

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Rose Auto Service, :  
Petitioner :  
v. : No. 923 C.D. 2011  
Unemployment Compensation : Submitted: November 4, 2011  
Board of Review, :  
Respondent :

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE FRIEDMAN

FILED: December 30, 2011

Rose Auto Service (Employer) petitions for review of the April 25, 2011, order of the Unemployment Compensation Board of Review (UCBR), which reversed the decision of a referee to deny Brian J. Ward (Claimant) unemployment compensation benefits. The UCBR determined that Claimant was eligible for benefits because his discharge was not the result of willful misconduct under section 402(e) of the Unemployment Compensation Law (Law).<sup>1</sup> We affirm.

Claimant worked for Employer as a full-time mechanic from February 5, 2007, through January 7, 2011. (UCBR's Findings of Fact, No. 1.) Claimant was salaried, but Employer billed out the work to its customers on an hourly basis.

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e). Section 402(e) of the Law provides that an employee shall be ineligible for compensation for any week in which his unemployment is due to his discharge for willful misconduct connected with his work. 43 P.S. §802(e).

(UCBR's Findings of Fact, No. 2.) Claimant was capable of doing as much work as, or more than, Employer's other mechanics. (UCBR's Findings of Fact, No. 3.) However, Employer believed that Claimant's productivity began to decline as a result of his family difficulties. (UCBR's Findings of Fact, No. 4.) Specifically, Employer believed that Claimant took too long to do certain jobs and dragged out his work unnecessarily. (UCBR's Findings of Fact, No. 5.)

On May 6, 2010, another employee observed Claimant standing still under the hood of a car. When he asked Claimant what he was doing, Claimant replied, "I'm just killing time." (UCBR's Findings of Fact, No. 6.) Employer was aware of this incident but did not discharge Claimant. (UCBR's Findings of Fact, No. 7.) On December 29, 2010, Employer believed that Claimant took twice as long as necessary to install a radiator thermostat in a vehicle. (UCBR's Findings of Fact, No. 8.) Employer also received complaints from other mechanics that Claimant talked too much on the job. (UCBR's Findings of Fact, No. 9.) Employer told Claimant that he was not to talk excessively when the shop was busy. (UCBR's Findings of Fact, No. 10.) Employer also received complaints that Claimant was asking other employees for help doing tasks that those employees believed he should have been able to do. (UCBR's Findings of Fact, No. 11.)

Employer noticed that another employee's labor for the period from October 1, 2010, to December 31, 2010, was worth \$48,040.00, which included one week of vacation. Claimant's labor during the same time period was worth \$45,774.00. (UCBR's Findings of Fact, No. 12.) During Claimant's last month of employment, Employer's work had slowed down. (UCBR's Findings of Fact, No. 13.)

Employer discharged Claimant for poor performance on January 7, 2011. (UCBR's Findings of Fact, No. 16.) There was no final incident that precipitated Claimant's discharge. (UCBR's Findings of Fact, No. 14.) Claimant believed that he properly performed his work throughout his employment. (UCBR's Findings of Fact, No. 15.)

Claimant filed a claim for unemployment benefits, which was granted by the local service center. Employer timely appealed to the referee, who held a hearing on March 10, 2011. At the hearing, Employer presented the testimony of Brian Rose, Employer's president and Claimant's supervisor, and John Witherspoon, another employee. Claimant appeared *pro se* and testified on his own behalf. The referee reversed the service center's decision, finding that Claimant was capable of doing as much work as other mechanics but allowed his work to deteriorate. Therefore, the referee concluded that Claimant was ineligible for benefits because his discharge was the result of willful misconduct.

Claimant timely appealed to the UCBR, which reversed. The UCBR found that Employer failed to credibly establish that Claimant had intentionally decreased his productivity or his job performance. Although Employer had some complaints about Claimant's work, there was no final incident that precipitated his termination. The UCBR also credited Claimant's testimony that he properly performed his work and did not deliberately attempt to disrupt his co-workers. Thus, the UCBR concluded that Employer failed to prove that Claimant's actions rose to

the level of willful misconduct under the Law. Employer now petitions for review of that decision.<sup>2</sup>

In its petition for review, Employer asserts that the evidence of record establishes that Claimant was discharged for willful misconduct. Specifically, Employer asserts that Claimant's conduct toward the end of his employment demonstrated an intentional disregard of Employer's interests. We disagree.

“Willful misconduct” is defined as: (1) a wanton and willful disregard of the employer's interests; (2) a deliberate violation of the employer's rules; (3) a disregard of the standards of behavior that an employer rightfully can expect from its employees; or (4) negligence that manifests culpability, wrongful intent, or evil design, or an intentional and substantial disregard of the employer's interests or the employee's duties and obligations. *Oliver v. Unemployment Compensation Board of Review*, 5 A.3d 432, 438 (Pa. Cmwlth. 2010) (*en banc*). Mere incompetence, inexperience, or inability, which may justify an employee's discharge, does not constitute willful misconduct. *Younes v. Unemployment Compensation Board of Review*, 467 A.2d 1227, 1228 (Pa. Cmwlth. 1983). However, poor work performance that reflects an unwillingness to work to the best of one's ability is indicative of a disregard of the standards of conduct that an employer has a right to expect of its employees. *Gardner v. Unemployment Compensation Board of Review*, 454 A.2d 1208, 1209 (Pa. Cmwlth. 1983). The employer has the burden of proving that it discharged an employee for willful misconduct. *Oliver*, 5 A.3d at 438.

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

Employer asserts that Claimant intentionally allowed his productivity to decline to Employer's detriment. The record does not support this claim. While it is true that Claimant admitted that he was experiencing marital problems at one point, he credibly testified that, once Employer approached him about the issue, he did not allow his personal life to affect his work.<sup>3</sup> Moreover, Claimant testified, and the UCBR found, that Claimant performed his work to the best of his ability throughout his employment. (N.T., 3/10/11, at 21; UCBR's Findings of Fact, No. 15.) "[A] finding that a claimant has worked to the best of his ability negates a conclusion of willful misconduct." *Norman Ashton Klinger & Associates, P.C. v. Unemployment Compensation Board of Review*, 561 A.2d 841, 843 (Pa. Cmwlth. 1989); *see also Younes*, 467 A.2d at 1228-29 (reversing UCBR's willful misconduct determination, where evidence showed that claimant was unable to complete her assignments, but there were no "additional findings that [claimant] was not working to the best of her ability and that this conduct continued in spite of warnings or an awareness on her part that it was inappropriate").

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<sup>3</sup> Regarding his marital difficulties, Claimant testified as follows:

The one day I was just up all night and I said to [Mr. Rose] like hey, I know, I'm sorry. I'm like look I had a lot on my mind you know like I haven't taken a vacation since I've been there. All my vacation days have been spent in court and I tried to explain to him I'm very sorry. And that was it you know. Like I didn't let it affect me after that. . . I did have that one moment where it was bad. . . And I was just like worn down but it wasn't for as long as he said it was. You know I made it clear to him that's what the problem was. I would correct it and [I] did.

(N.T., 3/10/11, at 22-23.)

Employer also asserts that Claimant was “repeatedly observed ‘killing time’ and not performing any work at all.” (Employer’s Brief at 8; *see id.* at 13.) The record, however, belies this claim. Employer’s witnesses testified to only one occasion in May 2010 when Claimant said he was “killing time,” (N.T., 3/10/11, at 15, 19), and Claimant was neither reprimanded nor discharged after that incident. In any event, that incident was too remote temporally from Claimant’s discharge eight months later to support a finding of willful misconduct. *See, e.g., Raimondi v. Unemployment Compensation Board of Review*, 863 A.2d 1242, 1247 (Pa. Cmwlth. 2004).

In an unemployment case, the UCBR is the ultimate factfinder and is empowered to make credibility determinations. *Bell v. Unemployment Compensation Board of Review*, 921 A.2d 23, 26 n.4 (Pa. Cmwlth. 2007). Questions of credibility and the resolution of evidentiary conflicts are within the UCBR’s discretion and are not subject to re-evaluation on judicial review. *Id.* Here, the UCBR resolved the credibility issues in favor of Claimant and against Employer. The UCBR rejected the testimony of Employer’s witnesses that Claimant intentionally dragged out his work and impeded the work of others by talking too much.<sup>4</sup> It also credited Claimant’s testimony that Employer’s work had slowed down immediately before he was discharged. (*See* N.T., 3/10/11, at 21, 23.) We conclude that the record contains

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<sup>4</sup> Claimant testified:

You know it’s not like we were swamped with work. You know we weren’t doing anything [and] I’d talk or whatever. Good morning. I like to say good morning to everybody to start my day off good. Good mood you know. I wouldn’t sit there and pin people against the wall and say talk to me . . . .

(N.T., 3/10/11, at 23.)

substantial evidence to support the UCBR's determination that, while Employer was obviously dissatisfied with the way Claimant performed his work, it "failed to credibly establish that the [C]laimant deliberately reduced his productivity or deliberately reduced his job performance," thereby rising to the level of willful misconduct. (UCBR's Decision & Order at 3.)

Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Senior Judge

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	:	
Respondent	:	

ORDER

AND NOW, this 30<sup>th</sup> day of December, 2011, we hereby affirm the April 25, 2011, order of the Unemployment Compensation Board of Review.

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ROCHELLE S. FRIEDMAN, Senior Judge