IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Washington Hospital, Petitioner	:	
v.	:	No. 1620 C.D. 2009
	:	Submitted: December 31, 2009
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: March 12, 2010

The Washington Hospital (Employer) petitions for review of a July 27, 2009, order of the Unemployment Compensation Board of Review (UCBR) affirming a referee's decision that Nannette F. Bosang (Claimant) was not ineligible for benefits under section 402(e) of the Unemployment Compensation Law (Law).[1] We affirm.

The relevant facts may be summarized as follows. Claimant worked full-time for Employer as an Admission Registration Clerk. Because Claimant suffered from depression and anxiety attacks, she applied for a leave of absence under

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e). Section 402(e) of the Law provides that a claimant shall be ineligible for benefits for any week in which her unemployment is due to discharge from work for willful misconduct connected with her work. 43 P.S. §802(e).

the Family and Medical Leave Act (FMLA).[2] Intermittent leave was approved from October 1, 2008, through January 1, 2009, during which Claimant could take a day or part of a day, as needed. Claimant was required to notify Employer when she needed this time.

Employer has a no-fault attendance policy, under which employees are allowed only five days off per year; employees that violate the policy are subject to progressive disciplinary measures, culminating in termination. In 2007, Claimant had attendance issues and she received a final warning in January 2008; she was aware or should have been aware that any more attendance issues could lead to her termination. In September 2008, Claimant was placed on ninety days' probation for working under the influence of prescription drugs in violation of Employer's drug and alcohol policy. Violation of any rule or policy during this probationary period could lead to termination of employment.

On November 20, 2008, Claimant called off from work, indicating that she had been unable to sleep for a number of days because of anxiety. Therefore, on November 21, 2008, Employer discharged Claimant for calling off from work the previous day. Claimant's supervisor did not indicate that Claimant's call-off was related to the FMLA. Rather, upon review of Claimant's attendance record, Claimant's supervisor decided that this absence rose to a terminable offense under Employer's attendance policy. If the supervisor had known that Claimant's call-off resulted from her anxiety attacks and/or depression, which were reasons for her

[2] 29 U.S.C. §§2601-2654.

FMLA leave, Claimant would not have faced discharge. Claimant is able and available for suitable work. (*See generally* Findings of Fact Nos. 1-15.)

Claimant applied for unemployment compensation benefits, which the local job center denied. On appeal, the referee reversed, crediting Claimant's assertion that her call-off for lack of sleep was related to her approved FMLA leave and determining that Claimant was not ineligible for benefits based on willful misconduct. Adopting the referee's findings and legal conclusions, the UCBR affirmed, and Employer filed a petition for review with this court.[3]

Employer argues that substantial record evidence exists to support a finding that Claimant violated its absenteeism policy while on probation and, therefore, the UCBR erred by failing to conclude that Claimant engaged in willful misconduct.[4] We disagree.

An employer carries the burden of establishing that an employee has engaged in willful misconduct. *Owens v. Unemployment Compensation Board of*

[3] Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law and whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

[4] We explained in *Steth, Inc. v. Unemployment Compensation Board of Review*, 742 A.2d 251, 253 (Pa. Cmwlth. 1999), that willful misconduct is behavior that evinces wanton and willful disregard of an employer's interest, deliberate violation of an employer's rules, disregard of behavioral standards that an employer can rightfully expect of its employee, and negligence manifesting culpability, wrongful intent, evil design or intentional disregard of an employer's interest or an employee's duties or obligations.

Review, 748 A.2d 794 (Pa. Cmwlth. 2000). In a case concerning a work rule violation, an employer must demonstrate both the existence of the reasonable work rule and the fact of its violation. *Id.* If the employer proves the existence of the rule, its reasonableness and its violation, the burden then shifts to the claimant to prove that she had good cause for her actions. *Id.* In this case, Employer could not meet its initial burden.

Employer's argument to the contrary overlooks one critical fact: the UCBR believed Claimant's testimony that she called off from work on November 20 for sleeplessness related to depression or anxiety, conditions for which she had been granted intermittent FMLA leave.[5] The law is well settled that the UCBR is the ultimate fact finder in unemployment compensation cases and, as such, is empowered

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[5] For example, Claimant testified:

> I explained to [Sandy] [Sandra Kirkavitch, Claimant's direct supervisor] that I was having panic attacks, I had no [sic] slept since Monday and that I was taking an FMLA day. At that point she brought up to me, she goes, you were seen in the ER yesterday with a migraine, I stated to her, yes I was, but that was—had no bearing on why I was calling off, my migraine was gone, that I was calling off because of my anxiety and that I had not slept because of that.

(R.R. at 27a.) Further, Claimant explained:

> EL Now isn't it true that on November 21st [sic] when you called into the hospital that the only reason for calling off work that you gave to Patty Lucas and to Ms. Kirkavitch was that you had not been—had any sleep, isn't that a fact?
>
> C No, I also stated that I had not slept because of my anxiety.

(R.R. at 31a.)

to assess witness credibility and resolve evidentiary conflicts. *Sprague v. Unemployment Compensation Board of Review*, 647 A.2d 675 (Pa. Cmwlth. 1994). Employer asserts that Claimant did not establish good cause for her actions because she did not offer medical testimony to prove that her lack of sleep was related to her depression or anxiety, and she never notified human resources that she had wrongly been denied FMLA leave. However, this is irrelevant because the burden never shifted to Claimant. Instead, the UCBR, based on the credible facts of record, determined that Claimant had not violated Employer's no-fault absenteeism policy when she called off from work on November 20.[6] It is the UCBR's interpretation of the facts, rather than Employer's, which controls.

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

[6] In fact, Employer's supervisor testified that, "[i]f [Claimant] was calling off for anxiety—if she had said anxiety or depression or anything like that it would not have happened, she would've been eight hours on FMLA." (R.R. at 43a.)

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O R D E R

AND NOW, this 12th day of March, 2010, the order of the Unemployment Compensation Board of Review, dated July 27, 2009, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Senior Judge