IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Danielle Chandler, Petitioner	:	
v.	:	
Unemployment Compensation Board of Review, Respondent	:	No. 2039 C.D. 2010
	:	Submitted: April 1, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: May 25, 2011

Danielle Chandler (Claimant) challenges the Order of the Unemployment Compensation Board of Review (Board) which affirmed the Referee's denial of benefits under Section 402(e) of the Unemployment Compensation Law (Law)[1].

The facts, as found by the Board, are as follows:

1. The claimant was last employed as a full-time bus operator for SEPTA Transportation Authority from May 15, 2005 until April 29, 2010, at a final rate of pay of $24.24 per hour.

2. The employer's policies allow employees to accrue 60 sick days every anniversary.

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

3. An employee is entitled to 300 days of sick leave during their [sic] employment.[2]

4. On July 31, 2008, the employer informed the claimant that she had exceeded her accrued amount of sick days by 39 days and that she would receive 21 sick days for the year beginning May 15, 2009 through May 15, 2010.

5. The claimant exhausted the 21 sick days prior to May 15, 2010.

6. On December 14, 2009, the claimant sustained injuries to her back and to her wrist.

7. The claimant was out of work on a Workers' Compensation claim for 30 days after her injury.

8. The employer did not count the time on Workers' Compensation against the claimant's sick time.

9. The employer's panel doctor released the claimant for full-duty work.

10. On March 8, 2010, the claimant's doctor has [sic] released the claimant for light duty through March 31, 2010.

11. The claimant was out of work from April 26, 2010 through April 29, 2010 due to a re-aggravation of the injury.

12. The claimant has not provided any medical documentation to the employer regarding her last absence beginning on April 26, 2010.

13. On April 29, 2010, the employer discharged the claimant for having exhausted her sick leave.

[2] This finding appears to be an error because a review of the Board's remaining findings explains that Claimant was employed from May 15, 2005, through May 15, 2010, and accrued sixty days a year in sick leave. Therefore, her total amount of sick days for five years was 300.

> 14. The claimant is able and available for light duty work.

Board's Decision and Order (Decision), August 31, 2010, Findings of Fact No.'s 1-14 at 1-2.

> The Board determined:
>
> The claimant has not provided any documentation or other evidence to support her absence from work beginning on April 26, 2010. As the claimant has not shown good cause for that absence, she is denied benefits under Section 402(e) of the Law. (emphasis added.)
> ….
> The claimant credibly testified that she is able and available for light duty work. Benefits cannot be denied under Section 401(d)(1) of the Law.

Decision at 3.

Claimant contends[3] that the Board erred when it concluded that Claimant engaged in willful misconduct.

Whether a claimant's conduct rises to the level of willful misconduct is a question of law subject to this Court's review. *Lee Hospital v. Unemployment Compensation Board of Review*, 589 A.2d 297 (Pa. Cmwlth. 1991). Willful misconduct is defined as conduct that represents a wanton and willful disregard of

[3] This Court's review in an unemployment compensation case is limited to a determination of whether constitutional rights were violated, errors of law were committed, or findings of fact were not supported by substantial evidence. *Lee Hospital v. Unemployment Compensation Board of Review*, 637 A.2d 695 (Pa. Cmwlth. 1994).

an employer's interest, deliberate violation of rules, disregard of standards of behavior which an employer can rightfully expect from the employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer's interest or employee's duties and obligations. *Frick v. Unemployment Compensation Board of Review*, 375 A.2d 879 (Pa. Cmwlth. 1977). The employer bears the burden of proving that it discharged an employee for willful misconduct. *City of Beaver Falls v. Unemployment Compensation Board of Review*, 441 A.2d 510 (Pa. Cmwlth. 1982). The employer bears the burden of proving the existence of the work rule and its violation. Once the employer establishes that, the burden then shifts to the claimant to prove that the violation was for good cause. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985).

Richard Duckett (Mr. Duckett), Director of Transportation, testified on behalf of SEPTA (Employer). Mr. Duckett explained that Claimant was discharged "because she had run out, she had expired her accrued level of sick leave." Notes of Testimony (N.T.), June 10, 2010, at 6. Every anniversary "an individual receives sixty days of sick time..." N.T. at 7. Claimant was warned that she "was about to expire sick time" on July 31, 2008. N.T. at 7.

> At that time [Claimant] had exceeded her accrued amount of sick time by 39 days, so she was granted a leave in excess of her allotted sick time, but she was told that on her next anniversary she would owe us those days back and she would only get 21 days instead of the 60 because she was 39 days over her allotted sick time.

N.T. at 8.

Claimant argues that her exhaustion of sick leave does not constitute willful misconduct. Claimant points out the Employer "did not terminate [Claimant] for absenteeism *per se*, but only because her sick leave was exhausted." Claimant's Brief at n. 2 at 10. This Court agrees that this is a "distinction without a difference." Board's Brief at n. 4 at 6.

It is completely reasonable for an employer to anticipate that an employee will attend work regularly, and comply with employer's rules on those occasions when physical problems prevent his attendance. *Robinson v. Unemployment Compensation Board of Review*, 429 A.2d 774 (Pa. Cmwlth. 1981). Further, "[a]lthough absenteeism alone does not constitute willful misconduct, absenteeism coupled with warnings about such conduct and a failure to notify the employer according to company rules can disqualify an employee from the receipt of unemployment compensation." *Holtzman v. Unemployment Compensation Board of Review*, 525, 372 A.2d 31, 33 (Pa. Cmwlth. 1977). *See also Williams v. Unemployment Compensation Board of Review*, 380 A.2d 932 n.10, (Pa. Cmwlth. 1977), which lists nine cases in which this Court denied benefits in situations involving absenteeism.

Mr. Duckett's testimony established that Employer notified Claimant of its policy concerning sick leave and warned Claimant that she had exhausted her allotted sick time and would receive less the following year. Claimant admitted that she had no sick time as of April 27, 2010. N.T. at 4. Employer discharged her because her sick leave expired and she was absent from work. Employer established that Claimant violated its attendance policy. Once the employer

establishes that, the burden then shifts to the claimant to prove that the violation was for good cause. *Peak v. Unemployment Compensation Board of Review*, 509 Pa. 267, 501 A.2d 1383 (1985).

Claimant argues that the Board erred when it concluded she did not establish good cause for failing to provide Employer with medical documentation when Employer was aware of Claimant's medical problems. Employer was aware of Claimant's injury up until March 31, 2010. N.T. at 12.

However, Claimant's own testimony established that she violated Employer's policy when she failed to provide any documentation to support the absence from April 26, through April 29, 2010:

> **Employer's Attorney [EL]**: … And there's been no other medical documentation provided since April.
>
> **Referee [R]**: Okay.
>
> **EL**: Since, by her doctor's own note, he lists 3/31/10, there's nothing subsequent to that.
>
> **R**: Okay, did you provide anything for April 26th?
>
> **Claimant [C]**: No, they're not, they're not going to apply to that, why would I give them any of their notes.
>
> **R**: Why did who, okay, did you give all of your notes…
>
> **C**: No, I didn't give them, [inaudible]…
>
> **R**: Why?
>
> **C**: The doctor never gave me another note, but he could have but I never asked for another note.

R: Why did you not?

C: I just never asked for one. (emphasis added).

N.T. at 12.

Claimant did not establish good cause for her violation. The denial of benefits under Section 402(e) of the Law is affirmed.[4]

Accordingly, the decision of the Board is affirmed.

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BERNARD L. McGINLEY, Judge

[4] Claimant argues that she established good cause for failing to report to work because of her medical condition.

In *Genetin v. Unemployment Compensation Board of Review*, 499 Pa. 125, 451 A.2d 1353 (1982), this Court determined that while medical problems can provide a "cause of necessitous and compelling nature" for purposes of determining unemployment compensation, the employee must establish that he could not fulfill his regular duties because of a physical condition, has communicated that inability to the employer, and must be available where employer has made a reasonable accommodation to the employee's physical condition.

Although *Genetin* is a voluntary quit case rather than willful misconduct, Claimant argues that it supports her position. Here, Claimant failed to establish that she could not fulfill her regular duties due to her physical malady from April 26, through April 29, 2010, and failed to notify employer of her condition.

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O R D E R

AND NOW, this 25th day of May, 2011, the decision of the Unemployment Compensation Board of Review is affirmed.

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BERNARD L. McGINLEY, Judge