

IN THE UTAH COURT OF APPEALS

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Nicholas Nicolosi,)	MEMORANDUM DECISION	
)	(Not For Official Publication)	
Petitioner,)		
)	Case No. 20100594-CA	
v.)		
)		
Department of Workforce)	F I L E D	
Services,)	(October 28, 2010)	
)		
Respondent.)	<table border="1"><tr><td>2010 UT App 299</td></tr></table>	2010 UT App 299
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Original Proceeding in this Court

Attorneys: Nicholas Nicolosi, St. George, Petitioner Pro Se
 Suzan Pixton, Salt Lake City, for Respondent

Before Judges Davis, McHugh, and Voros.

PER CURIAM:

Nicholas Nicolosi seeks judicial review of the decision of the Workforce Appeals Board (Board), denying unemployment benefits on the ground that Nicolosi was discharged for just cause, i.e., insubordination. Nicolosi also challenges the Board's decision establishing a fault overpayment of benefits in the amount of \$7415 on the ground that Nicolosi knowingly withheld material information about the job separation.

We reverse an administrative agency's findings of fact "only if the findings are not supported by substantial evidence." Drake v. Industrial Comm'n, 939 P.2d 177, 181 (Utah 1997). We will not disturb the Board's conclusion regarding the application of law to facts unless it "exceeds the bounds of reasonableness and rationality." Nelson v. Department of Emp't Sec., 801 P.2d 158, 161 (Utah Ct. App. 1990).

Nicolosi does not dispute that he was fired or claim that his statements that he was separated from employment in a reduction of force were truthful. Therefore, the petition for review challenges only the Board's decision that Nicolosi was discharged for just cause and therefore disqualified from receiving benefits. Nicolosi essentially contends that the Board erred in accepting his supervisor's testimony regarding the

incidents that led to the discharge, rather than accepting Nicolosi's conflicting testimony. In sum, Nicolosi denies that he threw the hard hat "at" his supervisor, denies that he was the aggressor in the confrontation, denies that he was insubordinate, and asserts that he was merely responding to the supervisor's anger. Nicolosi's arguments do not demonstrate a basis to disturb the Board's decision that Nicolosi was discharged for just cause.

"It is the province of the Board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences." Grace Drilling Co. v. Board of Review, 776 P.2d 63, 68 (Utah Ct. App. 1989). "It is not our role to judge the relative credibility of witnesses." Albertsons, Inc. v. Department of Emp't Sec., 854 P.2d 570, 575 (Utah Ct. App. 1993). The Board adopted the Administrative Law Judge's (ALJ) findings of fact and credibility determination. The ALJ resolved the conflicting testimony of Nicolosi and his supervisor by accepting the supervisor's version of the facts regarding the confrontation between the men.

The Board's findings of fact are supported by substantial evidence and support its determination of the three factors necessary to establish that an employee was discharged for just cause. First, Nicolosi knew that he was required to follow the instructions of his supervisor to fill the water truck without responding in a confrontational manner by yelling and swearing at the supervisor. Accordingly, the element of knowledge was established. Second, Nicolosi had control over his actions and could have refrained from yelling, throwing his hard hat, or engaging in confrontational behavior. Finally, the element of culpability was supported by the evidence. Although Nicolosi maintains the supervisor was at fault, the Board and ALJ found that Nicolosi yelled at his supervisor, used profanity, threw his hard hat to the ground, and failed to follow legitimate instructions from the supervisor. Even if the hard hat was not thrown at the supervisor or with enough force to break it into pieces, it was thrown from Nicolosi's head in anger with enough force that the padding and strap came off. These were overt acts that went beyond general disagreement or discussion and constituted acts of insubordination that interfered with the effective operation of the workplace. "Protesting or expressing general dissatisfaction without an overt act is not a disregard of the employer's interests;" however, "provocative remarks to a superior or vulgar or profane language in response to a civil request may constitute insubordination if it disrupts routine, undermines authority or impairs efficiency." Utah Admin. Code R994-405-208. The Board concluded that Nicolosi's actions were "insubordination and threatened the effective operation of the

job place." The Board's determination that Nicolosi was discharged for just cause based upon its factual findings was therefore reasonable and rational.

Accordingly, we affirm.

James Z. Davis,
Presiding Judge

Carolyn B. McHugh,
Associate Presiding Judge

J. Frederic Voros Jr., Judge