IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gary Kimmelman,	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	No. 1376 C.D. 2014
Respondent	:	Submitted: December 12, 2014

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: February 4, 2015

Gary Kimmelman (Claimant) petitions *pro se* for review of the Order of the Unemployment Compensation Board of Review (Board) that reversed the Referee's grant of benefits to Claimant under Section 402(e) of the Unemployment Compensation Law (Law).[1]

> The facts, as found by the Board, are as follows:
>
> 1. The claimant was last employed by Philadelphia Community College beginning in September 2002 and his last day of work was December 20, 2013.
>
> 2. The claimant's position was that of part-time adjunct teaching mathematics at a rate of pay of $1,379.00 per credit.

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

3. The employer had a policy regarding solicitation which was defined as the act of approaching another with the intent to buy or sell goods or services and/or, take orders or collect money from other than members of a sponsoring organization. The employer does not permit any person, organization or agency to solicit, conduct business, or raise funds on college property except where specific written permission has been obtained.

4. The claimant was or should have been aware of the employer's policy.

5. In October of 2011, the claimant received a verbal warning for violating the employer's solicitation policy.

6. In the Spring 2012 semester, the claimant created and photocopied his own instruction materials, part of which included pages of a textbook published in 1982, which he distributed to his students, and for which he had the students pay him their pro-rated share of the photocopying costs.

7. The claimant's department head thought that the claimant may have photocopied and distributed copyrighted materials that could put the employer at legal risk, and, because of this, issued the claimant a memorandum in May 2012 against photocopying copyrighted material without permission.

8. The May 2012 memo stated, in part, that all financial transactions to purchase instructor supplied course materials must be coordinated through the college bookstores and that the faculty may not sell materials directly to students. The letter also stood as a formal written warning for the claimant to cease these activities.

9. In the fall semester of 2013, the employer posted on its web site certain math instructional material for any student or faculty member to print and use.

10. The textbook for one of the claimant's courses cost $113.00 at the book store.

11. Most of the claimant's students did not have many financial resources, and he wanted to save them the textbook cost.

12. In lieu of a textbook, the claimant wanted the students to have on paper the materials from the employer web site and he printed, or had someone else print, copies of them.

13. At the beginning of the semester, the claimant had each student complete an intake form; on it was a block to check if they agreed to pay a portion of the cost of photocopying the instructional material, which almost all students did.

14. The claimant did not have the employer's own copy center print the web site materials because it was at a different site than where he taught, it took more time, cost at least five dollars more per student, and students were less likely to be motivated to get them on time.

15. The claimant did not interpret his collection of photocopying costs from students as selling them materials as contemplated in [the] May [sic] 2012 memo.

16. The claimant printed, or had someone print for him, a portion of the employer web site material and distributed this portion to all class members, but, when distributing a second portion, gave it only to those students who agree to reimburse him for printing costs.

17. A student who had not agreed to reimburse the claimant complained to the employer that the claimant did not give her the second portion of materials, and the employer informed her she was free to print those herself from its web site.

18. The employer discharged the claimant at the end of the fall 2013 semester, because of the claimant's repeated violation of the college policy on solicitation, despite prior warnings by the employer.

DISCUSSION:

> ….
> Since the claimant was discharged, the employer has the burden of establishing that the discharge was for willful misconduct in connection with his work, in accordance with the provisions of Section 402(e) of the Law. The employer has met this burden.
>
> In this case, the claimant did not violate the letter and/or intent of the solicitation policy. However, the claimant should have known distributing materials and collecting some portion of the cost would violate the department head's May 2012 directive and lead to discharge.
>
> The May 2012 memo instructs the claimant to use the copy center and bookstore for the purchase of instructor-supplied materials, and that he could not sell such materials himself. The Board finds incredible the claimant's testimony that he thought he could divide photocopying costs, collect them from students willing to reimburse him, and not provide the website materials to those who were not without violating the employer-s [sic] policy. The claimant violated the employer's policy of which he was aware and is ineligible for benefits pursuant to Section 402(e) of the Law.

Board's Decision, July 1, 2014, (Decision), Findings of Fact Nos. 1-18 and Discussion at 1-4.

On appeal,[2] Claimant essentially contends that the Board erred when it determined that there was substantial evidence to support a finding of willful misconduct.[3]

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[2] Our review is limited to determining whether constitutional rights were violated, whether errors of law were committed, and whether findings of fact are supported by substantial evidence. *Beddis v. Unemployment Compensation Board of Review*, 6 A.3d 1053, 1055 n.2 (Pa. Cmwlth.

[3] In his brief, Claimant listed the following in his Statement of Questions:

(Footnote continued on next page…)

Whether a Claimant's conduct rises to the level of willful misconduct is a question of law subject to this Court's review. *Lee Hospital v. Unemployment Compensation Board of Review*, 589 A.2d 297 (Pa. Cmwlth. 1991). Willful misconduct is defined as conduct that represents a wanton and willful disregard of an Employer's interest, deliberate violation of rules, disregard of standards of behavior which an Employer can rightfully expect from the employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the Employer's interest or employee's duties and obligations. *Frick v. Unemployment Compensation Board of Review*, 375 A.2d 879 (Pa. Cmwlth. 1977). The Employer bears the burden of proving that it discharged an employee for willful misconduct. *City of Beaver Falls v. Unemployment Compensation Board of Review*, 441 A.2d 510 (Pa. Cmwlth. 1982).

(continued…)

> 1. Was it the intent of the Appellant [Claimant] to harm the employer's interests?
>
> ….
>
> 2. Was it the intent of the Appellant [Claimant] to assist the students with their financial problems and motivated by 'Good Cause'?
>
> ….
>
> 3. Did the employer attempt to resolve their [sic] issues with the requested face to face meeting by Appellant [Claimant], or was his request disregarded and met with punitive actions?
>
> ….
>
> 4. Did Appellant [Claimant] receive the appropriate orientation and employee handbook outlining the Colleges [sic] [Employer] Policies and Procedures?
>
> ….
>
> 5. Did [C]laimant willfully violate Section 402(e) [sic]
>
> ….

Claimant's Brief, Statement of Questions at 5-6.

The Employer bears the burden of proving the existence of the work rule and its violation. Once the Employer establishes that, the burden then shifts to the Claimant to prove that the violation was for good cause. *Peak v. Unemployment Compensation Board of Review*, 501 A.2d 1383 (Pa. 1985).

In the present case, Employer established that Claimant was terminated for "[r]epeated violation[s] of the college policy on solicitation despite prior warning by two separate Department Heads." Notes of Testimony, April 14, 2014, (N.T.) at 4.

Claimant argues that the Board erred when it characterized his actions as willful misconduct. Claimant maintains that he merely intended to assist the students financially and did not intend to harm Employer's interests. More specifically, Claimant contends there was no substantial evidence[4] to establish he was aware of Employer's policies concerning solicitation.

Sharon Thompson (Ms. Thompson), Acting Vice President of Academic Affairs for Employer, credibly testified that Claimant was aware or should have been aware of Employer's policy.

> EW1 [Ms. Thompson]: All of our college policies are posted on the web and which is [sic] our college website to which all new employees are referred as well as since Mr. Kimmelman [Claimant] has been there…[a]nd an email is sent to all employees referring them to the

[4] Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Murphy v. Department of Public Welfare*, 480 A.2d 382, 386 (Pa. Cmwlth. 1984).

> Employee Handbook and to the web. In addition, when this issue of solicitation was first brought to Mr. Kimmelman's [Claimant's] attention in 2007 by the former Chair of the Department, he was made aware of the solicitation policy at that point.
> ….
> And then in 2012 of [sic] May, Mr. Kimmelman [Claimant] was made aware of his second time of doing that in a written Memo from the then second Department Chair….

N.T. at 5-6.

Jill Garfinkle Weitz (Ms. Weitz), the Vice President of Human Resources and General Counsel for Employer, testified that Claimant "admitted that he…had sold…copies of workbooks to students and that they had given him money in exchange…[d]espite numerously asking him and reminding him that we have a college bookstore and we have a process to do that, he kept saying well he didn't want to do that." N.T. at 30-31. Additionally, Claimant acknowledged Employer's warning in a letter to Employer and stated that he understood the seriousness of the situation and the consequences for violating Employer's policy regarding solicitation. N.T. at 56. The Board determined that Claimant "should have known distributing materials and collecting some portion of the cost would violate the department head's May 2012 directive and lead to discharge." Decision, Discussion at 3.

In unemployment compensation proceedings, the Board is the ultimate fact-finding body empowered to resolve conflicts in evidence, to determine the credibility of witnesses, and to determine the weight to be accorded evidence. *Unemployment Compensation Board of Review v. Wright*, 347 A.2d 328 (Pa. Cmwlth. 1975). Findings of fact are conclusive upon review provided that the

record, taken as a whole, provides substantial evidence to support the findings. *Taylor v. Unemployment Compensation Board of Review*, 378 A.2d 829 (Pa. 1977). Here, The Board resolved all conflicts in testimony, in relevant part, in favor of Employer.

The findings of fact challenged by Claimant are supported by substantial evidence. Employer established that it had a rule, that Claimant was made aware of that rule, and that Claimant violated that rule. Claimant failed to provide any legitimate argument that he had good cause for violating that rule.

Accordingly, the decision of the Board is affirmed.

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BERNARD L. McGINLEY, Judge

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v.	:	
Unemployment Compensation Board of Review, Respondent	:	No. 1376 C.D. 2014

O R D E R

AND NOW, this 4th day of February, 2015, the Order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge