



## **Kammerdiener v. Unemployment Compensation Board of Review**

2002 | Cited 0 times | Supreme Court of Pennsylvania | October 31, 2002

SUBMITTED: February 22, 2002

OPINION NOT REPORTED

MEMORANDUM OPINION

Claimant Ronald Kammerdiener appeals pro se from the order of the Unemployment Compensation Board of Review (Board), affirming the referee's denial of benefits on the ground that claimant engaged in disqualifying willful misconduct under Section 402(e) of the Unemployment Compensation Law. <sup>1</sup> We affirm.

According to the referee's findings, which were adopted by the Board, claimant was employed by Key Bellevilles as a wheelabrator technician. Claimant was switched from the daylight shift to the afternoon shift and was upset with the change. However, at the time of hire, claimant signed an agreement whereby he accepted certain conditions of employment such as mandatory overtime, shift work and a rotating work schedule. Approximately one week before his discharge, claimant left work early without notifying a supervisor because he was mistaken about the duration of his work shift. Consequently, claimant received a written warning from employer which stated: "this is your final warning and you will be discharged immediately due to any further incidents of attendance and/or work performance neglect." See Referee's Findings of Fact No. 7. Subsequently, claimant left work early due to illness, and on another occasion, claimant reported to work approximately two hours late because he overslept. Thus, pursuant to the aforementioned warning, employer discharged claimant. The Board adopted the referee's findings and denied benefits on the grounds that claimant was discharged for willful misconduct. <sup>2</sup> Claimant appeals to this court.

On appeal, claimant asserts that the Board made an error of law in concluding that claimant engaged in willful misconduct because employer does not uniformly enforce the attendance rules. Other than claimant's allegations, there is no evidence of record to support his contention that employer had knowledge of and did not take disciplinary action against other employees with equally poor attendance records. Claimant's attempt to justify his noncompliance by arguing that other employees were absent/tardy without disciplinary repercussions cannot succeed. Claimant was clearly and specifically warned that the rules would be strictly enforced against him upon any future infractions. Claimant's tardiness in spite of the warning constitutes willful misconduct. <sup>3</sup> Thus, the Board did not err in concluding that claimant engaged in willful misconduct.



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Furthermore, claimant essentially challenges the sufficiency of the evidence supporting the Board's and the referee's finding that claimant was discharged because he was tardy despite employer's warning. See Referee's Finding of Fact No. 10. Claimant contends that employer discharged him for voicing safety concerns. Claimant did not present testimony to this effect before the referee. Claimant only testified vaguely that he felt he "was discharged for other reasons than absenteeism." N.T. at 15, hearing of June 22, 2001. Moreover, claimant's contention that he was fired for anything other than his attendance was rejected by the Board in its finding that claimant was discharged for tardiness in the face of a strict warning. Findings of fact are conclusive on appeal so long as the record contains substantial evidence to support those findings.<sup>4</sup> The finding that claimant was discharged for attendance violations is supported by substantial evidence, namely the testimony of employer's controller, Louann Floyd, and documentation submitted by employer such as the employee warning report and the absentee reports. N.T. at 8-9, hearing of June 22, 2001. See also O.R., Item No. 3, OES Exhibits 6c, 6d, 6e. Claimant challenges Louann Floyd's credibility, specifically alleging that she lied when she testified that claimant had the worst attendance record. However, credibility determinations are the province of the Board and are not a function of the reviewing court.<sup>5</sup> The Board found Louann Floyd to be credible and this court is bound by that determination. Given that the Board resolved conflicting testimony and questions of credibility in favor of the employer, there is substantial evidence to support the finding that claimant was discharged for tardiness in the face of a prior warning.

Finally, as to claimant's remaining contentions, they have either been waived for failure to raise them below, or the arguments concern evidence never made a part of the record.<sup>6</sup> Accordingly, we affirm the order of the Board denying claimant benefits on the grounds that claimant was discharged for willful misconduct.

### ORDER

AND NOW, this 31st day of October, 2002, the order of the Unemployment Compensation Board of Review in the above captioned matter is AFFIRMED.

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

2. This court has defined willful misconduct as an act of wanton or willful disregard of the employer's interests, a deliberate violation of the employer's rules, a disregard of the standards of behavior which the employer has a right to expect of an employee or negligence indicating an intentional disregard of the employer's interests or the employee's duties and obligations to the employer. See *Arnold v. Unemployment Comp. Bd. of Review*, 703 A.2d 582, 583 n.5 (Pa. Cmwlth. 1997).

3. "[T]ardiness in the face of an express warning will suffice to deny a terminated claimant benefits." *Wideman v. Unemployment Comp. Bd. of Review*, 505 A.2d 364, 366 (Pa. Cmwlth. 1986). See also *Verner v. Unemployment Comp. Bd. of Review*, 471 A.2d 139, 142 (Pa. Cmwlth. 1984). "A conclusion that the employee has engaged in disqualifying willful



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misconduct is especially warranted in such cases where, as here, the employee has been warned and/or reprimanded for prior similar conduct." *Dep't of Transp. v. Unemployment Comp. Bd. of Review*, 479 A.2d 57, 58 (Pa. Cmwlth. 1984)

4. *Taylor v. Unemployment Comp. Bd. of Review*, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977).

5. The Board is the ultimate finder of fact and questions of credibility and evidentiary weight are matters for the fact-finder and not a reviewing court. See *Stringent v. Unemployment Comp. Bd. of Review*, 703 A.2d 1084, 1087 (Pa. Cmwlth. 1997).

6. Claimant complains that his due process rights were violated because the referee did not subpoena every witness claimant requested. This issue has been waived because claimant failed to raise it before the Board. Pa. R.A.P. 1551; *Gould v. Unemployment Comp. Bd. of Review*, 466 A.2d 750, 751 (Pa. Cmwlth. 1983). Regardless, the issuance of subpoenas is discretionary, not mandatory. 34 Pa. Code § 101.31; *Flores v. Unemployment Comp. Bd. of Review*, 686 A.2d 66, 76 (Pa. Cmwlth. 1996). Claimant complains employer refused to turn over his entire personnel record. This matter is also waived because claimant did not bring this complaint before the referee and further, he did not request a subpoena for such records. In addition, claimant refers to evidence not of record. We cannot consider any items of evidence not offered at the hearing and not made a part of the record. *Cunningham v. Unemployment Comp. Bd. of Review*, 358 A.2d 147, 149 n.1 (Pa. Cmwlth. 1976).

