

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Keith McKenzie,	:
Petitioner	:
	:
v.	: No. 806 C.D. 2011
	: Submitted: October 14, 2011
Unemployment Compensation	:
Board of Review,	:
Respondent	:

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: November 17, 2011

Keith McKenzie (Claimant) has filed a *pro se* petition for review from an order of the Unemployment Compensation Board of Review (Board) affirming the decision of the Referee denying him unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law)¹ for

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937), 2897, *as amended*, 43 P.S. §802. That section provides, in relevant part:

An employe 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.

(Footnote continued on next page...)

willful misconduct due to using another employee's ID badge, taking unauthorized breaks and the unauthorized use of Hospital computers. For the reasons that follow, we affirm the Board's decision.

Beginning on August 1, 2010, Claimant was employed by Sodexo/SDH Services East (Employer) as a full-time food service worker. Claimant was assigned by Employer to work at Penn Presbyterian Medical Center (Hospital) to work a regular shift beginning at 6:30 a.m. and ending at 3:00 p.m. Claimant occasionally worked a double shift which ended at 8:00 p.m. Claimant was entitled to a total of 60 minutes of breaks during a regular shift and 90 minutes of breaks during a double shift. Claimant was issued his own ID badge to access the Hospital. Employer made employees, including Claimant, aware that they were not permitted to use the Hospital's computers located in the Hospital Health Science Library (Hospital Library).

On November 2, 2010, Claimant worked a double shift from 6:30 a.m. to 8:00 p.m. and took breaks for a total of 162 minutes, 72 minutes more than he was entitled to take, all inside the Hospital Library, which he accessed by using

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Willful misconduct has been defined as (1) the wanton and willful disregard of the employer's interest; (2) the deliberate violation of rules; (3) the disregard of standards of behavior which an employer can rightfully expect from his employee; or (4) negligence which manifests culpability, wrongful intent, evil design or intentional and substantial disregard for the employer's interests or the employee's duties and obligations. *Sheetz, Inc. v. Unemployment Compensation Board of Review*, 578 A.2d 621 (Pa. Cmwlth. 1990).

another employee's ID badge. On November 3, 2010, Claimant worked a regular shift and took breaks for a total of 81 minutes, 21 more minutes than he was entitled to take, all inside the Hospital Library again accessed by using another employee's ID badge. On November 4, 2010, there was also use of the Hospital Library by Claimant. As soon as Employer was made aware of these infractions, as well as several others of the same nature, Employer investigated the incidents and verified their authenticity via video surveillance camera and computer web histories. Employer then discharged Claimant on November 17, 2010, for falsification of time records, falsification or misrepresentation of records, unauthorized breaks and unauthorized use of Hospital property. Claimant then filed for unemployment compensation benefits which were denied. Claimant appealed that decision, and a hearing was held before the Referee.

Before the Referee, Employer's Senior General Manager, Roy Manno (Manno), testified that he was contacted by Eric Orr (Orr), the Director of Security at the Hospital because Orr had been investigating Claimant as Orr had received a complaint that someone was viewing pornographic material on the Hospital Library computers. Upon his investigation, Orr found that Claimant was accessing the Hospital Library during the week of November 2nd and that Claimant was in the Hospital Library for extended periods of time. Manno offered into evidence the report from Orr dated November 9, 2010, concerning Claimant's use of another employee's ID badge to enter the Hospital Library on each occasion; numerous photographs of Claimant entering and exiting the Hospital Library; and a voluminous computer printout indicating when he had swiped an ID badge to gain entry into the Hospital Library on the dates in question using someone else's ID

badge. Manno stated that these printouts showed that Claimant used another employee's ID badge to access the Hospital Library which correlated with the time and date of the photographs.

Michael Antolini (Antolini), Employer's General Manager, explained the reasons that Claimant was terminated stating that among other things, usage of the Hospital's computers was not approved by Employer and that neither Claimant nor any other employee employed by Employer at the Hospital had specific duties that required them to use the Hospital's computers. Regarding taking breaks, Antolini specified that he told the employees that if they finished their work at the end of the day and received approval from their supervisors, they could take additional minutes for a break. "So they would have to come and ask the supervisor, hey I'm done with my work, you know, is everything okay, want me to do anything, you know, and if everything was good I didn't have an issue with 5 or 10 minutes at the end of the day." (January 19, 2011 hearing transcript at 12.)

Claimant testified that he first began working for Employer on August 1, 2010, as a food service worker delivering trays to patients and his last day of work was November 17, 2010, when he was terminated by Manno. He stated that Employer took over the previous company and he was never told by Employer that employees could not use the computers. When questioned by the Referee as to whether it was necessary to go through the Hospital Library to get to his work area, Claimant stated, "No," but explained that he was on break in the Hospital Library which was approved by his supervisor. He also claimed that he used another employee's ID badge repeatedly because he forgot his at home all the time due to

having two little girls that he had to worry about. Also, despite attending an orientation which discussed the ID badges and being given an employee handbook which discussed the employees' dress code which Claimant initialed, Claimant stated that he was not sure if he had an orientation. "We had a lot of, a lot of meetings that, that we were probably upstairs and came down at the end of it to sign papers or, it, I haven't the slightest idea." (January 19, 2011 hearing transcript at 22.)

The Referee found that there was no discrepancy regarding the hours that Claimant worked, but only regarding his overuse of break time. The Referee found Employer's testimony credible that employees were permitted to take additional break time only at the end of the day if they had completed all of their duties and received permission to do so from their supervisor. The Referee also found credible Employer's testimony that Claimant was entitled to 90 minutes of break time on November 2, 2010, because he had worked a double shift but Claimant had actually taken 162 minutes, 72 minutes more than he was authorized to take. Similarly, on November 3, 2010, Claimant was only authorized to take 60 minutes of break time because he had worked a normal shift but had taken 81 minutes, taking 21 minutes more than allowed. Further, the Referee found credible Employer's testimony that Claimant was not allowed to borrow another employee's ID badge if he forgot his own. The Referee also credited Employer's testimony that its employees were not authorized to use the Hospital Library and Claimant did not need to enter the Hospital Library to reach his work area. Ultimately, the Referee found that Claimant's discharge was due to willful

misconduct and denied him benefits. Claimant appealed that decision to the Board, which affirmed. This appeal by Claimant followed.²

Claimant contends that the Referee erred by denying him benefits because Employer never informed him that he was not allowed to use other employees' ID badges to access the Hospital and the Hospital Library. Further, he was justified in ignoring Employer's policy because he forgot his ID badge at home, and a supervisor was not present on the several days in question to assist him with this dilemma. He claims that he was never told what to do if he forgot his badge, and if he could not use another employee's badge to enter the Hospital, he would not be able to complete his duties. "So I did what was needed to get my job done. I've been employed at Penn Presbyterian hospital for 8 years before [Employer] took over in August 2010. I was never informed that we were no longer able to use each other's employees ID cards." (Claimant's brief at "G. Argument.")

Claimant ignores that it was Employer's work policy that each individual wear his own personal ID badge as part of his or her own uniform. Employer's senior general manager credibly testified that Claimant received training by Employer on the Hospital's identification and dress policies and he was aware that each Hospital worker was required to wear his own personal ID badge

² Our scope of review of the Board's decision is limited to determining whether an error of law was committed, constitutional rights were violated or findings of fact were supported by substantial evidence. *Frazier v. Unemployment Compensation Board of Review*, 833 A.2d 1181 (Pa. Cmwlth. 2003).

as part of his or her uniform. Not being able to find a supervisor was not an excuse to use another employee's ID badge. The Referee found and the Board affirmed that the use of another employee's ID badge violated the purpose of the Hospital's system for identifying and tracking each worker. The Board is the ultimate factfinder and determiner of credibility in unemployment cases, *McCarthy v. Unemployment Compensation Board of Review*, 829 A.2d 1266 (Pa. Cmwlth. 2003), and it did not find Claimant credible. Consequently, we will not disturb its credibility determinations on appeal.

Claimant also argues that his ID badge allowed him access to the Hospital Library and he did not know that he was not supposed to use the Hospital computers. He claims that if he was not supposed to use the Hospital Library, his ID badge should not have allowed him access to the Hospital Library. However, the senior general manager testified that all Hospital ID badges allowed access to the Hospital Library, and the general manager testified that Claimant was not approved to use the Hospital Library computers. Again, the Referee found the general manager's testimony credible, which was affirmed by the Board. *McCarthy*. Therefore, Claimant's argument is without merit.³

³ In his appeal to the Board, Claimant alleged that Manno intentionally lied under oath at the unemployment hearing regarding the allegation that he violated the work rule when he used Hospital property without authorization. He referenced his termination letter from Employer, which indicated that Manno and Antolini initialed that letter on December 20, 2010, during the grievance proceeding indicating that they were going to delete that violation. (The termination letter was introduced before the Referee but the termination letter provided to the Board had additions not on the letter provided to the Referee in that it had a circle around the words "Unauthorized use of Hospital property" and next to those words "Delete this violation," Manno and Antolini's initials, and the date 12/20/10.) The Board affirmed the Referee's decision denying benefits and Claimant requested reconsideration from the Board the annotated letter, **(Footnote continued on next page...)**

Finally, Claimant argues that Antolini held a meeting at which he stated that employees could take additional breaks at any time as long as they were approved but then lied at the unemployment hearing stating that additional breaks could only be taken at the end of the day. Claimant offered no evidence of what transpired at the grievance proceeding, and even if he had, that proceeding would have had no effect on the unemployment compensation hearing. In any event, the

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which the Board denied. Claimant does not argue that the Board erred in denying his reconsideration, but only argues:

I believe the trial court order is incorrect. According to number 51 of section 801 of the list of issues arising in Appeals Proceedings, it states “whether Claimant knowingly made false statement or knowingly failed to disclose a material fact in order to obtain or increase benefits and thereby is subject to an additional period of disqualification.” This rule should apply to both parties. The employer and Claimant should be held to the same standard. In order to get the ruling to go in their favor they knowingly made false statements. Employer also lied to the referee about not taking off the unauthorized use of hospital property. The paperwork that I have and submitted to the court shows that both Roy Manno and Michael Antolini signed and dated the termination paper to have this charge removed at my union grievance. At the unemployment hearing they stated they had not dismissed this charge, they intentionally lied under oath.

(Claimant’s brief under “G Argument.”) Even if the matter was before us, the Board had the discretion to grant the request if there was good cause and we could only reverse if the Board abused its discretion. *Georgia-Pacific Corp. v. Unemployment Compensation Appeal Board*, 630 A.2d 948 (Pa. Cmwlth. 1993). However, the Board denied the request because even without that one violation, Claimant still violated two other work rules of Employer’s by using another employee’s ID badge and by taking excessive breaks which amounted to willful misconduct. Further, even if there was proper authorization, the document was from a grievance proceeding which had no authority at an unemployment proceeding.

Board found Employer's witnesses most credible, and we will not disturb that determination.

Accordingly, the order of the Board is affirmed.

DAN PELLEGRINI, JUDGE

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ORDER

AND NOW, this 17th day of November, 2011, the order of the Unemployment Compensation Board of Review, dated March 22, 2011, at No. B-515-132, is affirmed.

DAN PELLEGRINI, JUDGE