IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Marc E. Rothstein,	:	
Petitioner	:	
	:	
v.	:	No. 875 C.D. 2014
	:	SUBMITTED: December 5, 2014
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION BY
JUDGE LEADBETTER **FILED: February 11, 2015**

Marc E. Rothstein petitions *pro se* for review of the Unemployment Compensation Board of Review's order affirming the denial of unemployment compensation benefits. In doing so, the Board affirmed the referee's determination that Rothstein committed disqualifying willful misconduct under Section 402(e) of the Unemployment Compensation Law (Law),[1] 43 P.S. § 802(e), when he failed without good cause to report to his employer that he was arrested and charged with the misdemeanor summary offenses of stalking, harassment, and indecent exposure as required by his employer's policy. After review, we affirm.

[1] Act of December 5, 1936, Second Ex. Sess., P.L. 2897, *as amended.*

The underlying facts are not in dispute. Rothstein worked as a Service Technician for Verizon Pennsylvania, Inc., and his job responsibilities required him to enter the homes of Verizon customers. Verizon had an established policy regarding employee off-the-job misconduct that provided as follows:

> Employees must avoid conduct off the job that could impair work performance or affect the company's reputation or business interests. In order for the company to determine whether off the job conduct could impair work performance or affect the company's reputation or business interests, you must promptly report to the VZ Ethics and EEO Guideline: . . . (3) any other arrest pending final resolution or conviction which may affect your ability to perform your job or otherwise affect the company's business interests.

Referee's Finding of Fact (FF) No. 2. Rothstein was arrested and charged with the aforementioned offenses on May 22, 2012, but he did not report his arrest to Verizon. Verizon did not learn of Rothstein's arrest and subsequent conviction of indecent exposure until approximately October 1, 2013, when an employee read a newspaper article detailing Rothstein's conviction. Rothstein was discharged several days later for failing to report his arrest and subsequent conviction.

Before the referee, Verizon's representative, Mr. Buffardi, testified that it is against Verizon's best interest to employ an individual who has been convicted of indecent exposure. Specifically, Buffardi stated: "Marc's a technician and they have to go into customer houses and it's a fairly large liability for the company if someone's convicted of that type of offense." Notes of Testimony (N.T.) at 5, Hearing of January 8, 2015. According to Buffardi, if Rothstein had reported his arrest to Verizon in May 2012, Verizon would most likely have assigned Rothstein to a non-customer based position. Rothstein, who appeared at the hearing without counsel, testified that he did not think he needed to

report the arrest and he did not report it on the advice of his union. When asked by the referee why he did not report the arrest to his manager and let the manager decide whether the offense needed to be reported, Rothstein stated: "I discussed it with my Union officials. Verizon is the type of company that kind of shoot[s] first and ask[s] questions after and maybe they felt that I would automatically get fired . . . ." *Id.* at 8. Rothstein reiterated several times throughout the hearing that he did not report his arrest to Verizon based on the advice of his union. He did acknowledge in response to questioning by the referee, however, that Verizon should have been notified of his arrest and the underlying charges. Specifically, Rothstein testified as follows:

> [Referee]: Well, do you think that Verizon as a company had the right to know that you were arrested and - - - with these charges? As your Employer did they have the right to know that?
>
> [Claimant]: I left that decision to be made up to my Union and they read the code of conduct and they didn't believe so.
>
> [Referee]: I don't get that. You have a public company, a company the size of Verizon, they don't have the right to know of an employee at least as [sic] been charged with something like indecent exposure or harassment or stalking? They don't have the right to know that? . . . I'm just asking your opinion, yes, not your Union's opinion, your opinion – you're their employee, you don't think that it is – that something's going on in your life like that your Employer has the right to know that?
>
> [Claimant]: If they're – if I knew or believed that they would take a completely fair position then, yes, I think they, you know, should be notified.
>
> [Referee]: And you don't think they should be given a chance to look at the situation to make that decision?

> [Claimant]: Oh, I'm not saying they shouldn't have been given a chance, I'm just simply saying that at the time I kind of put it in the hands of my Union.

Id. at 9-10.

Concluding that Rothstein was required to report his arrest and that he lacked good cause for violating the policy when he failed to so report, the referee denied benefits. In doing so, the referee also concluded that Rothstein's subsequent conviction disqualified him from benefits as well. The Board affirmed on appeal, adopting the referee's findings and conclusions. In affirming, the Board specifically agreed that in light of the nature of Rothstein's job, which required him to work in the homes of customers, his arrest for the offenses stated "reasonably could affect his ability to perform his job." Board's Order (mailed April 16, 2014). This appeal followed.

Here, where a claimant is discharged on the basis that he violated a work policy, it is well settled that the employer bears the burden of demonstrating the existence of the policy, its reasonableness, that the claimant was aware of the policy and that he violated it. *Chapman v. Unemployment Comp. Bd. of Review*, 20 A.3d 603, 607 (Pa. Cmwlth. 2011). Once these facts are established, the burden shifts to the claimant to demonstrate that he had good cause for violating the policy. *Id.* Good cause is demonstrated if the claimant's conduct was justified or reasonable under the circumstances. *Id.* The only issue that has been properly preserved for our review is whether Rothstein established good cause for failing to report his arrest or conviction.[2] While not preserved in his appeal to the Board, we

[2] While various issues are argued in Rothstein's appellate brief, including that the policy itself is vague and ambiguous, these issues were not raised before the referee or Board. An issue is waived for purposes of appellate review if it is not raised before the referee and Board. *See*
(Footnote continued on next page…)

will also address whether the policy at issue required Rothstein to report his arrest and/or conviction.

First, we address Rothstein's argument that he was not required to report his arrest because it had no impact on his ability to perform his job. Specifically Rothstein contends: "There is no indication that an arrest for stalking, harassment and indecent exposure would in any way affect Petitioner's ability to successfully and professionally perform his job. . . . His job required him to install and repair television cable systems, high speed internet, and dial tones . . . ." Appellate Brief at 16-17. Rothstein then details the facts underlying his arrest and conviction, explaining how such circumstances would not negatively impact his "knowledge in the field or ability to install and/or repair FiOS and copper wiring systems." *Id.* at 17.

Initially, we note that the evidence regarding the circumstances underlying Rothstein's arrest and subsequent conviction was not adduced before the referee, nor otherwise made a part of the certified record and, therefore, cannot be considered on appeal. *Pa. Turnpike Comm'n v. Unemployment Comp. Bd. of Review*, 991 A.2d 971, 974 (Pa. Cmwlth. 2009). Notwithstanding the lack of those details, we agree with the Board that the very nature of the charges against Rothstein could affect his ability to perform his job. Moreover, such charges could very well impact Verizon's reputation and business interests. Indeed, Verizon's representative testified that it was against employer's interest to employ an individual convicted of indecent exposure and that an employee working in

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(continued…)

Pa. R.A.P. 1551; *Wing v. Unemployment Comp. Bd. of Review*, 436 A.2d 179 (Pa. 1981); *Schaal v. Unemployment Comp. Bd. of Review*, 870 A.2d 952 (Pa. Cmwlth. 2005).

customers' homes with Rothstein's arrest history posed a liability issue. It is beyond question that Rothstein's criminal history, both the arrest and conviction, could impact his ability to perform his job. Rothstein's focus is misplaced in looking only to the impact his arrest has on his technical abilities; the customer's safety, comfort and confidence in Verizon services could all be impacted by knowledge that a technician charged with the crimes at issue may be sent to enter his/her home to perform needed repairs. *A fortiori*, customers of public services assume that company employees who have frequent and personal contact with the public have been vetted and determined to be trust-worthy, law-abiding individuals. Accordingly, we agree that Rothstein was required to report his arrest under the terms of the policy.

Rothstein next argues that he established good cause for failing to report his arrest. According to Rothstein:

> [H]e followed the explicit advice of his union representative, who told him that the Union had consulted and reviewed the relevant provisions and had determined that Petitioner should not tell anyone about the arrest. . . . Mr. Rothstein paid dues precisely for this purpose: in exchange for such dues, the Union was to represent Mr. Rothstein when appropriate and advise Petitioner in all matters relating to his employment. In fact, Petitioner specifically was told to consult and rely upon the Union for any issues and/or questions he had relating to his employment.

Appellate Brief at 23 (emphasis and citations omitted). In support of this position, Rothstein cites *Link v. Unemployment Compensation Board of Review*, 446 A.2d 999 (Pa. Cmwlth. 1982).

In *Link*, the claimant, believing that he was required to retire at age sixty-five under the labor-management agreement between his employer and

union, retired upon reaching sixty-five and then sought benefits. Shortly before retiring, however, a personnel clerk informed the claimant that a change in the law had occurred thereby permitting the claimant to work until he reached the age of seventy.[3] Upon further investigation, a union representative informed the claimant that the parties' agreement was still valid, including the provision imposing mandatory retirement at age sixty-five. Claimant accordingly retired. Benefits were initially denied on the ground that the claimant's retirement was not mandatory and that the claimant was given sufficient notice that he could continue working. This court disagreed on appeal, concluding that since both the employer and union had the duty under the federal law to inform employees of their right to continue working, the employer's and union's failure to properly advise the claimant effectively deprived him of the choice to continue his employment. Accordingly, we held that the claimant's retirement was involuntary, entitling him to benefits.

We conclude that *Link* is distinguishable and does not command reversal of the Board. Here, unlike *Link*, no evidence was adduced, nor did the Board find, that the union was administratively charged with interpreting Verizon's policies for the employees and determining what conduct or actions constituted compliance therewith. While Verizon employees may have sought the advice of the union on personnel matters, the policy put the responsibility to report relevant off-the-job misconduct on the individual employee. Violating the policy by

[3] The "change" referenced was The Age Discrimination in Employment Act Amendments of 1978, 29 U.S.C. §§ 621-634, which prohibited "the involuntary retirement of persons less than seventy (70) years of age." *Link*, 446 A.2d at 1000.

following poor advice from the union does not relieve an employee of the consequences of his violation, nor provide just cause for the violation.

We affirm.

BONNIE BRIGANCE LEADBETTER,
Judge

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O R D E R

AND NOW, this 11th day of February, 2015, the order of the Unemployment Compensation Board of Review in the above captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
Judge