IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brooke E. Abdellah,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2166 C.D. 2010
	:	
Unemployment Compensation Board of Review,	:	Submitted: May 13, 2011
	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: June 23, 2011**

Brooke Abdellah (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board), which reversed the decision of the Unemployment Compensation (UC) Referee (Referee) and held Claimant ineligible for benefits because of willful misconduct pursuant to Section 402(e) of the Unemployment Compensation Law (Law).[1] Claimant asserts that the Board erred because Employer did not prove Claimant's absences constituted willful misconduct and, in any event, Claimant had just cause for being absent. Upon review, we affirm.

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

Claimant applied for UC benefits after becoming separated from her employment with Healthstar Physical Therapy (Employer). The UC Service Center (Service Center) issued a determination finding Claimant eligible for benefits under Section 402(e) of the Law. Employer appealed the Service Center's determination, and an evidentiary hearing was held before a Referee at which Claimant, Employer, and Employer's office manager (Office Manager) testified. Following the hearing, the Referee issued a decision affirming the Service Center's determination holding Claimant eligible for benefits. Thereafter, Employer appealed to the Board, which issued an opinion reversing the Referee's decision and held Claimant ineligible for benefits under Section 402(e) of the Law. The Board made the following findings of fact:

1. The claimant was last employed by Healthstar Physical Therapy, Inc. as a full-time physical therapy (PT) assistant from October 4, 2008 through March 22, 2010.

2. In January 2010, the claimant's attendance began deteriorating.

3. The claimant's work schedule was three days a week, Monday, Wednesday and Friday from 7:30 a.m. until 5:00 p.m.

4. The claimant was in a car accident in December 2009 due to sliding on ice, and saw a doctor.

5. The claimant's car sustained damage.

6. The claimant asserted that this damage caused the claimant's car to frequently stall.

7. The claimant did not repair the car as she did not have the money.

8. The employer understood that the claimant's car problems were that she did not have snow tires placed on the car.

9. In January 2010, the claimant was absent twice and left work early once due to the snow.

10. The claimant was afraid to drive in the snow.

11. The employer offered the claimant a later start time of 10:00 a.m. to address her late arrivals and the claimant refused.

12. The employer believed that PT assistants were difficult to find and wanted to work with the claimant.

13. The employer repeatedly informed the claimant verbally that her timely presence at work was important as she was the only PT assistant at work during that scheduled time.

14. The claimant arrived late for work on February 22, 2010 and February 26, 2010.

15. The claimant continued to arrive late for work a total of eight times between February 22 and March 22, 2010.

16. The claimant was counseled about her attendance on February 8, 2010 and March 4, 2010.

17. The March 4, 2010 telephone conversation advised the claimant that it was crucial that she report for work on March 8 and March 10, 2010 of the following week.

18. The claimant did report for work on March 8 and March 10, 2010.

19. The claimant reported off ill for March 17, 2010.

20. The claimant was scheduled to work on March 24 and March 26, 2010.

21. On March 19 and 22, 2010, the claimant again arrived late to work.

22. The claimant called off from work for March 24 and March 26, 2010.

23. The claimant alleged that she did not recall what her illness was for this time period.

24. The employer stated the claimant asserted at that time she had the flu.

25. The claimant admitted she missed three days in March due to "getting sick over my pending divorce."

26. The claimant admitted that her late arrivals were usually 10-15 minutes.

27. The employer discharged the claimant for her final absence.

28. As of the June 15, 2010 hearing, the claimant has still not repaired her car.

29. At the date of the hearing, the employer still had not been able to find a PT assistant to replace the claimant.

(Board Decision, Findings of Fact (FOF) ¶¶ 1-29.) The Board found Employer credibly established "that the claimant was repeatedly informed that her late arrivals and frequent absences were an issue with the employer." (Board Op. at 3.) Furthermore, the Board found Claimant not credible in her testimony that "the employer did not indicate that her absences and late arrivals were not a problem." (Board Op. at 3.) Regarding Claimant's final absence, the Board found Claimant's submitted medical note was an indication Claimant saw "a medical person on that date," but the Board did not credit Claimant's allegation that "she did not remember why she was ill on the final two absences that resulted in her discharge." (Board Op. at 3.) In addition, the Board determined Claimant "alleged an illness because of her pending divorce" and that "[t]he claimant has failed to credibly establish any illness or specific event that would support her absence." (Board Op. at 3-4.) Thus, the Board concluded that, because Claimant was repeatedly late to

work, Employer had met its burden of establishing that Claimant's dismissal was for willful misconduct because Claimant failed to credibly show good cause for her absences on the final two occasions. (Board Op. at 4.) Accordingly, the Board held that Claimant was ineligible for benefits under Section 402(e) of the Law. (Board Op. at 4.) Claimant now petitions this Court for review.[2]

We begin with a review of the legal principles applicable to a denial of benefits due to an employee's willful misconduct. Section 402(e) of the Law states that an employee will be ineligible for unemployment compensation "[i]n which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work." 43 P.S. § 802(e). Although the Law does not specifically define "willful misconduct," this Court has defined it by saying the behavior

> must evidence (1) the wanton and willful disregard of the employer's interest, (2) the deliberate violation of rules, (3) the disregard of standards of behavior which an employer can rightfully expect from his employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer's interests or the employee's duties and obligations.

Kentucky Fried Chicken, Inc. v. Unemployment Compensation Board of Review, 309 A.2d 165, 168-69 (Pa. Cmwlth. 1973). "Whether an employee's conduct has risen to the level of willful misconduct is an issue of law reviewable by this

[2] This "Court's review is limited to determining whether constitutional rights were violated, whether an error of law was committed, whether a practice or procedure of the Board was not followed or whether the findings of fact are supported by substantial evidence in the record." Western & Southern Life Ins. Co. v. Unemployment Compensation Board of Review, 913 A.2d 331, 334 n.2 (Pa. Cmwlth. 2006).

Court." Graham v. Unemployment Compensation Board of Review, 840 A.2d 1054, 1057 (Pa. Cmwlth. 2004). However, the Board is the ultimate fact finder and "questions of credibility and evidentiary weight to be given [to] conflicting testimony" are determined by the Board and not by this Court. Freedom Valley Fed. Savings and Loan Assoc. v. Unemployment Compensation Board of Review, 436 A.2d 1054, 1055 (Pa. Cmwlth. 1981). In addition, the employer has the burden of proving that the employee was dismissed for willful misconduct. Graham, 840 A.2d at 1056. Once the employer has proven willful misconduct, the burden shifts to the claimant to show good cause for her actions. Ramsey v. Unemployment Compensation Board of Review, 427 A.2d 1249, 1250 (Pa. Cmwlth. 1981).

Absenteeism, alone, "is not a sufficient basis for denial of unemployment benefits," even though it may constitute grounds for discharge. Runkle v. Unemployment Compensation Board of Review, 521 A.2d 530, 531 (Pa. Cmwlth. 1987). In order for absenteeism to constitute willful misconduct, an additional element is necessary. Id. Factors that are considered in leading to a showing of absenteeism constituting willful misconduct are: "(1) [e]xcessive absences, (2) [f]ailure to notify the employer in advance of the absence, (3) [l]ack of good or adequate cause for the absence, (4) [d]isobedience of existing company rules, regulations, or policy with regard to absenteeism, [and] (5) [d]isregard of warnings regarding absenteeism." Petty v. Unemployment Compensation Board of Review, 325 A.2d 642, 643 (Pa. Cmwlth. 1974). When an employer fires a claimant for a pattern of absenteeism, the claimant will be eligible for benefits if the final absence was justified. See, e.g., Runkle, 521 A.2d at 531 (holding claimant eligible for

benefits because there was substantial evidence to show claimant was ill on her last absences); Haigler v. Commonwealth, 462 A.2d 954, 955 (Pa. Cmwlth. 1982) (holding claimant ineligible for benefits because he failed to justify his last absence).

Before this Court, Claimant argues that the Board erred in finding that her tardiness or absences constituted willful misconduct because: (1) there is no substantial evidence that Employer ever expressly warned Claimant that continued tardiness or absences would result in dismissal and, likewise, that Employer ever gave Claimant this ultimatum; (2) the Board based its decision on the last two days of absence only instead of also considering her previous absences, which she alleged were excused; (3) Claimant called Employer before every absence and Employer granted permission for the absences; (4) Claimant had good cause for her last two absences because she received a doctor's excuse for her final absences, never had the opportunity to present it to Employer, and the Board discredited the doctor's excuse without explanation; and (5) the Board stated that the Claimant alleged an illness because of her pending divorce without substantial evidence to support this statement.

We first address Claimant's argument that Employer did not meet its burden of proving willful misconduct because Employer never expressly warned Claimant that continued tardiness or absences would result in her dismissal. While we agree with Claimant that Employer never gave Claimant this ultimatum, there is credited testimony that Employer warned Claimant about her absences and that Claimant continued to miss work after the warnings. (Board Op. at 3; FOF ¶¶ 15, 19, 20;

Hr'g Tr. at 11, R.R. at 19.) Office Manager first counseled Claimant on February 8, 2010. Office Manager testified that "I told her she was the only PT assistant that worked during the day, which she is, and that the PT aides . . . cannot do her complete job. So that frequency of call offs is going to be a problem." (Hr'g Tr. at 23, R.R. at 31.) In addition, Office Manager told Claimant on March 4, 2010, that her attendance was of particular importance for the work week of March 8-12, 2010. (Hr'g Tr. at 24, R.R. at 32.) Office Manager gave Claimant a verbal warning, "if I don't see your smiley face when I come into work in the morning you're not going to have a job to come back to." (Hr'g Tr. at 24, R.R. at 32.) Claimant attended work the work week of March 8-12, 2010, but on March 17th, Claimant called off. (Hr'g Tr. at 28, R.R. at 36.) Employer testified that he and Office Manager requested "a written excuse from an MD but it was not provided. She continued on with further late arrivals and call offs. Finally – actually on 3/22/10 she had a late arrival." (Hr'g Tr. at 11, R.R. at 19.) Lastly, Claimant called off on March 24, 2010 and March 26, 2010, which resulted in her termination. (Hr'g Tr. at 10, R.R. at 18.) Based on this credited testimony, we conclude that there is substantial credited evidence to support the Board's finding that "[E]mployer repeatedly informed . . . [C]laimant verbally that her timely presence at work was important as she was the only PT assistant at work during that scheduled time." (FOF ¶ 13.) Even though an ultimatum may not have been given, because Employer "repeatedly informed [Claimant] that her late arrivals and frequent absences were an issue with [E]mployer," (Board Op. at 3), Employer did meet its burden of proving that Claimant had been warned about her excessive absenteeism and tardiness.

We next address Claimant's argument that the Board only attributed her willful misconduct to the last two days of Claimant's employment and that the Board should have, instead, looked at Claimant's attendance over the entire time that she was employed because her previous absences were excused and, therefore, could not constitute excessive absences. As stated previously, absenteeism alone does not constitute willful misconduct and an additional element, such as excessive absenteeism, must be present to constitute willful misconduct. Runkle, 521 A.2d at 531; Petty, 325 A.2d at 643. It appears this argument by Claimant is meant to show that she did not have a pattern of absenteeism that would constitute excessive, unexcused absenteeism prior to her final two consecutive absences. However, Claimant's conduct before her termination date evidences that she was excessively tardy or absent, thus constituting willful misconduct. Claimant's prior absences are evidenced in Employer's credited testimony. Between January 1, 2010, and February 22, 2010, Claimant was either late or absent, without excuse, on ten separate occasions. (Hr'g Tr. at 13, 16, 18, R.R. at 21, 24, 26.) In addition, Claimant was absent on March 17, 2010, prior to calling off for her final absences on March 23, 2010. (Hr'g Tr. at 11, R. R. at 19.) Claimant's conduct prior to her termination consisted of multiple days of absence, tardiness, and warnings.

In this vein, Claimant also argues that because she called Employer before every absence, and Employer gave her permission to be tardy or to be absent, her absences do not constitute willful misconduct. An employee's absences constitute willful misconduct if "the absences are unjustified *or* not properly reported." Id. (citing Welded Tube Company of America v. Unemployment Compensation Board of Review, 401 A.2d 1383, 1385 (Pa. Cmwlth. 1979) (emphasis altered)). Here,

the Board did not credit Claimant's excuse as to her final absences and, thus, the result does not change simply because Claimant "called off." (Board Op. at 3.) Claimant also alleges that Employer granted permission for the absences by replying "okay" when she would call off. (Hr'g Tr. at 16, R.R. at 24.) Office Manager, nevertheless, stated that "[Claimant] was never told no problem, it's just okay." (Hr'g Tr. at 28, R.R. at 36.) Employer also stated in his testimony when asked about Claimant's absences, "I wasn't okay with it, but there's nothing we can do about it." (Hr'g Tr. at 13, R.R. at 21.) Employer also stated, "I've always told [Claimant] we need her to be there." (Hr'g Tr. at 14, R.R. at 22.) Employer was simply acknowledging Claimant's absence and not granting permission. Thus, there is credited evidence of record that Claimant's actions here constituted willful misconduct.

We next address Claimant's contention that, even if Employer did meet its burden of showing willful misconduct, she met her burden of showing good cause for her last two absences. If Claimant's final absences, for which Employer terminated her, were for good cause then Claimant would be eligible for benefits under the Law. See, e.g., Runkle, 521 A.2d at 531 (holding claimant eligible for benefits because there was substantial evidence to show claimant was ill on her last absences); Haigler, 462 A.2d at 955 (holding claimant ineligible for benefits because he failed to justify his last absence). Thus, we must focus on Claimant's last two absences on March 24, 2010 and March 26, 2010.

A claimant establishes good cause "where the action of the employee is justifiable or reasonable under the circumstances." Frumento v. Unemployment

Compensation Board of Review, 466 Pa. 81, 87, 351 A.2d 631, 634 (1976). The Board found Claimant not credible when she alleged she was ill during the final two absences. (Board Op. at 3.) When Claimant called Employer on Wednesday, March 24, 2010, to report "off for the rest of the week," Office Manager testified that Claimant did not state she had a doctor's excuse. (Hr'g Tr. at 25, R.R. at 33.) Likewise, when Employer notified Claimant that she would no longer be employed with Employer, Office Manager testified that Claimant "said, okay, I understand, okay, I understand and that was it." (Hr'g Tr. at 25, R.R. at 33.) Office Manager testified that Claimant did not notify her during the call or subsequently that Claimant had a doctor's excuse for her last two consecutive absences. (Hr'g Tr. at 25, R.R. at 33.) In addition, when Claimant was questioned on what kind of illness she had that resulted in her absence on those two days, Claimant testified, "I don't recall." (Hr'g Tr. at 37, R.R. at 45.) Because the Board found Claimant not credible in showing good cause for her absence, Claimant failed to carry the burden of showing her final absences were justified. (Board Decision at 3-4.)[3] Moreover, there is no dispute that Claimant never presented the doctor's excuse to Employer and Claimant never testified that she told Employer she had possession

[3] Claimant also argues that, because she informed Employer about her fear of driving in bad weather, her previous absences in regards to inclement weather should be excused. However, this argument is not relevant because the focus is on the last two absences only. Moreover, as discussed above, even prior to her final absences, Office Manager told Claimant that her absences and late arrivals were a problem for Employer. (FOF ¶ 13; Hr'g Tr. at 23-24, R.R. at 31-32.) The Board found that Employer offered Claimant a later start time to allow her to take more time to get to work safely, but Claimant refused. (FOF ¶ 11; Hr'g Tr. at 11, 23, R.R. at 19, 31.) Despite Employer's attempts to work with Claimant regarding her attendance issues, Claimant continued to be late for work or absent from work, and for reasons in addition to bad weather. (FOF ¶¶ 19, 25; Hr'g Tr. at 11, 18, R.R. at 19, 26.) Therefore, Claimant's argument that her fear of driving in snow should excuse her absences fails.

of the doctor's excuse when she called in sick or when she was discharged by Employer for her absences. (Hr'g Tr. at 25, 37, R.R. at 33, 45.)

Claimant contends that she had a doctor's excuse for her final absences, never had the opportunity to present it to Employer, and that the Board discredited the doctor's excuse without explanation. Claimant is essentially arguing that the Board should have believed her evidence and it did not. However, it is not the role of this Court to determine the question of credibility because the Board is the ultimate arbiter of credibility. Freedom Valley Fed. Savings and Loan Assoc., 436 A.2d at 1055. As discussed above, Claimant never told Employer she had a doctor's note when she called to tell Employer she would be absent. (Hr'g Tr. at 25, 37, R.R. at 33, 45.) The Board found Claimant's testimony not credible when Claimant alleged she was ill and yet testified that she did not recall why she was ill on the final two absences that resulted in her discharge. (Board Op. at 3; Hr'g Tr. at 37, R.R. at 45) Because of a hearsay objection to the admission of the doctor's note,[4] the Board merely accepted the doctor's note as evidence that Claimant saw a medical person on that date. (Board Op. at 3.) All of these facts support the Board's credibility determination.

Lastly, Claimant argues that the Board incorrectly stated that Claimant "alleged an illness because of her pending divorce." (Board Op. at 3-4.) Claimant argues that she did not state that reason for her absence in her testimony.

[4] The doctor's excuse was objected to as hearsay. (Hr'g Tr. at 37, R.R. at 45.) "Hearsay evidence, [p]roperly objected to, is not competent evidence to support a finding of the Board." Walker v. Unemployment Compensation Board of Review, 367 A.2d 366, 370 (Pa. Cmwlth. 1976). Since the doctor's note was properly objected to as hearsay, it cannot provide the basis for a finding of fact. Id.

However, this issue is not relevant because the Board discredited Claimant's testimony regarding her final absence for a number of reasons aside from her divorce, as discussed above.[5]

Although Claimant testified that she had a doctor's excuse to establish good cause for her absence on her last two scheduled days of work, the Board ultimately found this evidence not credible. (Board Op. at 3-4). As fact-finder, it is within the authority of the Board to determine the credibility of witnesses and resolve conflicts in evidence. Freedom Valley Fed. Savings and Loan Assoc., 436 A.2d at 1055. Because it was Claimant's burden to show good cause for her actions, and Claimant failed to show good cause for failing to report to work, she did not meet her burden of proof and the Board appropriately denied Claimant benefits.

Accordingly, we affirm the order of the Board.

RENÉE COHN JUBELIRER, Judge

[5] Insofar as it is relevant, the Board only made a reasonable inference and not a finding of fact. The Board's inference is taken from Claimant's questionnaire where she stated, "in March I did miss three days because I was getting sick over my pending divorce." (Claimant Questionnaire at 1, April 8, 2010, R. Item 2.)

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Petitioner	:	
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	:	
Unemployment Compensation Board of Review,	:	
	:	
Respondent	:	

O R D E R

NOW, June 23, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge