

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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|---------------------------|---|-----------------------------|
| Orchard Manor, Inc.,      | : |                             |
|                           | : |                             |
| Petitioner                | : |                             |
|                           | : |                             |
| v.                        | : | No. 1471 C.D. 2013          |
|                           | : |                             |
| Unemployment Compensation | : | Submitted: February 7, 2014 |
| Board of Review,          | : |                             |
|                           | : |                             |
| Respondent                | : |                             |

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE COHN JUBELIRER**

**FILED: March 10, 2014**

Orchard Manor, Inc. (Employer) petitions for review of the Order of the Unemployment Compensation (UC) Board of Review (Board) finding that Employer did not prove that Vicki A. McBurney (Claimant) committed willful misconduct and, therefore, Claimant was not ineligible for UC benefits pursuant to Section 402(e) of the UC Law (Law).<sup>1</sup> On appeal, Employer argues, in relevant

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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) (providing, in relevant part, that an employee is ineligible for UC benefits for any week the employee's unemployment is due to willful misconduct connected with the employee's work).

part, that the Board's reason for discrediting Employer's witnesses is not supported by the record and that its witnesses' testimony support the conclusion that Claimant engaged in willful misconduct. Discerning no error or abuse of discretion, we affirm.

Claimant worked as a registered nurse (RN) manager for Employer until February 22, 2013, when Employer discharged her. (Board Op., Findings of Fact (FOF) ¶ 1.) Claimant filed a claim for UC benefits, asserting that she was discharged from her job but was not given a reason for her termination, which the local service center denied based on Section 402(e) of the Law.<sup>2</sup> (Internet Initial Claims at 2-3, R. Item 2; Notice of Determination, R. Item 5.) Claimant appealed, and the matter was assigned to a UC Referee (Referee). The Referee held a hearing at which Employer and Claimant presented evidence.

Employer introduced a copy of its work policies, signed by Claimant, which provide that its employees should act in a "positive manner" and "respectfully and honestly with one another," that "[n]o form of harassment will be tolerated," and that an employee may be discharged for violating this policy. (Orchard Manor Policy, Employer Ex. E-1, R.R. at 42a.) Employer also offered the testimony of several of its employees. Anna Kaufman, a RN manager of a different resident wing, stated that on February 20, 2013, she advised Claimant that they were told to watch their overtime and that Claimant should leave. (Hr'g Tr. at 8-9, R.R. at 10a-

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<sup>2</sup> The Notice of Determination was based on Employer's assertion that Claimant was discharged for unsatisfactory job performance. (Notice of Determination, R. Item 5; Employer's Record of Oral Interview, R. Item 4.) Employer makes no reference to this reason in its appeal.

11a.) RN Kaufman also indicated that, on February 21st, Claimant told her that Claimant hurt her leg by hitting it against a desk while Claimant was being “escorted” out of their office because of her overtime. (Hr’g Tr. at 9-10, R.R. at 11a-12a.) Kaitlyn Feather, a licensed practical nurse (LPN), testified that she observed Claimant at the nurses’ desk on February 21st, that Claimant was agitated about hurting her leg, that Claimant was talking in a louder tone, and that other staff members and residents were in the area. (Hr’g Tr. at 10, R.R. at 12a.) LPN Feather indicated that she was at the nurses’ station the whole time Claimant was there and she did not hear Claimant make any threats; however, she acknowledged that there may have been times that she left the station and may not have heard everything Claimant said. (Hr’g Tr. at 11, R.R. at 13a.) Barb Snyder, also a LPN, testified that she was in the cart room on February 21st, about fifteen feet from the nurses’ desk, and she heard Claimant make a loud statement that Claimant would “like to punch him in the face” or punch “them” in the face “after what happened last night,” which she considered threatening. (Hr’g Tr. at 12-13, R.R. at 14a-15a.) LPN Snyder, on cross examination, stated that she did not know whom Claimant was speaking about, she did not hear the whole conversation or to whom Claimant was speaking, and Claimant’s back was toward her. (Hr’g Tr. at 13-14, R.R. at 15a-16a.) Theresa Fernandez, a LPN, indicated that she “was coming up the hall” when she heard Claimant state in a loud, agitated voice “something about punching somebody in the face.” (Hr’g Tr. at 15, R.R. at 17a.) On cross-examination, LPN Fernandez testified that she did not know whom Claimant was referring to and she did not hear Claimant’s whole conversation. (Hr’g Tr. at 16, R.R. at 18a.)

Janet Gordon, Employer's Acting Director of Nursing at the time of the alleged event (Director), testified that, on February 21st, she became aware of Claimant's alleged threat. (Hr'g Tr. at 6, R.R. at 8a.) Amber Morian-Gowetski, Employer's Assistant Administrator (Assistant Administrator) testified that, on February 22, 2013, she interviewed Claimant about what happened the prior day and about being escorted from the property on February 20th, and that Claimant denied that either incident occurred. (Hr'g Tr. at 17, R.R. at 19a.) Assistant Administrator indicated that Claimant's conduct would have violated Employer's policies against harassment and disruptive behavior, and requiring respect, professionalism, kindness, and friendliness towards residents, visitors, and co-workers. (Hr'g Tr. at 18-19, R.R. at 20a-21a.) On cross-examination, Assistant Administrator stated that, during the interview, Employer "determin[ed] that [Claimant] was not telling [it] the truth . . . and . . . that the threat had actually occurred," but that Claimant was not given a reason, either orally or in writing, regarding why she was being discharged, and was told only that "she was being let go." (Hr'g Tr. at 20-21, R.R. at 22a-23a.)

Claimant testified that she had no confrontation with Employer regarding her overtime on February 20th and stated that, despite having work to do, she left when Employer told her not to work overtime. (Hr'g Tr. at 23, R.R. at 25a.) Claimant indicated that, on her way out of the office she hit her leg on her desk and, when she met Director in the hallway, Director "shooed" her out the door. (Hr'g Tr. at 23-24, R.R. at 25a-26a.) Claimant denied making the statement about punching somebody in the face and questioned why she would make such a statement. (Hr'g Tr. at 23-24, R.R. at 25a-26a.) Claimant explained that she told a

different co-worker that she had been rushed out of the office the prior day.<sup>3</sup> (Hr’g Tr. at 24, R.R. at 26a.)

The Referee reversed the local service center’s determination and rejected Employer’s witnesses’ testimony as not credible. The Referee concluded, *inter alia*, that Employer’s witnesses’ testimony “was insufficient to establish that the claimant harassed any staff member or other person” and held that Employer did not to meet its burden of proving that Claimant violated a work rule. (Referee Decision at 2.) Employer appealed to the Board, which made its own findings of fact.

1. The claimant was last employed as a full-time registered nurse manager by [Employer] from May 14, 2012 at a final rate of \$22.00 per hour[,] and her last day of work was February 22, 2013.
2. The employer maintains a policy prohibiting all forms of harassment and has zero-tolerance for infractions. The claimant was aware of the employer’s policy.
3. On February 22, 2013, the acting director of nursing received a report that the claimant allegedly made a comment about punching someone in the face.
4. The assistant [administrator] began an investigation into the events and questioned the claimant’s co-workers and then questioned the claimant.

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<sup>3</sup> Claimant also testified regarding Employer’s discipline of other staff, indicating that she had reported numerous employees whom she supervised to human resources for various violations of Employer’s policies and none of them were discharged. (Hr’g Tr. at 24-28, R.R. at 26a-30a.) Although the Referee discussed Claimant’s testimony in his Decision, (Referee’s Decision at 2), the Board did not and we review the Board’s Decision, not the Referee’s Decision.

5. The claimant denied making any statements about punching someone in the face.

6. The employer concluded that the claimant was not being truthful and discharged the claimant for violating the employer's prohibition on harassment.

(FOF ¶¶ 1-6.) The Board held that while Employer established the existence of its harassment policy, there was a conflict in the testimony regarding the alleged infraction. (Board Op. at 2.) The Board stated that, “[b]ased upon the totality of testimony, the Board resolves the conflict in favor of the claimant and concludes that the employer’s witnesses were not located in the immediate area of the claimant and are not found to be credible.” (Board Op. at 2.) Accordingly, the Board held that Employer could not substantiate Claimant’s alleged threat and, as such, could not demonstrate that Claimant violated Employer’s prohibition on harassment. (Board Op. at 2.) The Board “in no way question[ed] the employer’s right to discharge the claimant,” but concluded that Claimant was not disqualified from receiving UC benefits under Section 402(e) of the Law because Employer did not meet its burden of proof. (Board Op. at 2.) Employer now petitions this Court for review.<sup>4</sup>

Employer first asserts that the Board’s rejection of Employer’s witnesses’ testimony as not credible because they were not in the immediate area near Claimant is not supported by substantial evidence and the weight of the evidence

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<sup>4</sup> “The Court’s review is limited to determining whether constitutional rights were violated, whether an error of law was committed, whether a practice or procedure of the Board was not followed or whether the findings of fact are supported by substantial evidence in the record.” Western and Southern Life Insurance Co. v. Unemployment Compensation Board of Review, 913 A.2d 331, 334 n.2 (Pa. Cmwlth. 2006).

supports its witnesses' testimony, not Claimant's testimony. Employer asserts that LPN Fernandez and LPN Snyder were physically close to Claimant, testified that they heard her make a threat about punching someone in the face, and were upset by Claimant's statement. Employer asserts that there is no evidence in the record to contradict LPN Snyder's testimony regarding Claimant's threat, which is corroborated by LPN Fernandez's testimony. According to Employer, Claimant's denial lacks credibility because Employer's witnesses stated that Claimant complained to her co-workers about hitting her leg on the desk and Claimant testified before the Referee that she hit her leg, but when Assistant Administrator asked during the interview whether Claimant hurt her leg, Assistant Administrator indicated that Claimant said no. Employer further argues that Claimant never actually denied making the threatening statement and, therefore, the Board's credibility findings should be reversed.

Section 402(e) of the Law provides, in pertinent part, that “[a]n employe shall be ineligible for compensation for any week . . . [i]n which h[er] unemployment is due to h[er] discharge or temporary suspension from work for willful misconduct connected with h[er] work.” 43 P.S. § 802(e). While the Law does not define “willful misconduct,” our Court has defined it as:

(1) a wanton or willful disregard for an employer's interests; (2) a deliberate violation of an employer's rules; (3) a disregard for 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 an employee's duties or obligations.

Philadelphia Parking Authority v. Unemployment Compensation Board of Review, 1 A.3d 965, 968 (Pa. Cmwlth. 2010). “If the employer alleges willful misconduct

because the claimant violated a work rule, the employer must prove both the existence of the rule and its violation,” Caterpillar, Inc. v. Unemployment Compensation Board of Review, 550 Pa. 115, 123, 703 A.2d 452, 456 (1997), and that the claimant was aware of the work rule, Bruce v. Unemployment Compensation Board of Review, 2 A.3d 667, 671 (Pa. Cmwlth. 2010).

Noting that there were conflicts in the testimony, which the Board resolved in Claimant’s favor, the Board chose not to credit Employer’s witnesses’ testimony that Claimant made a threatening statement. Instead, the Board chose to credit Claimant’s testimony that she did not make the alleged threat. Employer asks this Court on appeal, essentially, to reverse the Board’s credibility determination based on Employer’s belief that LPN Snyder and LPN Fernandez were close enough to hear Claimant’s alleged threat and its belief that Claimant’s denial lacks credibility. However, the Board, as the ultimate fact finder, has the power to make credibility determinations and to resolve evidentiary conflicts. Gioia v. Unemployment Compensation Board of Review, 661 A.2d 34, 36 (Pa. Cmwlth. 1995). In fact, the Board “is free to reject even uncontradicted testimony.” Daniels v. Unemployment Compensation Board of Review, 755 A.2d 729, 731 (Pa. Cmwlth. 2000). That Employer might view the testimony differently from the Board does not create grounds for reversal if the Board’s findings are supported by substantial evidence.<sup>5</sup> Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994).

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<sup>5</sup> Substantial evidence is defined as “such relevant evidence which a reasonable mind might accept as adequate to support a conclusion.” Philadelphia Gas Works v. Unemployment Compensation Board of Review, 654 A.2d 153, 157 (Pa. Cmwlth. 1995).

Employer asserts that LPN Snyder and LPN Fernandez were physically close to Claimant, but, as the Board notes in its brief, LPN Snyder was performing a task in a different room and LPN Fernandez was “coming up the hall” when they allegedly heard Claimant make the statement. (Hr’g Tr. at 13-15, R.R. at 15a-17a.) A reasonable mind might accept this testimony as adequate to support the Board’s credibility finding that Employer’s witnesses were not in Claimant’s immediate area; therefore, the Board’s finding is supported by substantial evidence. Philadelphia Gas Works v. Unemployment Compensation Board of Review, 654 A.2d 153, 157 (Pa. Cmwlth. 1995). Moreover, both witnesses were distant enough not to be able to hear anything else of Claimant’s alleged conversation or to know to whom or about whom Claimant was speaking.<sup>6</sup> (Hr’g Tr. at 13-14, 16, R.R. at 15a-16a, 18a.) Although unnecessary because there is substantial evidence to support the Board’s credibility determinations, we note that, contrary to Employer’s arguments, Claimant’s credited testimony that she did not make the statement contradicts LPN Snyder’s and LPN Fernandez’s testimony. Similarly, Employer’s contention that Claimant did not deny making the statement is not supported by the record, in which Claimant expressly denies making the alleged threatening statement at least twice.<sup>7</sup> (Hr’g Tr. at 23-24, 27, R.R. at 25a-26a, 29a.)

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<sup>6</sup> Employer makes much of the fact that LPN Snyder was aware of Claimant being upset about hurting her leg, but LPN Snyder expressly testified that she did not know that Claimant had hurt her leg. (Hr’g Tr. at 13, R.R. 15a.) As for Employer’s claim that Claimant’s testimony lacked credibility because Assistant Administrator testified that Claimant denied hurting her leg during the February 22nd interview, the Board did not credit that testimony, choosing instead to believe Claimant.

<sup>7</sup> Claimant’s counsel asked: “Did you make any statement threatening to punch anybody in the face?,” to which Claimant responded: “No.” (Hr’g Tr. at 23-24, R.R. at 25a-26a.) On cross-examination, Employer’s counsel asked Claimant: “[i]s that why you responded with  
(Continued...)

Accordingly, we discern no abuse of discretion in the Board's credibility determinations.

Employer next argues that its witnesses' testimony supports the conclusion that Claimant threatened to punch somebody in the face, which is a violation of Employer's policies against, *inter alia*, harassment and threatening behavior, and is willful misconduct under Section 402(e) of the Law. However, because the Board did not credit Employer's proffered testimony, Employer did not satisfy its burden of proving that Claimant engaged in disqualifying willful misconduct. Employer also raises arguments pertaining to errors in the Referee's rationale for rejecting Employer's position, contending that the Board adopted the Referee's Decision. However, the Board issued its own opinion, with its own findings of fact, and its own rationale. It is the Board's opinion and rationale that we are reviewing on appeal, not the Referee's Decision. Therefore, we will not address Employer's arguments further.

Accordingly, we affirm the Board's Order.

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**RENÉE COHN JUBELIRER, Judge**

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hostility on this day, the threat to punch someone in the face?," and Claimant answered: "I didn't threaten to punch anyone in the face." (Hr'g Tr. at 27, R.R. at 29a.)

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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|                           | : |                    |
| Petitioner                | : |                    |
|                           | : |                    |
| v.                        | : | No. 1471 C.D. 2013 |
|                           | : |                    |
| Unemployment Compensation | : |                    |
| Board of Review,          | : |                    |
|                           | : |                    |
| Respondent                | : |                    |

**ORDER**

**NOW**, March 10, 2014, the Order of the Unemployment Compensation Board of Review entered in the above-captioned matter is hereby **AFFIRMED**.

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**RENÉE COHN JUBELIRER, Judge**