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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

JAROSLAW WASZCZUK, Plaintiff and Appellant, v. CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD, Defendant and Respondent; THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Real Party in Interest and Respondent.	C079254 (Super. Ct. No. 34-2013-80001699-CU-WM-GDS)

After Jaroslaw Waszczuk was fired from his job at the University of California Davis Health Systems (UCDHS), he sought unemployment benefits which were denied because he had been discharged for misconduct. Representing himself, as he did in the

administrative and trial court proceedings, Waszczuk appeals from denial of his petition for a writ of mandate to overturn the decision of the California Unemployment Insurance Appeals Board (the Board) that found him disqualified for unemployment benefits. He contends there was no showing of misconduct and he was denied a fair hearing. He also raises issues concerning the length of his suspension before discharge, the lack of performance evaluations for the last two years, and the absence of progressive discipline. We find no merit in any of the contentions and affirm.

BACKGROUND

Waszczuk began his employment with UCDHS in 1999. At discharge, his position was associate development engineer and he worked in the heating, ventilation, and air conditioning (HVAC) shop.

In 2011 Danésha Nichols, a UCDHS investigations coordinator, began an investigation of allegations against Waszczuk of disruptive behavior that violated UCDHS's policies against violence and hate incidents in the workplace and discrimination. The substantiated allegations included the use of profanities and derogatory comments about other employees, including supervisors Dorin Daniliuc and Patrick Putney. On April 13, 2012, the plant manager sent Waszczuk a notice of intent to suspend due to his continued inappropriate behavior in the workplace. The notice told Waszczuk he was immediately expected to follow all UC policies and procedures, show respect and remain professional in the workplace, follow direct orders, and attend classes regarding communication and respectful treatment. In May, Waszczuk was suspended for 10 working days.

On April 27, 2012, Waszczuk sent an e-mail to Nichols that included a video entitled "Welcome to Romania." The e-mail accused Nichols of protecting "PO&M [Plant Operation and Maintenance] Emperor, HVAC Chicken Farm Manager. Daddy and his child porn lover boy and Romanian Supervisor who thinks that Saint Nick is still his Patron i[n] USA and could steal without being punished." The e-mail referred to the

video as made by Romanians and as "almost like the HVAC shop." "Maybe it make you understand why the HVAC Shop looks like a junk yard with filthy restrooms, 'dining-lunch area' and Romanian Locker Room" and claimed there were goats and chickens in Putney and others' car trunks. The video showed defecation and people engaged in sexual activity. This e-mail and included video triggered a second investigation of Waszczuk.

In an interview as part of the second investigation, Waszczuk submitted a written document that stated the purpose of the video was to show Putney and Daniliuc, who are Romanian, that the HVAC shop culture was like that in the video.

On May 3, 2012, Waszczuk sent an e-mail to Mike Garcia, a labor relations manager, and several other staff members. The e-mail complained about harassment and abuse in the central plant and people being bullied. It continued, "I am no psychologist, but I read the Williams letter and some story about Columbine where two kids were picked on and tormented. We need no Columbine school tragedy in the central plant. . . . I am using my pen to defend myself and don't own gun [*sic*] and I don't like guns but not everybody [is] defending themselves, like me, with pen and written word." The e-mail concluded that Waszczuk was thinking of pressing criminal charges against several UCDHS employees, including Nichols.

The second investigation substantiated allegations that Waszczuk's disruptive and intimidating e-mails regarding Daniliuc's national origin violated policies regarding workplace violence and discrimination.

On December 5, 2012, UCDHS terminated Waszczuk for violating policies regarding work place violence and hate, and discrimination.

Waszczuk applied for unemployment insurance benefits. The Employment Development Department denied benefits, finding Waszczuk was ineligible because he had been discharged for breaking a reasonable employer rule.

Waszczuk appealed the denial of benefits; a hearing before an administrative law judge (ALJ) was scheduled for February 13, 2013. The notice of the hearing stated all documents had to be submitted by February 7. The night before the hearing, Waszczuk submitted 170 pages of documents. The ALJ noted she had authority to deny admittance of these late filed documents, but left them in the file for future proceedings.

The issue at the hearing was "whether Mr. Waszczuk left the most recent employment voluntarily without good cause or whether he was discharged for misconduct connected with the most recent work." UCDHS appeared by telephone. At the hearing, there was testimony about Waszczuk's disruptive conduct in 2011, including his use of profanity and intimidating behavior.

The focus of the hearing was on the two e-mails about Romania and Columbine; the contents of these e-mails were read into the record. Waszczuk admitted he sent both e-mails. The video was not presented as evidence, but Waszczuk admitted the video showed defecation and sex and testified he sent it because he believed the HVAC shop looked like Romania. He testified he sent the e-mail about Columbine to communicate to Garcia that he needed "to take care of conflicts in the central plant." He claimed it was a hostile work environment and "somebody would finally snap there and would kill people."

The ALJ found Waszczuk had been discharged for misconduct. After initial disruptive and harassing behavior in 2011 and a warning, Waszczuk sent further e-mails that were disruptive and threatening. The ALJ found this behavior was not a good faith error in judgment or discretion, but a disregard of a standard of behavior the employer had a right to expect.

Waszczuk appealed to the Board, which adopted and affirmed the decision of the ALJ.

Waszczuk then petitioned for a writ of mandate, contending he was denied a fair hearing and it was error to find misconduct. The trial court found sending the two e-mails did constitute misconduct and denied the petition.

Waszczuk appeals from the judgment.[1]

DISCUSSION

I

The Law

"The fundamental purpose of California's Unemployment Insurance Code is to reduce the hardship of unemployment by 'providing benefits for persons unemployed through no fault of their own.' [Citations.] In light of this purpose, ' "fault is the basic element to be considered . . . " ' when 'interpreting and applying' the provisions of the code. [Citation.]" (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd*. (2014) 59 Cal.4th 551, 558 (*Paratransit*).)

"An individual is disqualified for unemployment compensation benefits if the director finds that he or she left his or her most recent work voluntarily without good cause or that he or she has been discharged for misconduct connected with his or her most recent work." (Unemp. Ins. Code, § 1256.)[2] "The term 'misconduct,' as used in the code, is limited to ' "conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency,

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[1] The matter was assigned to the panel as presently constituted in September 2018.

[2] Further undesignated statutory references are to the Unemployment Insurance Code.

unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute." ' [Citations.]" (*Amador v. Unemployment Ins. Appeals Bd.* (1984) 35 Cal.3d 671, 678 (*Amador*).)

The elements of misconduct are: "(1) The claimant owes a material duty to the employer under the contract of employment. [¶] (2) There is a substantial breach of that duty. [¶] (3) The breach is a willful or wanton disregard of that duty. [¶] (4) The breach disregards the employer's interests and injures or tends to injure the employer's interests." (Cal. Code Regs., tit. 22, § 1256-30, subd. (b).) "An employee owes an implicit duty to support and serve the employer's interests and not to willfully or wantonly engage in acts or statements which evince an attitude of disregard of the employer's interests. Except in aggravated circumstances, ordinarily the first instance of an employee's isolated willful or wanton act or statement showing disregard of the employer's interests would not be sufficiently substantial to constitute misconduct. If the employee continues the acts or statements after warning or reprimand, his or her conduct viewed as a whole may constitute a willful and substantial breach and justify a discharge for misconduct, particularly if the repeated acts or statements occur within a relatively short span of time." (*Id.*, § 1256-32, subd. (b).)

"Section 1256 creates a rebuttable presumption that, absent evidence from the employer, the employee was not discharged for misconduct." (*Paratransit, supra,* 59 Cal.4th at p. 561.) "The employer bears the overall burden of proving misconduct. [Citations.] However, once it is established that the employee has violated a reasonable order, the burden shifts to the employee to show good cause. [Citation.]" (*Amador, supra*, 35 Cal.3d at p. 681, fn. 7.)

II

Substantial Evidence of Misconduct

A. *Standard of Review*

"In reviewing a decision of the Board on a petition for writ of administrative mandamus, ' "the superior court exercises its independent judgment on the evidentiary record of the administrative proceedings and inquires whether the findings of the administrative agency are supported by the weight of the evidence." ' [Citation.] On review of that decision, an appellate court determines whether the independent 'findings and judgment of the [superior] court are supported by substantial, credible and competent evidence' in the administrative record. [Citations.] '[A]ll conflicts must be resolved in favor of the respondent and all legitimate and reasonable inferences made to uphold the superior court's findings; moreover, when two or more inferences can be reasonably deduced from the facts, the appellate court may not substitute its deductions for those of the superior court.' [Citation.]" (*Paratransit, supra,* 59 Cal.4th at p. 562.)

Waszczuk's brief is rambling and his arguments are not set forth clearly with each point under a separate heading as required by rule 8.204(a)(1)(B) of the California Rules of Court. We have tried to discern and individually address his specific arguments. While Waszczuk is representing himself on appeal, his status as a party appearing in propria persona does not provide a basis for preferential consideration. A party proceeding in propria persona "is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys." (*Barton v. New United Motor Manufacturing, Inc*. (1996) 43 Cal.App.4th 1200, 1210.)

B. *Sufficiency of the Evidence*

Waszczuk contends UCDHS "did not provide any evidence of Waszczuk's misconduct because it did not have any evidence. It was physically impossible to provide any documents during the phone hearing." Waszczuk is mistaken.

There was evidence of misconduct produced at the hearing. First, at the beginning of the hearing, the ALJ marked as exhibits various documents in the file relating to Waszczuk's employment and discharge. Second, there was testimony about Waszczuk's disruptive and intimidating behavior, beginning in 2011 and continuing after his suspension in 2012. Testimony is evidence. Third, the contents of the Romania and Columbine e-mails were read into the record without objection. (*Tennant v. Civil Service Com.* (1946) 77 Cal.App.2d 489, 498-499 [necessity of objection in administrative proceeding].) Further, Waszczuk admitted sending the e-mails and did not dispute their content. He also admitted the vulgar content of the video accompanying the April 2012 e-mail. Finally, Waszczuk admitted he knew of UCDHS's policies about workplace violence, discrimination, and harassment. This was all evidence.

This evidence showed a continued pattern of misconduct. The misconduct began with shouting profanity and other intimidating behavior. It continued after Waszczuk was suspended and instructed to follow UCDHS's policies, show respect, and remain professional in the workplace. Despite the notice of suspension and warning, Waszczuk sent an e-mail to Nichols that was extremely disrespectful in tone and accompanied by a vulgar video that mocked Daniliuc's Romanian heritage. This was followed by the e-mail referring to the Columbine shooting and guns. At the hearing, Waszczuk presented the testimony of a coworker who did not find the Columbine e-mail offensive, but viewed it as simply a warning. Both the ALJ and the trial court found the e-mail threatening.

It is not our role on appeal to conclusively determine the nature and intent of the e-mail. Our role is to resolve all conflicts in favor of the judgment and not to substitute our deductions for those of the trial court. (*Paratransit, supra,* 59 Cal.4th at p. 562.) The trial court could reasonably infer the Columbine e-mail was threatening.

Waszczuk provided no evidence of good cause for his behavior and violation of the UCDHS policies and direct instructions. If his goal was to call attention to problems in the workplace, he could have done so in a respectful manner, without vulgarity,

disrespect to his fellow employees, or references to guns and violence. This is not a case like *Amador, supra,* 35 Cal.3d 671, where an employee was found not to have committed misconduct despite refusing to comply with a work assignment. In *Amador,* a histotechnican, one who prepares tissue samples for pathologists, refused to perform a procedure known as grosscutting on tissue removed from live patients. (*Id.* at pp. 675-676.) Our Supreme Court found her refusal was not misconduct because it was based on her good faith belief that she was unqualified to perform the important task, a belief supported by her previous work experience at Stanford University and Oxford University, where histotechnicans were not allowed to perform grosscutting, and by the opinions of three pathologists. (*Id.* at pp. 680-681.)

Waszczuk appears to argue that his discharge was not for misconduct because he had received good performance reviews for 11 years. That Waszczuk may have been a good employee in the past does not excuse or eradicate his continued misconduct in 2011 and 2012.

III

Fair Hearing

Waszczuk contends he was denied a fair hearing. He argues the ALJ improperly denied him an extension to submit 170 pages of documents, an extension he required due to illness. He further contends the ALJ was "belligerent and hostile" towards him and had a "despicable bias" against him.

On a petition for a writ of administrative mandamus, the trial court shall inquire as to whether there was a fair trial. (Code Civ. Proc., § 1094.5, subd. (b).) "We review the fairness of the administrative proceeding de novo." (*Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1073.) A "fair trial" means a fair administrative hearing. (*Ibid.*) At the hearing, each party has the right to call and examine parties and witnesses, introduce exhibits, question opposing parties and witnesses, and rebut evidence against it. (Cal. Code Regs., tit. 22, § 5062, subd. (d).)

The ALJ found Waszczuk was untimely in submitting the documents because they were not submitted until the night before the hearing, which did not permit time for review by the ALJ or UCDHS. Waszczuk disputes the timing and cites to evidence in the record showing the documents were submitted several days before the hearing and were sent to UCDHS. He further contends he sought an extension due to illness, a good cause, which the ALJ improperly denied.

Waszczuk describes the documents only as including his 1999-2010 performance evaluations and contends they were critical to rebut UCDHS's allegations of misconduct. He appears to be making the argument we have already rejected, that his prior good performance means his discharge could not have been for misconduct. In its review, the Board found the excluded documents were irrelevant or cumulative. Waszczuk has not shown otherwise. "An administrative law judge has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or to prevent injustice, undue burden, or prejudice." (Cal. Code Regs., § 5062, subd. (f).) There was no error in excluding the documents even if the submission was timely. Waszczuk has failed to show he was denied a fair trial.

Waszczuk's claim that the ALJ was biased against him and belligerent and hostile does not withstand scrutiny. The one comment by the ALJ that Waszczuk sets forth as a purported example of his claims of belligerence, hostility, and "despicable bias" shows none of these. We have carefully reviewed the record of the administrative proceeding and find these allegations unfounded.

IV

Other Contentions

Throughout his brief, Waszczuk objects that he was placed on administrative leave for an extended period of time. The record indicates Waszczuk's last day of work was August 2, 2011. Between then and the termination of his employment on December 5,

2012), Waszczuk was on various terms of paid administrative leave pending investigations into his behavior, suspension, and medical leave. The trial court found the issue of the time elapsed between the alleged events of misconduct and his eventual termination was not before the ALJ at the hearing. On appeal, Waszczuk fails to show how his extended administrative leave had any effect on the finding that he was discharged for misconduct and thus ineligible for unemployment benefits.

Waszczuk contends he was denied progressive discipline. He fails to mention, however, that he was suspended for the 2011 misconduct. He was given notice and an opportunity to improve his behavior. He failed to do so.

Waszczuk raises the point that he was not given performance evaluations for 2011 and 2012. He cites to *Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958. The issue in *Jensen* was whether a negative performance evaluation would support an action for libel. The case has no application here; it does not address whether a performance evaluation is required before a finding of discharge for misconduct. It is unclear what point Waszczuk is trying to make about the missing evaluations. He was on leave for most of that time.

In his reply brief and at oral argument, Waszczuk referred to numerous matters outside the record, including a separate case, an employment matter involving another employee, a 2009 settlement agreement, and matters he alleged occurred in 2014. "Appellate review is generally limited to matters contained in the record. Factual matters that are not part of the appellate record will not be considered on appeal and such matters should not be referred to in the briefs." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 102.) Further, absent a justification for failure to raise the point in the opening brief, we will not consider arguments raised for the first time in a reply brief or in oral argument. (See *Mansur v. Ford Motor Co.* (2011) 197 Cal.App.4th 1365, 1387-1388 [reply brief]; *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1554, fn. 9 [oral argument].)

DISPOSITION

The judgment is affirmed. The Regents of the University of California shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

/s/
Duarte, J.

We concur:

/s/
Blease, Acting P. J.

/s/
Butz, J.