IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lawrence Derby, Petitioner	:	
v.	:	
Unemployment Compensation Board of Review, Respondent	:	No. 911 C.D. 2010
	:	Submitted: September 10, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: November 10, 2010

Lawrence Derby (Claimant) petitions for review from the order of the Unemployment Compensation Board of Review (Board) which affirmed the referee's denial of benefits under Section 402(e) of the Unemployment Compensation Law (Law).[1]

The facts, as initially found by the referee and confirmed by the Board, are as follows:

> 1. The Claimant was last employed as a Sales Representative by West German BMW from January 2, 2000 through November 2, 2009 and was paid on a strictly commission basis with a $300 per month car allowance.

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

2. This Employer has a policy which prohibits a sales representative from taking a credit application from a customer over the telephone.

3. The Claimant was aware of this policy.

4. On September 1, 2009 the Claimant was issued a written warning for verbally taking a customer's personal credit application via telephone.

5. On October 17, 2009 an employee brought to the attention of the Sales Manager paperwork concerning a credit application made by a customer that was taken by the Claimant.

6. The customer's credit application was not signed.

7. The individual who brought this matter to the attention of the Sales Manager told him that the Claimant stated that the credit application was not signed because he took it over the telephone, and that he was allowed to do so.

8. When the Sales Manager confronted the Claimant, the Claimant admitted that he had taken the customer's credit application over the telephone?

9. As a result, on November 2, 2009 the Claimant was discharged for his second violation of the aforestated Employer policy.

Referee's Decision (Decision), January 22, 2010, Findings of Fact Nos. 1-9 at 1-2.

The referee determined:

Evidence presented at the Referee's hearing indicates that the Claimant was discharged from this employment for his second violation of a known and reasonable Employer policy when the Sales Manager discovered that the Claimant had taken a credit application from a customer over the telephone. The Referee found credible the testimony of Sales Manager that the credit application

> in question was not signed by the customer and that when he confronted the Claimant the Claimant admitted to once again taking a customer's credit application over the telephone.
>
> At the Referee's Hearing the Claimant incredibly denied the second act of taking the customer's credit application over the telephone, therefore, the Claimant did not present at the Hearing justification for the second policy violation which caused his discharge. The Commonwealth Courts [sic] have consistently held that a knowing violation of a reasonable Employer policy, without justification, constitutes willful misconduct. That being the case, the Referee is constrained to decide that the Employer has met its burden of proving that the Claimant committed willful misconduct, thereby rendering himself ineligible for benefits under Section 402(e) of the Law.

Decision at 2.

The Board adopted the referee's reasoning and resolved conflicts in testimony and evidence in favor of West German BMW (Employer).

Claimant contends that the Board erred when it found that Claimant supplied insufficient evidence at the hearing and when it determined that he was ineligible for benefits under Section 402(b)[2] of the Law.[3]

---

[2] Claimant was actually found ineligible for benefits under Section 402(e) of the Law. This Court will excuse the typographical error and address the merits of the Claimant's ineligibility for benefits under Section 402(e).

[3] This Court's review in an unemployment compensation case is limited to a determination of whether constitutional rights were violated, errors of law were committed, or essential findings of fact were not supported by substantial evidence. Lee Hospital v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994).

Claimant asserts that the Board erred when it failed to consider documentary evidence which he claims proves that he did not take a credit application over the phone but had the application faxed to him. He also claims that he did not admit that he took the application over the phone as the referee found in Finding of Fact No. 8.

At the hearing, Jonathan Goldberg (Goldberg), sales manager for Employer, testified that Claimant received a written warning on September 1, 2009, for violating Employer's rule concerning taking a credit application over the phone and was informed that if he violated the rule again he would be terminated. On October 17, 2009, it was brought to Employer's attention that Claimant violated the rule for a second time. Notes of Testimony, January 15, 2010, (N.T.) at 6. Goldberg spoke to Claimant about the incident and Claimant told him, "I had a customer's privacy notice and as long as I have a privacy notice, then it was acceptable to take credit application over the telephone." N.T. at 6. Goldberg also read a written statement of Employer's business manager which stated that the credit application had not been signed. N.T. at 18.[4]

Claimant testified that he did not take the credit application over the telephone. He also submitted an email from the customer whose application Employer maintained was taken over the telephone, Daniel Thistle, which stated,

[4] Although Goldberg testified regarding what the business manager told him, Claimant did not object to the hearsay. In any event, this evidence was corroborated by Goldberg's testimony that he saw the unsigned credit application and Claimant's admission to Goldberg that he took the application over the phone. Unobjected to hearsay testimony which is corroborated by other evidence may support a finding of fact. Walker v. Unemployment Compensation Board of Review, 367 A.2d 366 (Pa. Cmwlth. 1976).

"I found in the office copies of the faxes I sent to you about the car lease. I'm attaching them to this e-mail. I'm willing to take an affidavit that this is what I faxed to you." N.T. at 9. Attached to the email was what Claimant characterized as "the very back page of a credit application. . . . And for verification, you'll note that it was . . . signed and dated on the 15th [of September, 2009]. . . . I brought with me an attachment to that e-mail that encloses the privacy notice, as well . . . also dated September the 15th, 2009." N.T. at 9-10.

The Board chose to accept Employer's evidence over Claimant's. In unemployment compensation proceedings, the Board is the ultimate factfinding body empowered to resolve conflicts in evidence, to determine the credibility of witnesses, and to determine the weight to be accorded evidence. Unemployment Compensation Board of Review v. Wright, 347 A.2d 328 (Pa. Cmwlth. 1975). Findings of fact are conclusive upon review provided that the record, taken as a whole, provides substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977). This Court will neither reweigh the evidence nor accept a version of the facts which the Board rejected.

Whether a claimant's conduct rises to the level of willful misconduct is a question of law subject to this Court's review. Lee Hospital v. Unemployment Compensation Board of Review, 589 A.2d 297 (Pa. Cmwlth. 1991). Willful misconduct is defined as conduct that represents a wanton and willful disregard of an employer's interest, deliberate violation of rules, disregard of standards of behavior which an employer can rightfully expect from the employee, or

negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer's interest or employee's duties and obligations. Frick v. Unemployment Compensation Board of Review, 375 A.2d 879 (Pa. Cmwlth. 1977). The employer bears the burden of proving that it discharged an employee for willful misconduct. City of Beaver Falls v. Unemployment Compensation Board of Review, 441 A.2d 510 (Pa. Cmwlth. 1982). The employer bears the burden of proving the existence of the work rule and its violation. Once the employer establishes that, the burden then shifts to the claimant to prove that the violation was for good cause. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985).

In sum, Employer established, through Goldberg's testimony, that it had a rule that prohibited salesmen from taking credit applications over the telephone. It established that Claimant was aware of the rule by introducing the September 1, 2009, written warning for violating the rule which stated, "This type of action will not be tolerated moving forward and will result in termination." September 1, 2009, Written Warning at 1. Claimant signed the September 1, 2009, written warning which indicated he was aware of the rule. Employer presented evidence that Claimant broke the rule. Claimant did not establish good cause for violating the rule and asserted that he did not break it. The Board rejected Claimant's testimony and credited Employer's evidence. The Board did not err.[5]

[5] Claimant also asserts that Employer wanted to terminate him because of his role as shop steward in a workforce that was recently unionized. Even if that was the case, it does not change the Board's conclusion that Claimant committed willful misconduct when he accepted a credit application over the telephone in violation of Employer's work rule.

Accordingly, this Court affirms.

_____

BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lawrence Derby, Petitioner	:	
v.	:	
Unemployment Compensation Board of Review, Respondent	:	No. 911 C.D. 2010

O R D E R

AND NOW, this 10th day of November, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

_____

BERNARD L. McGINLEY, Judge