

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Philip E. Deli, :
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 Petitioner :
 :
 :
 v. : No. 652 C.D. 2010
 : Submitted: October 8, 2010
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 Unemployment Compensation :
 Board of Review, :
 :
 Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN

FILED: November 22, 2010

Philip E. Deli (Claimant) petitions for review of the March 17, 2010, order of the Unemployment Compensation Board of Review (UCBR) affirming a referee's decision to deny unemployment compensation benefits to Claimant on the basis that his discharge was the result of willful misconduct under section 402(e) of the Unemployment Compensation Law (Law).¹ We affirm.

The facts as found by the referee, which were adopted by the UCBR, are as follows:

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e) (stating that employees are ineligible for compensation for any week in which their unemployment is due to discharge from work for willful misconduct).

1. For the purpose of this appeal, the claimant was last employed full-time by Brittany Trucking Company (Reed Oil) where he performed the job duties of Oil Delivery Driver at a final rate of pay of \$14.25 per hour. He began this employment October 31, 2005 with a last day of work October 23, 2009.
2. Drivers do not have a specific delivery area.
3. On October 19, 2009, the employer requested that the claimant work overtime on Saturday, October 24, 2009.
4. The claimant agreed to work Saturday, October 24, 2009 and deliveries were scheduled for the claimant.
5. The claimant had previously worked on Saturdays when requested by the employer.
6. On October 23, 2009, after completing his deliveries, the claimant found a stack of tickets for the next day, October 24, 2009 for the west Pittsburgh area.
7. It was not unusual for the claimant being required to work in the west Pittsburgh area.
8. The claimant was upset and left the following note: "Whoever this delivery area is, they need to come in and do it. I am not working all week to come in and do other people's route. Mine's big enough. I am trying not to get behind on mine. If it was all mine, my ass would be here." Then the claimant signed his name stating, "See you Monday."
9. The claimant did not report for work on October 24, 2009 and as a result deliveries for customers scheduled was not made [sic].
10. The employer terminated the claimant's employment for failure to work on Saturday, October 24, 2009 as the claimant had previously agreed to work on Saturday, October 24, 2009, resulting in deliveries not being made in a timely manner.

(Findings of Fact, Nos. 1-10.)

Claimant applied for unemployment compensation benefits, but his application was denied. Claimant filed an appeal, and a hearing was held before a referee. At the hearing, Employer's witnesses testified that drivers did not have an assigned delivery route. Claimant testified to the contrary, and, in support of his testimony, Claimant offered a photograph of a text message he received on his work cell phone from Employer, dated Sunday, October 25, 2009, which read: "Don't worry about coming in tomorrow we will call u when theres [sic] work in your area." (Claimant's Exhibit No. 1.) Resolving the conflicts in the evidence in favor of Employer, the referee denied benefits. Claimant appealed to the UCBR, which affirmed and adopted the referee's findings and conclusions as its own.

On appeal to this court,² Claimant first argues that the UCBR erred as a matter of law and capriciously disregarded the evidence in finding that Claimant did not have an assigned delivery route. We disagree.

Capricious disregard of evidence is the "deliberate disregard of competent testimony which one of ordinary intelligence could not possibly have avoided in reaching the result." *Miller v. Unemployment Compensation Board of Review*, 379 A.2d 663, 664 (Pa. Cmwlth. 1977). Here, Employer's text message arguably could be construed as an admission that Claimant had an assigned delivery

² Our scope of review is limited to determining whether constitutional rights were violated, an error of law was committed, or findings of fact were unsupported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

route. However, given that Employer sent it after he found Claimant's note and before Employer officially fired Claimant, it is equally possible that the message was intended in a sarcastic manner. Thus, we cannot conclude that the UCBR capriciously disregarded the evidence.

Claimant next argues that a single instance of absenteeism is not willful misconduct and that Employer failed to meet its burden of proving willful misconduct.³ We are unpersuaded by this argument.

We agree with Claimant that absenteeism alone is not necessarily a sufficient basis for denial of unemployment benefits. *See Runkle v. Unemployment Compensation Board of Review*, 521 A.2d 530, 531 (Pa. Cmwlth. 1987). However, there is more than absenteeism involved in the facts of this case. Willful misconduct occurs when, among other things, an employee disregards the standards of behavior which an employer can rightfully expect from its employee. *Kentucky Fried Chicken of Altoona, Inc. v. Unemployment Compensation Board of Review*, 309 A.2d 165, 168-69 (Pa. Cmwlth. 1973). Here, the UCBR found that Claimant had agreed to work on the Saturday in question and that Employer was unable to make the scheduled deliveries because Claimant did not report for work. (Findings of Fact, Nos. 4, 9.) Even if Claimant correctly believed that he had an assigned delivery area, his actions were in disregard of the standard of behavior which Employer can

³ The question of whether Claimant's actions rise to the level of willful misconduct is a question of law subject to review by this court. *Runkle v. Unemployment Compensation Board of Review*, 521 A.2d 530, 531 (Pa. Cmwlth. 1987).

rightfully expect from him, and Claimant has not shown just cause for his actions.⁴ Claimant had promised to work that day, and he knew that Employer was relying on him when Employer scheduled those deliveries. Leaving a note which would not be found until Saturday morning, even if Claimant thought the deliveries were out of his delivery area, forced Employer to disappoint its customers and, therefore, was willful misconduct.

Claimant's final argument is that the UCBR abused its discretion when it ignored Claimant's request to supplement the record with newly-discovered evidence, namely a photograph taken of Employer's bulletin board on January 8, 2010, which, according to Claimant, shows that drivers have assigned delivery areas. However, we need not address this argument because we have already concluded that Claimant, as a matter of law, acted in disregard of the standard of behavior which Employer can rightfully expect from him regardless of whether or not Claimant had an assigned delivery area.

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

⁴ The burden of proving willful misconduct, so as to render a petitioner ineligible for unemployment compensation benefits, is on the employer. *Runkle*, 521 A.2d at 531. Once an employer has met its initial burden of proving willful misconduct, the claimant must demonstrate that, under the particular facts of the case, he or she had good cause for the conduct leading to discharge. *Brady v. Unemployment Compensation Board of Review*, 539 A.2d 936, 938 (Pa. Cmwlth. 1988).

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Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 22nd day of November, 2010, the March 17, 2010, order of the Unemployment Compensation Board of Review is hereby affirmed.

ROCHELLE S. FRIEDMAN, Senior Judge