IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stephen J. Burns, Petitioner	:	
v.	:	
Unemployment Compensation Board of Review, Respondent	:	No. 1268 C.D. 2011
	:	Submitted: September 21, 2012

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE COVEY FILED: October 16, 2012

Stephen J. Burns (Claimant) appeals from the Unemployment Compensation Board of Review's (UCBR) May 13, 2011 order reversing the Referee's decision and denying Claimant unemployment compensation (UC) benefits. Claimant essentially presents two issues for this Court's review: (1) whether Claimant's employment was properly terminated for willful misconduct, and (2) whether the UCBR capriciously disregarded substantial evidence presented by Claimant. We affirm.

Claimant was employed by AO North America, Inc. (Employer) as a comptroller beginning August 24, 2009 and ending July 2, 2010. Employer has a Code of Conduct that indicates that employees are to treat each other with respect, and harassment of any kind to another employee, customer or vendor would not be tolerated. In June 2010, Employer received a complaint that Claimant was posting

disparaging comments about employees on Twitter. Employer's general manager and human resources representative reviewed Claimant's Twitter posts and called Claimant into a meeting on July 2, 2010. At the meeting, Claimant admitted he was the author of the posts. Claimant was notified by certified letter that, based on the July 2, 2010 meeting, he was discharged as a result of his behavior in violation of Employer's Code of Conduct.

Claimant applied for UC benefits. On November 15, 2010, the Altoona UC Service Center denied UC benefits under Section 402(e) of the Unemployment Compensation Law (Law).[1] Claimant appealed and, on January 5, 2011, a hearing was held by a Referee. On January 6, 2011, the Referee mailed his decision reversing the UC Service Center's decision. Employer appealed to the UCBR. On May 13, 2011, the UCBR mailed its decision reversing the Referee's decision and finding Claimant ineligible for UC benefits under Section 402(e) of the Law. Claimant appealed, pro se, to this Court.[2]

Claimant argues that his conduct did not constitute willful misconduct. Specifically, Claimant contends that his posts were not about Employer's employees, thus, they did not constitute willful misconduct. We disagree.

"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).

> Section 402(e) of the Law provides that an employee is ineligible for unemployment compensation benefits when

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

[2] This Court's review is limited to determining whether the findings of fact were supported by substantial evidence, whether constitutional rights were violated, or whether errors of law were committed. *Johnson v. Unemployment Comp. Bd. of Review*, 869 A.2d 1095 (Pa. Cmwlth. 2005).

> his unemployment is due to discharge from work for willful misconduct connected to 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 n.4 (Pa. Cmwlth. 2000) (citation omitted). "In the case of a work rule violation, the employer must establish the existence of the rule, the reasonableness of the rule and its violation." *Lindsay v. Unemployment Comp. Bd. of Review*, 789 A.2d 385, 389 (Pa. Cmwlth. 2001).

Here, Claimant signed a "Receipt Verification Form" acknowledging that he received Employer's Employee Policy Manual (Manual) on September 2, 2009. Original Record (O.R.) Item No. 9 (Employer's Ex. 1). The Manual contained Standards of Conduct, wherein, "[d]isparagement of the Organization, its officers, directors, managers and employees[,]" "[h]arassment of other employees, customers, or visitors[,]" and, "[d]isrespect toward fellow employees, visitors, customers, or other guests" are included in a list of items which "may result in disciplinary action up to and including discharge[.]" *Id.* The Manual further contains a Code of Conduct which specifically directs that "[e]mployees are expected to treat each other with respect." *Id.* Claimant does not contest the reasonableness of these policies.

At the hearing, Beth Cowan (Ms. Cowan), one of Employer's human resource business partners, testified that another employee complained that Claimant posted disparaging remarks on his Twitter account regarding employees, the organization and customers. The posts repeatedly referred to Claimant's work environment as "toxic[,]" his co-workers as "morons[,]" and his administrative

assistant as "dysfunctional[,]" "psychotic[,]" and "schizophrenic[.]" O.R. Item No. 2. As a result, Ms. Cowan reviewed Claimant's Twitter account, and met with Claimant. Ms. Cowan testified that when she asked Claimant at the meeting if he made the posts "[Claimant] admitted that he did." O.R. Item No. 9 at 5. She further testified that when she asked him if he was aware that these posts were not appropriate under Employer's Code of Conduct, Claimant responded that "[h]e understood." O.R. Item No. 9 at 6. Clearly, this evidence is relevant, and one could conclude therefrom that Employer had a reasonable policy against disparaging other employees, or the organization, that Claimant was aware of the policy, and that Claimant violated said policy. Thus, there was substantial evidence to support the UCBR's finding that Claimant's actions rose to the level of willful misconduct.

Claimant asserts that his posts did not constitute willful misconduct because they were about employees at Drexel University where he volunteered. Although Claimant testified at the hearing that the posts did not refer to Employer's employees, he never mentioned that fact at the meeting with Employer's general manager and human resource representative. "In an unemployment compensation case, the UCBR is the ultimate fact finder and is empowered to make credibility determinations." *Bell v. Unemployment Comp. Bd. of Review*, 921 A.2d 23, 26 n.4 (Pa. Cmwlth. 2007). The UCBR found this testimony not credible, and specifically found "that [C]laimant's disparaging remarks concerned his co-workers and his employment with his [E]mployer." Claimant's Br., App. iii. Hence, Claimant's posts did constitute willful misconduct.

Claimant next argues that the UCBR capriciously disregarded substantial evidence presented by Claimant. Specifically, Claimant contends that the Referee's findings of facts were supported by substantial evidence which the UCBR capriciously disregarded. We disagree.

> The 'capricious disregard standard of review,' previously applicable where only the party with the burden of proof presented evidence and did not prevail before the administrative agency, is now 'an appropriate component of appellate consideration in every case in which such question is properly brought before the court. Capricious disregard is a deliberate disregard of competent evidence that one of ordinary intelligence could not possibly avoid in reaching the result. This standard will generally assume a more visible role on consideration of negative findings and conclusions. Nevertheless, it is not to be applied in such a manner as would intrude upon the agency's fact-finding role and discretionary decision-making authority.
>
> Further, 'where there is substantial evidence to support an agency's factual findings, and those findings in turn support the conclusions, it should remain a rare instance in which an appellate court would disturb an adjudication based upon capricious disregard.'

Diehl v. Unemployment Comp. Bd. of Review, 4 A.3d 816, 824 (Pa. Cmwlth. 2010) (citations omitted). In the instant case, as explained above, substantial evidence supports the UCBR's findings, and those findings in turn support the conclusions. Thus, we find no reason to disturb the UCBR's decision.

"[T]he UCBR, not the [R]eferee, is the ultimate fact finding body and arbiter of credibility in unemployment compensation cases." *Deal v. Unemployment Comp. Bd. of Review*, 878 A.2d 131, 133 n.2 (Pa. Cmwlth. 2005). "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*, 921 A.2d at 26 n.4. Here, the UCBR found the Employer's testimony credible, and specifically "[did] not find credible the claimant's assertions that the disparaging remarks he posted on Twitter concerned his activities as a volunteer at Drexel University." Claimant's Br., App. iii. As the UCBR accepted Employer's testimony and rejected Claimant's testimony, the UCBR did not err in reversing the Referee's decision.

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 16th day of October, 2012, the Unemployment Compensation Board of Review's May 13, 2011 order is affirmed.

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ANNE E. COVEY, Judge