IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gary Hill,	:	
Petitioner	:	
	:	
v.	:	No. 922 C.D. 2010
	:	Submitted: September 24, 2010
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: December 15, 2010

Gary R. Hill (Claimant), *pro se*, petitions for review of an adjudication of the Unemployment Compensation Board of Review (Board) denying his claim for unemployment compensation benefits. In doing so, the Board affirmed the Referee's determination that Claimant was ineligible for benefits under Section 402(e) of the Unemployment Compensation Law (Law),[1] by reason of his willful misconduct. We affirm.

Claimant was employed by Keystone Home Brew Supply (Employer) from November 2008 until his last day of work on May 4, 2009. Employer operates a

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[1] Act of December 5, 1936, Second Ex.Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §751-914. Section 402(e) states, in relevant part, that "[a]n employe[e] shall be ineligible for compensation for any week … [i]n which his unemployment is due to his discharge … from work for willful misconduct connected with his work[.]" 43 P.S. § 802(e).

retail store offering specialty products to home brewers. Claimant was responsible for a wide range of tasks including customer service, cleaning, packaging products for resale, and stocking shelves.

Claimant was terminated on May 4, 2009, for "unsatisfactory work performance." Certified Record, Item No. 3 (C.R. ___), Employer Questionnaire. Claimant applied for unemployment compensation benefits. The UC Service Center granted Claimant's application, finding that Claimant had worked to the best of his ability. Employer appealed.

Claimant requested, and was scheduled, to participate in the Referee's hearing on January 12, 2010, by telephone because he had relocated to Colorado. On January 6, 2010, a notice was mailed to Claimant's last known address in Colorado informing him that the hearing had been rescheduled for January 20, 2010. The notice was not returned as undeliverable. Claimant did not participate in the hearing.[2]

At the hearing, the Referee heard testimony from Jason Harris, owner and president of Employer. Harris explained that, due to the small size of the business, all employees are expected to assist customers who enter the store, even if it means interrupting other duties or their lunch break. After the customers are served, employees may return to their other duties or finish their lunch break. Employer requires employees to arrive to work ten minutes before the store opens. Employer's employment policies have not been reduced to writing but are communicated orally.

Harris testified about Claimant's termination. He testified that during the week prior to Claimant's termination, he found Claimant reading a book during his lunch break, leaving customers unattended. When Harris or the store manager

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[2] On the day of the hearing, the Referee called the telephone number Claimant had provided but Claimant did not answer his phone.

asked Claimant to help the customers, he refused, saying that he had five more minutes until the end of his lunch break.[3]

Harris identified additional incidents. Claimant was often late to work and had received a written reprimand for tardiness. Claimant had held himself out to be a former commercial brewer yet had trouble explaining brew recipes and systems to customers. Claimant was trained to check inventory in Employer's computer system, but he would not do so. Harris recalled that on one occasion Claimant told a customer that the store lacked a piece of equipment, when, in fact, a check of inventory would have showed an ample supply. Finally, Harris stated that Claimant did not serve as many customers per hour as other employees.[4]

The Referee found that Claimant had refused to comply with Employer's business rules and policies, which constituted willful misconduct. Claimant appealed the Referee's determination to the Board, asserting that he did not receive notice of the January 20th hearing until January 21st. The Board determined that the Referee's findings were proper and incorporated them into its determination. The Board also found that Claimant did not provide good cause for a remand hearing because notice of the January 20th hearing was mailed to Claimant's last known address on January 6th and was not returned by postal authorities as undeliverable; accordingly, timely receipt was presumed. Claimant now petitions for this Court's review.

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[3] In addition to not helping customers while he was at lunch, Harris noted that Claimant would often continue to do packaging or other tasks rather than stop to assist customers.

[4] Harris testified that his other employees averaged around two customer transactions per hour, while Claimant only averaged one and one half transactions per hour.

On appeal,[5] Claimant raises two issues: (1) Employer's initial appeal of the UC Service Center's determination was not timely filed; and (2) assuming the Board properly reached the merits, Employer did not meet its burden of proof in showing Claimant engaged in willful misconduct.

We begin with Claimant's contention that Employer's initial appeal to the Referee was untimely. In this case, the last date for Employer to appeal the UC Service Center's grant of benefits was October 28, 2009. Claimant alleges that because the envelope and appeal documents are date-stamped October 29, 2009, Employer's appeal was not timely filed. We disagree.

The Department has promulgated a regulation for determining whether an appeal has been timely filed.[6] When an appeal is filed by United States mail, as

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[5] On appeal, our review is limited to determining whether constitutional rights were violated, whether an error of law has been committed, or whether necessary findings of fact are supported by substantial evidence. *Roberts v. Unemployment Compensation Board of Review*, 977 A.2d 12, 16 n.2 (Pa. Cmwlth. 2009).

[6] The regulation states:

> (b) A party may file a written appeal by any of the following methods:
>
> 1) United States mail. The filing date will be determined as follows:
>
> (i) The date of the official United States Postal Service postmark on the envelope containing the appeal, a United States Postal Service Form 3817 (Certificate of Mailing) or a United States Postal Service certified mail receipt.
>
> (ii) If there is no official United States Postal Service postmark, United States Postal Service Form 3817 or United States Postal Service certified mail receipt, the date of a postage meter mark on the envelope containing the appeal.
>
> (iii) If the filing date cannot be determined by any of the methods in subparagraph (i) or (ii), the filing date will be the date recorded by the Department,

(Footnote continued on the next page . . .)

Employer did in the case *sub judice*, the Department will look first to the official United States Postal Service postmark on the envelope or a certified mail receipt. 34 Pa. Code §101.82(b)(1)(i). However, if neither of those items are present, then the Department will look to the postage meter mark on the envelope. 34 Pa. Code §101.82(b)(1)(ii). If the filing date cannot be determined by these methods, the filing date will be the date recorded by the Department when it receives the appeal. 34 Pa. Code §101.82(b)(1)(iii).

Here, the postmark on the envelope used to mail employer's appeal is not legible. C.R. 6. The appeal was not sent by certified mail, so there is no certified mail receipt. Therefore, the date recorded by the Department for receipt of the appeal controls. The Department's Form UC-46B Petition for Appeal, which was completed by its Appeal Clerk, states that the appeal was received by the UC Service Center on October 28, 2009. C.R. 6. In accordance with 34 Pa. Code §101.82(b)(1)(iii), we find that Employer's appeal was timely filed on October 28, 2009, and, thus, Claimant's first issue lacks merit.

Claimant next argues that Employer failed to prove his conduct amounted to willful misconduct. While "willful misconduct" is not expressly defined in the Law, it has been judicially defined as: (1) a wanton and willful disregard of an employer's interests; (2) a deliberate violation of an employer's rules; (3) a disregard of the standards of behavior which an employer can rightfully expect of an employee; or (4) negligence indicating an intentional disregard of the employer's interest or the employee's duties and obligations. *Frumento v. Unemployment Compensation Board*

(continued . . .)

> the workforce investment office or the Board when it receives the appeal.

34 Pa. Code §101.82(b)(1)(i)-(iii).

of Review, 466 Pa. 81, 83-84, 351 A.2d 631, 632 (1976). Whether a claimant's conduct constitutes 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, 299 (Pa. Cmwlth. 1991).

The employer bears the burden of establishing that an employee's conduct constituted willful misconduct. *Roberts v. Unemployment Compensation Board of Review*, 977 A.2d 12, 16 (Pa. Cmwlth. 2009). Similarly, when an employee is discharged for a work rule violation, the employer bears the burden of showing the employee was aware of the rule and violated it. *Id.* The burden then shifts to the employee to show that either the rule was unreasonable or he had good cause to violate the rule.[7] *Id.*

The gist of Claimant's argument is that Employer's testimony regarding his alleged misconduct was unsubstantiated because there was no written documentation of any disciplinary actions aside from one letter about tardiness. Claimant's argument ignores the fact that Employer had not adopted formal written policies but, rather, communicated them orally. The Referee found Employer's witness testimony to be credible, and the Board adopted that finding.[8] Employer's testimony established that Claimant was informed of Employer's rule requiring employees to assist customers at all times, even during their lunch break, but he

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[7] "Good cause" is established when an employee's actions are justified or reasonable under the circumstances. *See Frumento,* 466 Pa. at 87, 351 A.2d at 634.

[8] In unemployment compensation proceedings the Board is the ultimate fact-finding body empowered to resolve conflicts in evidence, to determine credibility of witnesses, and to determine the weight to be accorded evidence. *See Unemployment Compensation Board of Review v. Wright*, 347 A.2d 328, 329 (Pa. Cmwlth. 1975). Here the Board agreed with, and affirmed, the Referee and in doing so adopted and incorporated his findings and conclusions. Therefore, the Board also found Employer's testimony to be credible.

refused to comply with this directive. Employer's credited testimony also confirmed that Claimant was often late to work and could not perform assigned tasks to Employer's satisfaction. Nothing in the documentation provided by Claimant to the Department, Referee or Board refutes these statements. Therefore, the Board's finding that Claimant was ineligible for benefits by reason of his willful misconduct was supported by substantial evidence.

For all of the foregoing reasons, we affirm the Board's order.

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MARY HANNAH LEAVITT, Judge

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O R D E R

AND NOW, this 15th day of December, 2010, the order of the Unemployment Compensation Board of Review, dated March 29, 2010, in the above-captioned matter is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge