

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jeffrey J. Weeks, :
Petitioner :
 :
v. : No. 378 C.D. 2014
 : Submitted: October 10, 2014
Unemployment Compensation :
Board of Review, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: October 24, 2014

Jeffrey J. Weeks (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) that reversed a Referee's decision and determined that Claimant is ineligible for unemployment compensation benefits under Section 402(e) of the Unemployment Compensation Law (Law).¹ We affirm.

¹ 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 “[a]n employe 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....”

Claimant was employed as a factory laborer by Fibreflex Packing & Manufacturing Company (Employer) until he was discharged for willful misconduct² for getting into an altercation with Employer's Assistant Plant Manager, Charles Keim (Manager). Claimant filed for unemployment compensation benefits and the UC Service Center concluded that he was not ineligible for benefits under Section 402(e) of the Law because Claimant did not admit to the incident that caused the discharge and Employer did not provide information to show that Claimant was involved in the incident. Employer appealed.

Before the Referee, to demonstrate that Claimant engaged in willful misconduct, Employer's Manager testified that on his last day of work, Claimant reported for work looking like he had been up all night partying. Manager stated that

² The burden of proving willful misconduct rests with the employer. *Guthrie v. Unemployment Compensation Board of Review*, 738 A.2d 518, 521 (Pa. Cmwlth. 1999). Willful misconduct has been defined as: (1) wanton or willful disregard for an employer's interests; (2) deliberate violation of an employer's rules; (3) a disregard for 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 an employee's duties or obligations. *Philadelphia Parking Authority v. Unemployment Compensation Board of Review*, 1 A.3d 965, 968 (Pa. Cmwlth. 2010). Insubordination or threats of violence toward a superior constitutes willful misconduct as a matter of law even if no physical altercation occurs or if the threat is not directly communicated to the supervisor. *See Sisak v. Unemployment Compensation Board of Review*, 421 A.2d 512, 513 (Pa. Cmwlth. 1980) (holding that the claimant committed willful misconduct even though his written threat of "violence" was not delivered directly to his immediate boss or couched in vulgar or explicit language); *Rodites v. Unemployment Compensation Board of Review*, 382 A.2d 1287-88 (Pa. Cmwlth. 1978) (holding that the claimant committed willful misconduct when he became involved in a heated exchange with a city councilman and "offered to take the councilman outside"); *Unemployment Compensation Board of Review v. Lee*, 340 A.2d 586, 588 (Pa. Cmwlth. 1975) (holding that the claimant committed willful misconduct when he threatened his supervisor with bodily harm after refusing to allow him to punch his time card for overtime pay). Whether an employee's conduct constitutes willful misconduct is a question of law subject to our review. *Grieb v. Unemployment Compensation Board of Review*, 827 A.2d 422, 426 (Pa. 2003).

his son and Claimant's co-worker, Ryan Keim (Co-worker), reported that Claimant was driving the forklift with his eyes half-closed and that he should be sent home. Manager testified that he went to the back and told Claimant to go home. He stated that Claimant was eating food at the time and threw it against the wall and became hysterical. Manager testified that Claimant took off his shirt, got in Manager's face, and wanted to fight because he was told to go home; however, Manager told Claimant that he wasn't going to fight and to go home and go to bed and then walked away. (N.T. 11/12/13 at 7).³ He stated that he wasn't afraid of Claimant and didn't

³ "N.T. 11/12/13" refers to the transcript of the Referee's hearing.. Specifically, Manager testified as follows, in relevant part:

EL Could you describe what those dealings were?

EW2 ... And I went back there and I said to him, I said Jeff, why don't you go home and go to bed? And that when he – he was eating food, whatever, and he had – he threw it against the wall, and he was like all hysterical and he wanted to fight me. He took his shirt off. He got right in my face and everything. And I said I'm not going to fight you, you know. Then he – then, you know, he storms into the office [inaudible], you know.

* * *

CL Is it possible that you misinterpreted what he had said and that...

EW2 No.

CL ... he in fact wasn't actually threatening you with physical har[m]?

EW2 No. He got right in my face. He took his shirt off and he wanted to fight me since I told him to go home.

(*Id.* at 7, 11).

write him up for the incident, but that it was witnessed by other employees and the owner's daughter informed the owner of the incident. (*Id.* at 9-12).

Co-worker testified that Claimant seemed sedated or extremely tired like he had missed several days of sleep when he reported to work that day. (N.T. 11/12/13 at 13). He stated that Claimant could barely open his eyelids and asked if he could take a nap. (*Id.*). He testified that Claimant almost hit him with the forklift and that he reported the incident to Manager, that Claimant seemed "to be out of it," and that Claimant should be sent home. (*Id.* at 13, 16). Co-worker stated that he witnessed the altercation between Manager and Claimant.⁴ He testified that

⁴ Regarding the altercation, Co-worker testified as follows, in pertinent part:

EL Okay. And did you happen to hear any of the conversation that your dad had with [Claimant]?

EW1 As soon as my dad came back, he saw – like [Claimant] said he wanted to take a nap and lay down and....

R Wait, I'm sorry. Who said that?

EW1 [Claimant] asked me if he could go take a nap and lay down while I did the work for a little while, and I said that was fine. But my dad was already on his way back. He called [Claimant]. [Claimant] got up. He told him to go home. At that point, [Claimant] was in the process of making food or something, and he was eating his food. And as soon as my dad told him that, he went hysterical and he threw his food against the wall. He seemed to get really tense. He confronted my dad about not respecting him enough as a man and such, and he took off his shirt and threw his shirt and got really physically tense and up in his face. That's about it.

* * *

(Footnote continued on next page...)

Employer's owner, Tom Hoffman (Owner), was called and informed of the incident and that Owner said that Claimant was not allowed back on the property. (*Id.* at 22).⁵

Claimant testified that Co-worker has accused him of coming to work while intoxicated numerous times and that he has passed Employer's drug screens. (N.T. 11/12/13 at 26). He stated that Employer was aware that he was on medication and acknowledged that he was tired on his last day of work. (*Id.* at 27). He testified that it is "pretty well documented" that Manager has a personal issue with him. (*Id.*) Claimant stated that on his last day, Manager just walked up to him while he was eating oatmeal and said, "[Y]ou're high as hell, go home." (*Id.* at 27, 28, 29). He denied that he almost hit Co-worker with the forklift that day. (*Id.*). He stated that, in response, he immediately asked Manager to take him for a drug screen because he could not miss work due to his financial situation and Manager refused. (*Id.*).

(continued...)

CL ... When you saw the parties go outside, did you see [Claimant] threaten your father?

EW1 No, he never verbally said anything like I'm going to hit you or anything like that. But his body language and the taking off of his shirt and, you know, muscles tense, you know, things like that, his posture was extremely aggressive compared to my dad's. My dad wasn't being aggressive at all.

(N.T. 11/12/13 at 13, 20).

⁵ Joseph Hoffman (Hoffman), Employer's Vice President, also testified that while he saw Claimant driving a forklift that morning, he did not witness the altercation. (N.T. 11/12/13 at 23-24). Hoffman stated that Manager told him that he had been threatened by Claimant and that Claimant threw something at the wall. (*Id.* at 24). He testified that Owner, the other owner of the company, was contacted because he was out of the office that day. (*Id.* at 24-25).

Claimant acknowledged that while he threw his food at the wall, yelled at Manager and took off his shirt, he did not get in Manager's face and that Manager approached him during the altercation. (*Id.* at 34). He also acknowledged an 11/21/12 Quest Diagnostic Report showing morphine, codeine and opiates in his system and explained that their presence was due to his pain medication. (*Id.* at 35). Claimant testified that later in the day of the altercation, his brother took a call from Employer and was told that Claimant was not allowed on the premises and that the police would be called if he came back. (*Id.* at 37-38). He stated that this was confirmed when he called on his next scheduled day of work and a secretary told him not to come on the property and to have his brother return his uniforms. (*Id.* at 32-33).

Ultimately, the Referee affirmed the UC Service Center's determination, finding that Claimant was not ineligible for benefits under Section 402(e):

Regarding the claimant's outburst when sent home, there is a conflict in the parties' testimony as to whether he threatened to fight the [Manager]. The claimant credibly established he did not threaten physical harm to the [Manager] but rather was yelling and agitated because the supervisor refused to believe he was not impaired and would not send him for a drug test to prove it. Although claimant's behavior was inappropriate, under the circumstances, a single incident of this type does not rise to the level of willful misconduct.

(Referee's 11/20/13 Decision at 3).

However, on appeal, the Board made the following relevant findings of fact regarding Claimant's termination: Claimant reported to work in a drowsy state

and almost hit Co-worker while driving a forklift which was reported to Manager; Manager saw Claimant and told him that he was “as high as hell” and directed him to go home and get some sleep; Claimant was upset because he couldn’t afford to lose most of a day’s pay and because Employer had previously sent him for drug testing that did not show any illegal or non-prescribed drugs in his system; Claimant denied being under the influence and asked for a drug test; Manager refused to send him for a drug test and repeated the directive that he go home; Claimant became upset and threw his oatmeal against the wall; Claimant continued to yell at Manager and took off his work shirt, threw it on the ground and got in Manager’s face; Manager told Claimant that he was not going to fight, that Claimant should leave the premises and walk away; Claimant’s brother told him that a co-worker called and said that he was not permitted on Employer’s premises; and this was confirmed when Claimant called Employer and a secretary told him to have his brother return his uniforms because he was not allowed on the property. (Board 2/6/14 Decision at 1-2). In reversing the Referee’s grant of benefits, the Board explained:

[Claimant] was not discharged for working while impaired. [Manager] directed him to go home for the day. There is no evidence that [Employer] intended to discipline [Claimant]. [Claimant] was discharged for his behavior toward [Manager]. There is no doubt that [Claimant] was upset and frustrated, given that [Employer] had previously sent him for drug testing on multiple occasions. However, it was not unreasonable under the circumstances for [Manager] to determine that he could not operate the machinery safely and to send him home.

[Claimant] did not have good cause to throw the oatmeal against the wall or to throw his work shirt. He then got in [Manager]’s face in a posture inviting a physical confrontation. [Claimant]’s behavior is below the standards

that [Employer] has a right to expect. Benefits are denied under Section 402(e) of the Law.

(*Id.* at 3).

This appeal by Claimant followed⁶ in which he argues that the Board erred in reversing the Referee's determination that he did not threaten physical harm to Manager and that his conduct did not constitute willful misconduct because Manager was not afraid and did not write him up for the incident and Claimant was not terminated as a result. We do not agree.

By statute, the Board, as the ultimate finder of fact,⁷ is entitled to reverse the credibility determinations of a referee. Section 504 of the Law, 43 P.S. §824. The Board may reverse a referee's credibility determination where there is substantial evidence and enough detail to allow meaningful appellate review. *McLean v. Unemployment Compensation Board of Review*, 686 A.2d 908, 909 (Pa. Cmwlth.

⁶ Our review of the Board's decision is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. *Middletown Township v. Unemployment Compensation Board of Review*, 40 A.3d 217, 222 n.8 (Pa. Cmwlth. 2012).

⁷ The Board is the ultimate finder of fact in unemployment compensation proceedings. *Peak v. Unemployment Compensation Board of Review*, 501 A.2d 1383, 1389 (Pa. 1985); *Chamoun v. Unemployment Compensation Board of Review*, 542 A.2d 207, 208 (Pa. Cmwlth. 1988). Issues of credibility are for the Board, which may either accept or reject a witness' testimony whether or not it is corroborated by other evidence of record. *Id.* This Court must examine the evidence in the light most favorable to the party who prevailed before the Board, and to give that party the benefit of all inferences that can be logically and reasonably drawn from that evidence. *Taylor v. Unemployment Compensation Board of Review*, 378 A.2d 829, 831 (Pa. 1977). Findings of fact are conclusive on appeal if the record contains substantial evidence to support the findings. *Id.*

1996).⁸ As outlined above, the Board’s findings in this case are amply detailed and supported by substantial evidence and demonstrate that Claimant threatened his supervisor with violence by physically menacing Manager during the altercation and that Employer terminated his employment as a result of that altercation. That there is evidence supporting contrary or different findings or supporting a finding that Claimant was justified in his actions is of no moment and is not a basis for this Court to reverse the Board’s determination on appeal.⁹ As a result, the Board did not err in reversing the Referee’s award of benefits because Claimant’s conduct as found by the Board constitutes disqualifying willful misconduct as a matter of law under Section 402(e). *Sisak; Rodites; Lee*.

⁸ Claimant erroneously cites *Treon v. Unemployment Compensation Board of Review*, 453 A.2d 960 (Pa. 1982) because, as noted by the Referee, her finding regarding whether Claimant improperly threatened physical harm involved “[a] conflict in the parties’ testimony as to whether [Claimant] threatened to fight the [Manager].” (Referee’s 11/20/13 Decision at 3). The Board did not have to provide a reason for reversing a referee’s credibility determination under *Treon* where the evidence on that point is inconsistent or contradictory. *Oliver v. Unemployment Compensation Board of Review*, 5 A.3d 432, 440-41 (Pa. Cmwlth. 2010).

⁹ The fact that a witness has presented a version of the facts different from that accepted by the Board is not a basis for reversal if substantial evidence supports the Board’s findings. *Tapco, Inc. v. Unemployment Compensation Board of Review*, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994). “It is irrelevant whether the record contains evidence to support findings other than those made by the fact-finder; the critical inquiry is whether there is evidence to support the findings actually made.” *Ductmate Industries, Inc. v. Unemployment Compensation Board of Review*, 949 A.2d 338, 342 (Pa. Cmwlth. 2008) (citation omitted). As the burdened party with respect to establishing good cause, Claimant had to meet both his burden of production and his burden of persuasion. *See Kirkwood v. Unemployment Compensation Board of Review*, 525 A.2d 841, 844 (Pa. Cmwlth. 1987). The Board was free to reject Claimant’s evidence regarding his purported good cause, even if it was unrebutted. *Carriers Terminal Company v. Unemployment Compensation Board of Review*, 449 A.2d 873, 874 (Pa. Cmwlth. 1982).

Accordingly, the Board's order is affirmed.

DAN PELLEGRINI, President Judge

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| Jeffrey J. Weeks, | : |
| Petitioner | : |
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| | : |
| Unemployment Compensation | : |
| Board of Review, | : |
| Respondent | : |

ORDER

AND NOW, this 24th day of October, 2014, the order of the Unemployment Compensation Board of Review dated February 6, 2014, at No. B-13-09-C-B823 is affirmed.

DAN PELLEGRINI, President Judge