

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brian Scott Heisey,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 605 C.D. 2010
	:	
	:	Submitted: August 13, 2010
	:	
Unemployment Compensation Board	:	
of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON

FILED: October 15, 2010

Petitioner Brian Scott Heisey (Claimant) petitions *pro se* for review of an order of the Unemployment Compensation Board of Review (Board). The Board affirmed the Unemployment Compensation Referee's (Referee) decision denying Claimant unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law)¹ based on willful misconduct. For the reasons set forth below, we affirm.

Claimant applied for unemployment compensation benefits after being discharged from his employment as a full-time sales consultant with Heritage Group

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802 (e).

Associates (Employer). The Lancaster Unemployment Compensation Service Center (Service Center) issued a determination, finding Claimant ineligible for unemployment compensation benefits under Section 402(e) of the Law. Claimant appealed the Service Center's determination, and an evidentiary hearing was held before the Referee.

Employer presented the testimony of John Broderick (President of Heritage Group Associates), William Winter (sales manager), Dominique Mary (receptionist), and Douglas Sheetz (project coordinator) in support of its position. The sales manager testified that Claimant became aggravated after he informed Claimant of a reduction in his draw against commission and asked him to sign a new compensation agreement. (Certified Record (C.R.), Item 12.) The sales manager testified that while he was attempting to make Claimant a copy of the newly-executed compensation agreement, Claimant pushed him away from the copier, grabbed the agreement, and crumbled it up. (*Id.*) The receptionist testified that she observed Claimant come out of the sales manager's office, screaming, "He better fire me, f-ing fire me, because I'll make it horrible around here." (*Id.*) The receptionist testified that she told Claimant to calm down, and he told her to "F off." (*Id.*) The receptionist testified that she observed Claimant shove the sales manager while he was attempting to make a copy of the new agreement. (*Id.*) The project coordinator testified that the receptionist called for him to come to the

lobby area, where he saw Claimant push the sales manager at the copy machine. (C.R., Item 14.) The project coordinator testified that he heard Claimant say, “Lay me the [expletive] off so I can draw unemployment.” (*Id.*) The project coordinator testified that he heard Claimant say, “How in the [expletive] am I going to live on \$10 an hour?” (*Id.*) The President of Heritage Group Associates testified that he discharged Claimant because of Claimant’s actions, the way he was yelling, and his language. (*Id.*)

Claimant presented the testimony of his fiancée, Judy Montgomery, who testified that Claimant called her from his office on his last day of work for Employer. (*Id.*) Claimant’s fiancée testified that she heard the whole conversation between the sales manager and Claimant on the phone. (*Id.*) Claimant’s fiancée testified that during the conversation she never heard any curse words, threatening words, or abusive words used by any party. (*Id.*) Claimant’s fiancée testified that Claimant told her that the sales manager shoved Claimant’s arm out of the way at the copier and then Claimant grabbed the copy and crumbled up the original. (*Id.*)

Following the hearing, the Referee affirmed the Service Center’s determination denying unemployment compensation benefits pursuant to Section 402(e) of the Law. The Referee resolved any conflicts in the testimony, in relevant part, in favor of Employer. (C.R., Item 15.) The Referee concluded that Claimant’s

actions violated the standard of behavior that an employer has the right to expect of an employee. (*Id.*) Claimant subsequently appealed to the Board.

The facts, as found by the Board, are as follows:

1. The claimant was last employed as a full-time sales consultant by Heritage Group Associates from March 2003 at a final rate of \$800 per week draw against commission. His last day of work was October 8, 2009.
2. The employer adjusts an employee's draw rate quarterly or bi-annually, depending on the employee's sales.
3. During the course of the claimant's employment, his draw against commission changed 6 times based on settlements.
4. As of September 24, 2009, the claimant had a negative balance of \$38,392.23 draw against commission.
5. The president decided to reduce the claimant's draw against commission from \$800 to \$400 and told the sales manager to have the claimant sign the new agreement.
6. On October 8, 2009, the sales manager called the claimant into his office and told him about the change.
7. The claimant became very agitated, raised his voice, and said he could not live on that amount. The claimant refused to sign the agreement and left the office. The claimant returned a few minutes later and signed it.
8. The claimant continued to be agitated out in the lobby area, yelling about suing the president and the company and making everyone's lives

miserable. The claimant was using profanity. He told the receptionist to “shut up,” when she told him to calm down.

9. The claimant later returned to the sales manager’s office and demanded the agreement back. The sales manager said he could not give him the original document, but would make him a copy.
10. The sales manager went with the document to the photocopier in the lobby area to make the copy.
11. As the document was in the copier, the claimant, still agitated, tried to grab it. The sales manager tried to block the claimant from grabbing the document and the claimant shoved the sales manager out of the way, grabbed the document, and crumbled it up.
12. The receptionist and project manager witnessed the event and the project manager stepped in to stop things.
13. When the president arrived, he and the claimant argued about the change to the draw. When the president learned that the claimant had shoved the sales manager, he terminated the claimant’s employment.
14. The employer terminated the claimant’s employment for his behavior on October 8, 2009.

(C.R.), Item 21.)

Based on these facts, the Board affirmed the Referee’s decision, holding that Claimant was ineligible for unemployment compensation benefits under Section 402(e) of the Law. The Board determined that Claimant’s behavior of yelling, threatening, using profanity, and shoving the sales manager, was clearly inappropriate and rose to the level of willful misconduct. Claimant then petitioned this Court for review, and Employer intervened in this matter.

On appeal,² Claimant essentially argues that there is not substantial evidence in the record to support the Board's findings regarding his actions on the day he was fired, because the Board erred in resolving conflicting testimony in favor of Employer. Claimant also argues that the Board erred in concluding that his conduct rose to the level of willful misconduct under Section 402(e) of the Law, or, alternatively, the Board erred in failing to conclude that he had good cause for his actions.³

First, we will address whether the Board's findings of fact are supported by substantial evidence. Substantial evidence is defined as relevant evidence upon which a reasonable mind could base a conclusion. *Johnson v. Unemployment Comp. Bd. of Review*, 502 A.2d 738, 740 (Pa. Cmwlth. 1986). In determining whether there is substantial evidence to support the Board's findings, this Court must examine the testimony in the light most favorable to the prevailing party, giving that party the benefit of any inferences that can logically and reasonably be drawn from the evidence. (*Id.*) A determination as to whether substantial evidence exists to support a finding of fact can only be made upon examination of the record as a whole. *Taylor v. Unemployment Comp. Bd. of Review*, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). The Board's findings of fact are conclusive on appeal only so long as the record taken

² This Court's standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704. Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. *Hercules, Inc. v. Unemployment Comp. Bd. of Review*, 604 A.2d 1159 (Pa. Cmwlth. 1992).

³ We have paraphrased Claimant's issues on appeal based upon our review of Claimant's petition for review, statement of questions involved, and arguments contained in his brief. If issues remain relating to monies Employer allegedly still owes Claimant, those issues are more appropriately addressed in a different forum, as this Court lacks jurisdiction to resolve those issues in the context of an appeal from the denial of unemployment compensation benefits.

as a whole contains substantial evidence to support them. *Penflex, Inc. v. Bryson*, 506 Pa. 274, 286, 485 A.2d 359, 365 (1984).

Claimant contends that Employer's witnesses' testimony conflicted with the testimony of both Claimant and his witness as to the events on Claimant's last day of employment. Further, Claimant argues that the testimony of the President of Heritage Group Associates was not credible because the Department of Labor and Industry previously cited him for not paying employees overtime. In an unemployment case, the Board is the ultimate fact finder and is, therefore, entitled to make its own determinations as to witness credibility and evidentiary weight. *Peak v. Unemployment Comp. Bd. of Review*, 509 Pa. 267, 272, 501 A.2d 1383, 1386 (1985). The Board is also empowered to resolve conflicts in the evidence. *DeRiggi v. Unemployment Comp. Bd. of Review*, 856 A.2d 253, 255 (Pa. Cmwlth. 2004). Here, the Board resolved any conflicts in the testimony in favor of Employer and rejected the testimony of both Claimant and his witness as not credible. (C.R., Item 21.) The testimony of Employer's witnesses, as summarized above, supports the Board's findings that Claimant's agitated behavior was inappropriate as indicated by his yelling, using profanity, and shoving the sales manager. (*Id.*) When viewed in a light most favorable to Employer, our review of the record in this case demonstrates that there is substantial evidence to support the Board's findings.

We address, next, Claimant's contention that the Board erred in concluding that his conduct rose to the level of willful misconduct under Section 402(e) of the Law. Section 402(e) of the Law provides, in part, that "[a]n employe shall be ineligible for compensation for any week . . . [i]n which his unemployment is due to his discharge or temporary suspension from work for willful misconduct

connected with his work.” 43 P.S. § 802(e). The term “willful misconduct” is not defined by statute. The courts have defined “willful misconduct” as follows:

- (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 Comp. Bd. of Review, 573 Pa. 594, 600, 827 A.2d 422, 425 (2003). Whether an employee’s conduct constituted willful misconduct is a matter of law subject to this Court’s review. *Walsh v. Unemployment Comp. Bd. of Review*, 943 A.2d 363, 368 (Pa. Cmwlth. 2008). This court has held that verbal and physical fighting rises to the level of willful misconduct because it constitutes a disregard of standards of behavior which an employer has the right to expect from an employee. *Jones v. Unemployment Comp. Bd. of Review*, 460 A.2d 412, 414 (Pa. Cmwlth. 1983). While the employer bears the burden of proving that a claimant’s behavior constitutes willful misconduct, it is the claimant who bears the burden of proving good cause for his actions. *Walsh*, 943 A.2d at 369.

Claimant argues that his actions did not rise to the level of willful misconduct because, contrary to the Board’s findings, he did not use profanity, yell, or threaten anyone. The Board found that Claimant became very agitated after the sales manager informed Claimant of the change in the amount of his draw against commission and asked Claimant to sign the new agreement. (C.R., Item 21.) The Board found Claimant left the sales manager’s office after signing the new agreement and went into Employer’s lobby, where he used profanity, yelled, and made threats. (*Id.*) The Board found that Claimant then returned to the sales manager’s office and

asked for the signed agreement back. (*Id.*) The Board found that when the sales manager went to the photocopier to make Claimant a copy of the new agreement, Claimant shoved the sales manager out of the way and grabbed the document. (*Id.*) The Board found that Claimant disregarded the standard of behavior Employer has a right to expect of its employee. (*Id.*) Based upon our review of the record, we are convinced that the Board correctly concluded that Employer met its burden, establishing that Claimant's actions amounted to willful misconduct.

Because Employer satisfied its burden of proof as to willful misconduct, the burden shifted to Claimant to prove that he had good cause for his behavior. To prove "good cause" a claimant must demonstrate that his actions were justifiable and reasonable under the circumstances. *Walsh*, 943 A.2d at 369. Claimant argues that he was justified in attempting to rescind the new agreement because he was coerced into signing the agreement when the sales manager told him he would not receive a paycheck unless he signed the agreement. Examples of "justifiable provocation" include unwanted physical touching or excessive verbal abuse. *Horace W. Longacre, Inc. v. Unemployment Comp. Bd. of Review*, 316 A.2d 110, 111-112 (Pa. Cmwlth. 1974). Here, the Board noted that, although Claimant was clearly upset about the change in his draw against commission from \$800 to \$400 per week, the change was consistent with Employer's procedure. (C.R., Item 21.) Specifically, the Board found that Claimant's draw against commission changed six (6) times based on settlements. (*Id.*) The Board found that Claimant did not have good cause for his inappropriate behavior. (*Id.*) We agree.

Accordingly, given the record before us, we cannot conclude that the Board erred when it determined that Claimant's conduct rose to the level of willful

misconduct, and he is, therefore, ineligible for unemployment compensation benefits under Section 402(e) of the Law.

Accordingly, we affirm the decision of the Board.

P. KEVIN BROBSON, Judge

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	:	
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ORDER

AND NOW, this 15th day of October, 2010, the order of the Unemployment Compensation Board of Review is hereby **AFFIRMED**.

P. KEVIN BROBSON, Judge