IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Rondell L. Simmons, Petitioner	:	
v.	:	
Unemployment Compensation Board of Review, Respondent	:	No. 2187 C.D. 2012
	:	Submitted: April 26, 2013

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

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE COVEY FILED: May 22, 2013

Rondell L. Simmons (Claimant) petitions this Court for review of the Unemployment Compensation Board of Review's (UCBR) October 31, 2012 order reversing the Referee's decision, thereby denying Claimant unemployment compensation (UC) benefits under Section 402(e) of the Unemployment Compensation Law (Law),[1] and assessing a fault overpayment under Section 804(a) of the Law.[2] Claimant presents three issues for this Court's review: (1) whether there was substantial evidence to support the UCBR's finding that Claimant was discharged for willful misconduct; (2) whether the UCBR erred by concluding that Claimant had a history of insubordination; and, (3) whether the UCBR erred by assigning a fault overpayment. We affirm.

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

[2] 43 P.S. § 874(a).

Claimant was employed by the Hotel Carlisle and Embers Convention Center (Employer) commencing on August 10, 2007 as a maintenance person, working 3 to 4 days per week.[3] On December 30, 2011, Employer issued a written warning to Claimant outlining his history of insubordination and negative attitude and informing Claimant that any further act will result in discipline, up to and including employment termination. On January 28, 2012, Employer's owner/manager since 2009 Farouk Hegazi (Hegazi), instructed Claimant to clean the hotel's outside trash bins. On February 2, 2012, Hegazi asked the front desk clerk to find out if Claimant did the job. Claimant told the clerk that he had not performed the job because his "ass hurt." Notes of Testimony, June 1, 2012 (N.T.) at 11-12. Claimant admitted to Hegazi that he made the statement, but as a joke. Employer discharged Claimant for insubordination.

Claimant subsequently applied for UC benefits on the basis that he was laid off due to a lack of work, and he began receiving benefits. Employer informed the UC Service Center that the separation was due to Claimant's insubordination. On April 10, 2012, the Lancaster UC Service Center mailed a determination denying Claimant UC benefits under Section 402(e) of the Law, and a notice of fault overpayment in the amount of $848.00. Claimant appealed, and a hearing was held before a Referee on June 1, 2012. On July 9, 2012, the Referee reversed the UC Service Center's determination. Employer appealed to the UCBR. On October 31, 2012, the UCBR reversed the Referee's decision. Claimant appealed to this Court.[4]

[3] Claimant had worked full-time for Employer but, at some point, his hours were reduced to part-time. He worked part-time for Employer at the time of his discharge.

[4] "Our scope of review is limited to determining whether constitutional rights were violated, whether errors of law were committed, or whether the factual findings are supported by substantial evidence." *Deklinski v. Unemployment Comp. Bd. of Review*, 37 A.3d 1262, 1263 n.3 (Pa. Cmwlth. 2012).

Claimant first argues that there was not substantial evidence to support the UCBR's finding that Claimant was discharged for willful misconduct. We disagree. Section 402(e) of the Law provides that an employee is not eligible for benefits if "his unemployment is due to his discharge . . . for willful misconduct connected with his work . . . ."

> The employer bears the burden of proving willful misconduct in an unemployment compensation case. Willful misconduct has been defined as (1) an act of wanton or willful disregard of the employer's interest; (2) a deliberate violation of the employer's rules; (3) a disregard of standards of behavior which the employer has a right to expect of an employee; or (4) negligence indicating an intentional disregard of the employer's interest or a disregard of the employee's duties and obligations to the employer.

Dep't of Transp. v. Unemployment Comp. Bd. of Review, 755 A.2d 744, 747-48 n.4 (Pa. Cmwlth. 2000) (citation omitted). "When an employee is discharged for violating a work rule, the employer must prove the existence of the rule and the fact of its violation. The burden then shifts to the employee to prove that he or she had good cause for violating the rule." *Lewis v. Unemployment Comp. Bd. of Review*, 42 A.3d 375, 377 (Pa. Cmwlth. 2012) (citation omitted).

At the Referee hearing, Employer introduced a written reminder of its policies it had issued to its employees, including Claimant, on December 1, 2011. Claimant signed the policy form which expressly lists "[g]ross insubordination," "[d]eliberate interference with [Employer's] operation," and "actions that conflict with the company's interests" as "[a]ction[s] that will result in immediate termination." Certified Record (C.R.) Item 2. Employer also admitted into evidence the written warning issued to Claimant on December 30, 2011, in which it listed seven specific incidents of Claimant's insubordination, then concluded:

> No matter how many times you were told to stop these destructive actions and to follow instructions, you ignored all direction and continued to do whatever you feel like doing causing the Hotel losses and embarrassment.
>
> This attitude can no longer be tolerated and any such action in the future will result in more disciplinary action up to and including termination.

C.R. Item 2. Claimant refused to sign the warning.

Hegazi testified at the hearing that Claimant had a recent history of not performing jobs he was assigned. In one referenced incident, after removing ceiling tiles above the maintenance desk, Claimant left the debris on the desk. When asked why, Claimant stated he wanted to "piss off" his supervisor. In another occurrence, after Claimant was asked to empty the front desk trash can, Claimant wrote on a Safety Maintenance Request form, "Rondell will never take out trash again," and threw the form at the front desk supervisor. N.T. Ex. 19. Hegazi also testified that pool cleaning was Claimant's responsibility, but the pool conditions had deteriorated during Claimant's employment. Approximately two weeks before Claimant's discharge, Hegazi told Claimant the pool water had become too cloudy. According to Hegazi, Claimant responded that the pool should be closed and, until Employer gave him work five days a week plus overtime, it would remain in that condition. A shouting match ensued between Claimant and Hegazi. Hegazi further related that he received notice that Claimant filed for UC benefits in January 2012 due to lack of work. However, because Employer had plenty of work for Claimant, Hegazi assumed that Claimant had been laid off from another job. Hegazi finally testified regarding the February 2, 2012 incident, wherein Claimant said he did not do the job because his "ass hurt." N.T. at 11-12. Hegazi stated that he probably should have fired Claimant sooner, but he was aware that Claimant had significant family responsibilities and needed the job.

At the hearing, Claimant admitted he wrote the note refusing to take trash out again, but claimed he wrote it in 2009 and that it was not directed to Employer. As to the final incident, Claimant testified the front desk clerk called him at home after his shift and asked him about emptying the outside trash cans. Claimant admitted making the comment to the clerk because he was sitting on the riding mower at work all day. Claimant did not intend for the clerk to relay the comment to Hegazi, nor did he mean any disrespect by it. In any event, Claimant testified that although emptying outside trash bins was not his responsibility, Hegazi asked him to empty one outside trash can, which he did before he left work that day.

The Referee found Claimant's comment, while a sign of poor judgment, did not constitute willful misconduct. However, based upon the same evidence, the UCBR "resolve[d] the conflicts in the testimony, in relevant part, in favor of [Employer] and [found Hegazi's] testimony to be credible." UCBR Op. at 2. The UCBR specifically found "[t]hrough credible testimony and documentary evidence, [Employer] established that [Claimant] had a history of insubordination and was even warned that further incidents may result in discharge," yet thereafter Claimant refused to maintain the pool unless his hours were reinstated and then refused to empty outside trash bins. UCBR Op. at 2. The UCBR discredited Claimant's assertions that his posterior pain prevented him from emptying trash cans as instructed, and that he did not intend his comment as disrespectful in light of Employer's credible evidence of Claimant's history of insubordination and negative attitude. The UCBR finally found that Claimant's comment, while made off-duty, was contextually related to his job. The UCBR concluded that Claimant failed to establish good cause for his actions.

"In an unemployment compensation case, the UCBR is the ultimate fact finder and is empowered to make credibility determinations. Questions of credibility and the resolution of evidentiary conflicts are within the discretion of the UCBR and

are not subject to re-evaluation on judicial review." *Bell v. Unemployment Comp. Bd. of Review*, 921 A.2d 23, 26 n.4 (Pa. Cmwlth. 2007) (citation omitted). Moreover, "[f]indings made by the [UCBR] are conclusive and binding on appeal if the record, examined as a whole, contains substantial evidence to support the findings." *Owoc v. Unemployment Comp. Bd. of Review*, 809 A.2d 441, 443 (Pa. Cmwlth. 2002). "Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *City of Pittsburgh, Dep't of Pub. Safety v. Unemployment Comp. Bd. of Review*, 927 A.2d 675, 676 n.1 (Pa. Cmwlth. 2007) (quotation marks omitted).

Here, it is undisputed that Claimant was aware of Employer's policy relative to insubordination and that a single violation could result in discharge. Claimant received a written warning about his insubordination approximately one month before his employment termination. Employer proved that Claimant nevertheless acted in violation of that policy without good cause for his behavior. Thus, the record in this case clearly contains substantial evidence to support the UCBR's conclusion that Claimant's actions constituted willful misconduct.

Claimant next argues that the UCBR erred by considering Claimant's history of insubordination. Claimant specifically avers that his conduct was not continual, and the additional incidents were wholly immaterial to whether the final incident rose to the level of willful misconduct. We disagree. The final incident alone rose to the level of willful misconduct. Based upon the evidence the UCBR deemed credible, the UCBR specifically held: "The final incident involved the [C]laimant's refusal to empty trash cans. When asked why he refused, he said 'because [his] ass hurt[].' The refusal and the comment were separate acts of insubordination." UCBR Op. at 2. Because there was substantial evidence to support the UCBR's findings, it is beyond our authority to re-evaluate them. *Duquesne Light Co. v. Unemployment Comp. Bd. of Review*, 648 A.2d 1318 (Pa. Cmwlth. 1994).

Further, an employee's failure to follow a specific, reasonable order without a good cause will alone support a finding of willful misconduct. *Kalenevitch v. Unemployment Comp. Bd. of Review*, 531 A.2d 590 (Pa. Cmwlth. 1987). In addition, "[a] conclusion that the employee has engaged in disqualifying willful misconduct is especially warranted in . . . cases where [as here] the employee has been warned and/or reprimanded for prior similar conduct." *Ellis v. Unemployment Comp. Bd. of Review*, 59 A.3d 1159, 1163 (Pa. Cmwlth. 2013) (quoting *Dep't of Transp. v. Unemployment Comp. Bd. of Review*, 479 A.2d 57, 58 (Pa. Cmwlth. 1984)). Thus, the UCBR properly considered Claimant's history of insubordination.

Finally, Claimant argues that the UCBR erred by assigning a fault overpayment. Specifically, Claimant contends that "[a] misunderstanding or different view on what the phrase 'lack of work' means does not equate to fault under [the Law]," and that "an anonymous computer entry that lacks attribution cannot form the foundation for a finding of fault." Claimant Br. at 20. We disagree. Claimant's Department UC claim record, which was admitted into the record without objection, denotes after his discharge, "CLMR IS FILING 4 PAST WKS WITH WAGES, AND IS NOW **PERLAID OFF**." N.T. Ex. 24 (emphasis added). To the extent the claim record may have been hearsay, it is still competent evidence and may form the basis for a finding of fact if it is corroborated by other competent evidence. *Remaly v. Unemployment Comp. Bd. of Review*, 423 A.2d 814 (Pa. Cmwlth. 1980). "All that is necessary is that facts adding weight or confirming the hearsay be established by competent evidence." *Socash v. Unemployment Comp. Bd. of Review*, 451 A.2d 1051, 1053 (Pa. Cmwlth. 1982).

Here the claim record is corroborated by Claimant's admission that, after his discharge, he informed someone at the Department that he no longer worked for Employer. Although Claimant did not specify exactly what he told the Department in February 2012, Claimant maintained throughout the hearing that he "was laid off for

lack of work," not discharged. N.T. at 9, 18, 22. Based upon Claimant's corroboration of the claim record entry, the UCBR did not err by finding Claimant notified the Department that he was permanently laid off, rather than being discharged. Moreover, it is undisputed that based upon his misrepresentations to the Department, Claimant was granted benefits in the amount of $848.00 to which he was later deemed not entitled. Pursuant to Section 804(a) of the Law:

> Any person who by reason of his fault has received any sum as compensation . . . to which he was not entitled, shall be liable to repay . . . a sum equal to the amount so received by him and interest at the rate determined by the Secretary of Revenue . . . .

Accordingly, the UCBR properly assigned a fault overpayment against Claimant.

For all of the above reasons, the UCBR's order is affirmed.

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ANNE E. COVEY, Judge

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O R D E R

AND NOW, this 22nd day of May, 2013, the Unemployment Compensation Board of Review's October 31, 2012 order is affirmed.

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ANNE E. COVEY, Judge