Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: January 13, 2010

Alvin A. Jackson (Claimant) petitions for review from an order of the Unemployment Compensation Board of Review (Board) which affirmed the decision of a referee denying Claimant unemployment compensation benefits due to his willful misconduct under Section 402(e) of the Unemployment Compensation Law (Law).[1] We affirm.

[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 shall be ineligible for compensation for any week:

> (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….

Claimant was discharged from his employment with Temple East – Northeastern Hospital (Employer) on July 31, 2008 and he thereafter applied for benefits. Claimant's application was granted by the job center. Employer appealed and a hearing was conducted before a referee. The referee issued a determination reversing the job center and denying Claimant benefits due to his willful misconduct. Claimant appealed to the Board which made the following findings:

> 1. The claimant was last employed as an environmental service aide by Temple East-Northeastern Hospital from November 2, 1999 to July 31, 2008. His final rate of pay was $14.91 per hour.
>
> 2. The employer's policy states that conduct unbecoming an employee includes viewing, displaying, distributing, or any other activity involving pornography and sexual, racial, gender, or other forms of harassment of employees, patients, family members or others. Such infractions are serious and may warrant immediate termination of employment.
>
> 3. The claimant was aware of the employer's company policy.
>
> 4. On June 25, 2007, the claimant was reinstated from a previous termination for behavior which included having inappropriate discussions of a sexual nature with his coworkers and being out of his work area.
>
> 5. The claimant was rehired under a last chance agreement. The claimant knew that failure to exhibit and maintain the expected standard of behavior and or performance level would result in his termination.

6. The claimant admitted that it was known amongst his coworkers that he was homosexual.

7. On July 13, 2008, the claimant was told to clean the patients' rooms on the fifth floor.

8. While in the basement of the employer's facility, the claimant encountered one of his coworkers, Andrew Simmons.

9. The claimant approached Mr. Simmons and asked him whether he wanted "to come join his team."

10. Mr. Simmons told the claimant that he was "not gay."

11. The claimant proceeded to make Mr. Simmons uncomfortable and laughed as Mr. Simmons attempted to walk away.

12. Mr. Simmons attempted to remove himself from the situation by getting on an elevator. However, the claimant followed him.

13. Mr. Simmons told the claimant to leave him alone. He stated that he was 37 and not gay.

14. The claimant responded by saying "I'm 46 so what does that means[sic]."

15, Approximately 30 minutes later, the claimant and Mr. Simmons again encountered each other in the employer's laundry room. The claimant yelled for Mr. Simmons but Mr. Simmons ignored the claimant and kept walking.

16. On or about July 15, 2008, Mr. Simmons informed the supervisor about the incident.

17. The employer conducted an investigation of the incident that transpired between the claimant and Mr. Simmons on July 13, 2008.

> 18. On July 31, 2008, the claimant was discharged for conduct unbecoming an employee by making inappropriate comments of a sexual nature to another employee.

(Board's decision at p. 1, 2.)

Based on the above, the Board determined that Employer has a policy which requires immediate termination for anyone who sexually harasses another employee. Claimant knew or should have known of the policy. In fact, Claimant was on a last chance agreement for similar conduct and knew that further violation of the policy would result in his termination. Based on the credible testimony of Claimant's co-worker, the Board determined that Employer met its burden of proving that Claimant made inappropriate sexual comments on July 13, 2008, in violation of Employer's policy. The Board further determined that Claimant failed to establish good cause for his conduct, inasmuch as it concluded that Claimant's testimony that he did not make the comments to his co-worker was not credible. This appeal followed.[2]

Initially, Claimant argues that it was error to allow, over his objection, the introduction of a record pertaining to an incident in 2007, wherein Claimant was disciplined for violating Employer's sexual harassment policy and ultimately returned to his position pursuant to a last chance agreement. Claimant argues that admission of this evidence is in violation of Pennsylvania Rules of Evidence 403 which states:

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[2] This court's review is limited to determining whether constitutional rights were violated, whether an error of law was committed and whether findings of fact are supported by substantial evidence. Guthrie v. Unemployment Compensation Board of Review, 738 A.2d 518 (Pa. Cmwlth. 1999).

> Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

In rejecting Claimant's argument, we initially note that in accordance with the Administrative Agency Law, 2 Pa.C.S. § 505, administrative proceedings are not bound by the technical rules of evidence. Additionally, 2 Pa.C.S. § 505 provides that "all relevant evidence of probative value may be received." Here, Claimant's history of having previously violated Employer's sexual harassment policy and having been returned to work under a last chance agreement, has probative value in that it establishes that Claimant was aware of Employer's policy, had in fact been punished for violating it and knew that similar conduct was inappropriate and would lead to his termination. We also observe that the employment history of a claimant is important for purposes of establishing prior warnings or a claimant's understanding of the employer's expectations. Hawkins v. Unemployment Compensation Board of Review, 472 A.2d 1191 (Pa. Cmwlth. 1984).

Next, Claimant argues that Employer failed to meet its burden of proving that Claimant engaged in willful misconduct. Where, as here, a claimant has been discharged for a work rule violation, the employer has the burden of proving the existence of the rule and that the claimant violated it. Caterpillar, Inc. v. Unemployment Compensation Board of Review, 550 Pa. 115, 123, 703 A.2d 452, 456 (1997). Once the employer establishes those elements, 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).

Here, Employer presented its work rule which provides that employees who engage in harassment, including sexual harassment, are subject to termination. Claimant was aware of the policy and he had previously been disciplined for violating it. The fact that Claimant violated Employer's policy is supported by the testimony of Claimant's co-worker Mr. Simmons, which testimony was credited by the Board. According to Mr. Simmons, Claimant approached him and asked him to "come join his team."[3] Mr. Simmons responded that he was not gay. Claimant laughed at Mr. Simmons and proceeded to make him feel uncomfortable. Mr. Simmons attempted to remove himself from the situation by getting on an elevator. Claimant, however, followed him onto the elevator. Mr. Simmons asked Claimant to leave him alone, recited his age and again said that he was not gay. Claimant recited his age and said "so what does that mean." Then, a half-hour later, Claimant encountered Mr. Simmons and yelled for him. Mr. Simmons ignored Claimant and kept walking.

Here, Employer's policy prohibited sexual harassment. Pursuant to the last chance agreement, Claimant was specifically prohibited from discussing his or any other employees' sexual orientation. Contrary to Employer's policy, Claimant engaged in sexual harassment when he asked his co-worker if he wanted to "join his team" and continued to follow him after the co-worker told him that he wasn't gay and asked that he be left alone.

[3] According to Claimant it was well known by his co-workers that he was homosexual.

Claimant testified that he did not make the comments to his co-worker. The Board, however, did not find Claimant's testimony credible. It is the Board who determines the credibility of a witness and the weight to be accorded to the testimony. Bowman v. Unemployment Compensation Board of Review, 410 A.2d 422 (Pa. Cmwlth. 1980).

Finally, Claimant maintains that this case should be remanded for the taking of additional evidence. Specifically, Claimant states that subsequent to the hearing and appeal, Claimant and "Employer entered into a settlement agreement regarding his employment." (Claimant's brief at p. 8.) The agreement was not presented because it was not executed until July 9, 2009, well after the referee's and the Board's determination.

A remand is not proper, however, as "[a]n employer and employee … cannot determine the employee's entitlement to benefits by subsequent agreement …." Sill-Hopkins v. Unemployment Compensation Board of Review, 563 A.2d 1288, 1289 (Pa. Cmwlth. 1989). "The fact that claimant was reinstated, by agreement between the parties, is not determinative of the issue of claimant's eligibility for benefits during his period of separation under the law." Nesmith v. Unemployment Compensation Board of Review, 402 A.2d 1132, 1133 (Pa. Cmwlth. 1979). A claimant's eligibility for benefits is to be determined by the referee and Board. Id. As such, a remand is not warranted.

In accordance with the above, the decision of the Board is affirmed.

JIM FLAHERTY, Senior Judge

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O R D E R

Now, January 13, 2010, the order of the Unemployment Compensation Board of Review, in the above-captioned matter, is affirmed.

JIM FLAHERTY, Senior Judge