

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Reginald Hill,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1861 C.D. 2010
	:	
Unemployment Compensation	:	Submitted: March 18, 2011
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: May 4, 2011

Reginald Hill (Claimant), representing himself, petitions for review from an order of the Unemployment Compensation Board of Review (Board) denying him unemployment compensation benefits (benefits) under Section 402(e) of the Unemployment Compensation Law (Law)¹ because of willful misconduct. The Board concluded Claimant violated Cintas Corporation’s (Employer) attendance policy by his chronic tardiness and absenteeism. Finding no error, we affirm.

Claimant worked for Employer for approximately eight months as a garment mender on an assembly line. Employer terminated Claimant in April 2010 for violation of its attendance policy. Claimant applied for benefits. In his

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 states an employee shall be ineligible for compensation for any week in which his unemployment is due to willful misconduct connected to his work. 43 P.S. §802(e).

application for benefits, Claimant referenced transportation problems. He also stated his diabetes contributed to his absenteeism and tardiness. The local service center granted benefits.

Employer appealed, and a referee hearing followed. After hearing, the referee issued a decision reversing the service center and denying Claimant benefits under Section 402(e). In his decision, the referee made the following findings:

2. The [E]mployer has an attendance point system which advises employees that if they accumulate attendance points in excess of 5.25 points within a rolling twelve month period, they will be subject to termination.

3. The employer's attendance point system policy provides employees will receive the following points for the reasons listed below:

- 1 point for an unexcused absence where the partner calls out in advance of the start of their shift.
- 1.75 points for an unexcused absence where the partner does not call out in advance of the start of their shift.
- .25 points for an employee who reports to work more than seven minutes late.
- .25 points for an employee who leaves work early.

4. The claimant was aware or should have been aware of the above employer policy and his need to report off from work to the employer prior to the start of his scheduled workshift when absent from work.

5. The claimant was absent and/or late for work on the following days for which he received the following attendance points:

- December 2, 2009 late .25 points
- December 11, 2009 late .25 points

- December 16, 2009 absent (no-call/no-show) 1.75 points
- December 17, 2009 late .25 points
- December 24, 2009 late .25 points
- December 28, 2009 late .25 points
- January 14, 2010 absent with call out 1 point
- January 22, 2010 absent (no-call/no-show) 1.75 points
- April 7, 2010 late .25 points

6. Each of the claimant's above days of tardiness were in excess of seven minutes.

7. Prior to the claimant's final day of tardiness on April 7, 2010, the claimant was issued a verbal warning and two written warnings on three different dates due to the employer's dissatisfaction with his attendance/tardiness.

8. The claimant was aware or should have been aware his job was in jeopardy if he continued to be tardy and/or absent from work.

9. When the claimant was issued his final written warning on January 25, 2010, which listed the dates of his tardiness, absenteeism and no-call/no-shows for work, the claimant was given an opportunity by the employer to write a written statement if he disagreed with such information on such warning form.

10. The written explanation the claimant provided to the employer when he was provided the above final warning notice by the employer was the following: "This point system was all dropped on me too fast to follow through with what has been asked of me."

Referee Dec. 4/22/2010, at 1-2. Claimant accrued sufficient points for termination by his absence from work on January 22. Claimant further surpassed this threshold with his final incidence of tardiness in April. Employer enforced its policy and terminated Claimant. Id. at 2.

The referee found Employer's witness credible. The referee accepted Employer's testimony that it did not assess points for days Claimant provided medical documentation. Additionally, the referee believed Employer's witness when she recounted Claimant's admission that he had been "playing games" with his supervisor on two days in which he was a "no show/no call" from work. Id. at 2.

The referee found Claimant not credible. Claimant's failure to offer documentary evidence supporting his tardiness and absenteeism was a factor in the credibility determination. Also, the referee disbelieved Claimant's testimony that Claimant was too ill to go to work on the two days he missed work without excuse and without calling in.

Based on these findings, the referee concluded Employer met its burden and Claimant failed to meet his. Accordingly, the referee determined Claimant was ineligible for benefits. Claimant appealed.

Claimant's appeal document to the Board was a handwritten letter. In the letter, Claimant provided a narrative and stated he was unaware he needed to provide documentation at the hearing.²

² Claimant attached to his letter a note from his doctor, dated July 2010, which read "Mr. Hill was under our care for diabetic neuropathy with limbs numbness and tingling. It is difficult for him to ambulate." Claimant's Correspondence 8/2/10 at 2. However, the note does not identify any specific time-frame Claimant was under the doctor's care. Claimant also attached to his letter a printout from the Mayo Clinic website of an article discussing "diabetic neuropathy." Diabetic neuropathy, MAYO CLINIC (7/28/10), available at <http://mayoclinic.com/health/diabetic-neuropathy>.

The Board affirmed. The Board adopted the referee's findings of fact.³ The Board also stated, "The claimant's justification, given at the hearing, for why he was late for work is different than the reason provided on his claimant questionnaire. Based on his inconsistent statements, the Board does not find his assertions to be credible." Board Dec. at 1.

Claimant appeals.⁴ Claimant contends he had a doctor's note for his absence from work on January 14, 2010, which indicates he was under his doctor's care on that day. Claimant includes a copy of this note in his brief. Based on this note, Claimant argues he should have one less point under the Employer's policy. He further argues this reduction will leave him with insufficient points for termination.

Our Supreme Court explains that in unemployment compensation cases willful misconduct is behavior evincing a willful disregard of the employer's interests, a deliberate violation of the employer's work rules, or a disregard of standards of behavior the employer can rightfully expect from its employees. Caterpillar, Inc. v. Unemployment Comp. Bd. of Review, 550 Pa. 115, 703 A.2d 452 (1997). When asserting discharge due to a violation of a work rule, an

³ The Board is the ultimate fact finder. Skowronek v. Unemployment Compensation Board of Review, 921 A.2d 555 (Pa. Cmwlth. 2007). Here, Claimant does not challenge any specific findings. Accordingly, these findings are conclusive on appeal. Id.

⁴ We are limited to determining if the necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Ductmate Industries, Inc. v. Unemployment Comp. Bd. of Review, 949 A.2d 338 (Pa. Cmwlth. 2008).

employer must establish existence of the rule and its violation. Lausch v. Unemployment Comp. Bd. of Review, 679 A.2d 1385 (Pa. Cmwlth. 1996). Once an employer makes out a prima facie case of willful misconduct, the burden shifts to the claimant to show good cause as a justification for the conduct considered willful. McKeesport Hospital v. Unemployment Comp. Bd. of Review, 625 A.2d 112 (Pa. Cmwlth. 1993).

“[E]xcessive absences may constitute willful misconduct.” Id. at 114. However, absenteeism, “even if excessive” does not constitute willful misconduct, “where justified or properly reported according to company policy” Steth, Inc. v. Unemployment Comp. Bd. of Review, 742 A.2d 251, 253 (Pa. Cmwlth. 1999).

Here, Employer met its burden. Employer offered its attendance policy into evidence. Notes of Testimony (N.T.), 5/25/10, Employer’s Ex. 5, Production Attendance Policy (Policy). The introduction to the policy stresses, “In our business, it is extremely important that each partner come to work each day. When a partner fails to show up for work, he or she puts a lot of undue stress and extra work on the other partners.” Policy at 1. The policy clearly identifies the points assessed for each violation and the discipline to be imposed. Claimant signed and dated the policy in December 2009. Id. at 1-2.

Employer also offered four documents, each titled “Partner Disciplinary Documentation” (PDD). Each identified the conduct at issue, the date, and the points assessed. Each PDD corresponded with a different level of discipline, covering an oral warning, a first and second written warning, and finally termination. These first three PDDs were issued within a one-month period.

Claimant signed the first three PDDs. He added this notation to the third PDD: “This point system was all dropped on me too fast to follow through with what has been asked of me.” N.T., Employer’s Ex. 9, PDD 1/25/10. Claimant did not sign the termination PDD.

The PDDs show Claimant violated the Policy on nine occasions without justification. Employer testified Claimant had been late or absent on additional days but had provided medical notes for those dates. Employer’s witness also credibly testified these excused days were not included in the point assessments.

Through this evidence Employer met its burden of establishing Claimant violated its policy on a chronic basis. In contrast, Claimant failed to meet his burden of establishing a justification for his absences.

At hearing, Claimant testified he was not sure why he called off on January 14, 2010. N.T. at 23. Additionally, he offered contradictory explanations for his attendance issues. First he explained he was late because of problems with the bus schedule. Later he testified his absenteeism on that day “probably was medical. Everything I was doing was medical.” N.T. at 27. Claimant’s shifting explanations support the Board’s credibility findings.

Claimant offered no documentation to support his positions. At hearing, he explained he “brought [his] medical records” to support his testimony. N.T. at 27. However, the sole document Claimant offered into evidence was actually a list of the prescription drugs dispensed to Claimant from a particular

pharmacy, covering the period of August 2009 through March 2010. This document does not address any medical issues and does not explain his tardiness and absenteeism.

In subsequent filings before the Board, Claimant offered a medical note from July 2010. Also, Claimant attaches to his appellate brief a note from his doctor dated January 14, 2010. The law is clear that a party may not expand the record developed before the referee by attaching documents to subsequent filings. Croft v. Unemployment Comp. Bd. of Review, 662 A.2d 24 (Pa. Cmwlth. 1995). Neither the Board nor this Court may consider auxiliary factual communications in deciding the case. Id. Accordingly, these documents are not properly part of the record and may not be considered.

Based on the evidence of record, we discern neither error nor abuse of discretion. Accordingly, we affirm.

ROBERT SIMPSON, Judge

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Board of Review,	:	
	:	
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ORDER

AND NOW, this 4th day of May, 2011, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge