

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kimberly E. Bochak, :
Petitioner :
 :
v. : No. 2229 C.D. 2009
 : Submitted: March 26, 2010
Unemployment Compensation Board of :
Review, :
Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN

FILED: May 26, 2010

Kimberly E. Bochak (Claimant) petitions *pro se* for review of the September 21, 2009, order of the Unemployment Compensation Board of Review (UCBR) denying Claimant unemployment compensation benefits pursuant to section 402(e) of the Unemployment Compensation Law (Law).¹ We affirm.

Claimant was employed as a resolution specialist by Home Loan Service (Employer) until her last day of work on Friday, March 6, 2009. On Saturday, March 7, 2009, Claimant was involved in a domestic dispute with her ex-boyfriend, and, as a consequence, Claimant was charged with simple assault and incarcerated that same

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 her discharge from work for willful misconduct connected with her work. 43 P.S. §802(e).

day. The charges against Claimant were dismissed by the court on April 9, 2009. (UCBR's Findings of Fact, Nos. 1, 6-7, 16.)

As Claimant was aware, Employer's policy requires employees to report absences and lateness through a centralized call-off line, as well as directly to their supervisor. In the event that an employee is unable to provide notice personally, a family member designee must contact the call-off line on the employee's behalf. Failure to notify Employer of an absence prior to an employee's scheduled shift is deemed a "no-call/no-show," and two days of "no-call/no-show" is grounds for termination from employment. (UCBR's Findings of Fact, Nos. 2-5.) While incarcerated, Claimant was absent from her scheduled work shifts on Monday, March 9, 2009, and Tuesday, March 10, 2009, without notice to Employer, and she was discharged as a result. (UCBR's Findings of Fact, Nos. 8, 15.)

Claimant applied for unemployment compensation, but the local service center denied her benefits under section 402(e) of the Law.² (O.R., Item 3.) Claimant appealed, and the matter was scheduled for hearing before a referee. At the hearing, a representative for Employer provided a copy of Employer's "no-call/no-show" policy

² Finding that Claimant was incarcerated for the majority of the week at issue, the local service center also found Claimant ineligible for benefits pursuant to section 401(d)(1) of the Law, 43 P.S. §801(d)(1), which requires a claimant to be able to work and available for suitable work in order to secure compensation. (O.R., Item 3.) Although, in its opinion, the UCBR agreed that Claimant could be denied benefits under this section of the Law, (UCBR's op. at 3-4), the UCBR now acknowledges that, because Claimant was able and available for work for the majority of the week at issue, this was not an appropriate ground for the denial of benefits. (UCBR's brief at 9 n.5.) However, because Claimant also was found ineligible for benefits pursuant to section 402(e) of the Law, we agree with the UCBR that inclusion of these additional grounds for denial of benefits was harmless error.

and stated that Claimant was discharged after she failed to follow the procedures outlined in that policy for absences on March 9th and 10th of 2009. (O.R., Item 8, N.T. at 5.)

During her testimony, Claimant explained that she was unable to contact Employer to timely report her absences. Claimant stated that nobody knew she was in jail, and she could not reach anyone because she was only permitted to make collect calls and her family members all had cell phones. Claimant testified that she finally was able to contact her daughter through a bondsman; however, Claimant could not recall her supervisor's direct phone number,³ and, although she gave her daughter Employer's 1-800 number, her daughter did not get through. Claimant further testified that her daughter was unable to post bond until March 10, 2009. According to Claimant, she was released at about 10:00 p.m. and returned home at approximately 11:00 p.m., at which time she called her supervisor and left a voicemail message explaining where she had been. Claimant said that she called Employer again at 8:00 a.m. on March 11, 2009, but was informed that she already had been discharged due to her failure to call off work for two days. (O.R., Item 8, N.T. at 6-11.)

After consideration of the evidence, the referee affirmed the denial of benefits, (O.R., Item 9), and Claimant then appealed to the UCBR. In regard to Claimant's failure to provide the required notice to Employer, the UCBR made the following relevant findings:

³ Claimant explained that the direct phone number was in her cell phone, which was not accessible to her in jail. (O.R., Item 8, N.T. at 8.)

9. The claimant was in contact with her daughter through a bonding agent sometime between March 7 and March 9, 2009.

10. The claimant admits that she was able to make collect calls but asserts that [she] was not successful in her attempts to contact family members from jail on their cell phones.

11. The claimant's daughter paid her bond on March 9, 2009.

12. The claimant asserts that she did not ask her daughter to telephone the employer to report her absence from work because she could not recall the telephone number of the call center.

13. The claimant was released from jail on March 10, 2009.

14. At approximately 11 p.m. on March 10, 2009, the claimant telephoned her supervisor on his personal phone and left a message as to the reasons for her absence.

15. On the morning of March 11, 2009, the claimant spoke with her supervisor who informed her that she had been discharged for her no-call/no-shows on March 9 and 10, 2009.

(UCBR's Findings of Fact, Nos. 9-15.)

Based on its findings, the UCBR determined that Employer met its burden of establishing that Claimant's discharge was attributable to willful misconduct in connection with her work. The UCBR further determined that Claimant failed to establish good cause for her conduct. Specifically, the UCBR stated:

The employer demonstrated that the claimant was a no-call/no-show for work on March 9 and 10, 2009. ... The Board does not find the claimant's testimony to be credible that she was unable to contact any family member via their [sic] cell phone and that she could not remember the employer's call center telephone number. The claimant has not established good cause for her absence as the claimant was arrested through fault of her own as a result of getting into a domestic dispute with her ex-boyfriend. The claimant should have realized that her ability to attend work was jeopardized by her engagement in a domestic dispute incident. The claimant has not established good cause for her failure to report her absence.

(UCBR's op. at 3.) Accordingly, the UCBR concluded that Claimant was ineligible for benefits under section 402(e) of the Law. Claimant now petitions this court for review of that decision, arguing that the UCBR erred in concluding that she was guilty of willful misconduct.⁴

The term willful misconduct is not defined in the Law; however, in *Frumento v. Unemployment Compensation Board of Review*, 466 Pa. 81, 83-84, 351 A.2d 631, 632 (1976), our supreme court defined "willful misconduct" as:

an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has a right to expect of an employee, or negligence indicating an

⁴ Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with law or whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704. Whether certain conduct constitutes "willful misconduct," for purposes of determining unemployment compensation, is a question of law and fully reviewable by this court. *Boyle v. Unemployment Compensation Board of Review*, 510 A.2d 890 (Pa. Cmwlth. 1986).

intentional disregard of the employer's interest or of the employe's duties and obligations to the employer.

Where the claimant's misconduct is based on the violation of an employer's rule or policy, the employer bears the burden of establishing both the existence of the rule or policy and its violation by the claimant. *Docherty v. Unemployment Compensation Board of Review*, 898 A.2d 1205 (Pa. Cmwlth. 2006). Once the employer has established the rule and its violation, the burden shifts to the claimant to demonstrate either that the rule is unreasonable or that good cause existed to violate the rule. *Id.* A claimant has good cause if his or her actions are justifiable and reasonable under the circumstances. *Fruemento*. Conduct of a claimant that is justifiable or reasonable under the circumstances is not willful misconduct because it cannot properly be charged as a willful disregard of the employer's interest or rules or of the standard of conduct that the employer has a right to expect. *Eshbach v. Unemployment Compensation Board of Review*, 855 A.2d 943 (Pa. Cmwlth. 2004).

Here, Claimant does not dispute that Employer has sustained its burden. Rather, Claimant contends that she had good cause for her failure to properly report off work where, due to her incarceration, she was unable to call into work herself or contact anyone to do it for her. Under these circumstances, Claimant asserts that her work rule violation was justifiable and, thus, did not rise to the level of willful misconduct. We are constrained to disagree.

The insurmountable problem with Claimant's argument is that the UCBR expressly rejected her testimony as not credible.⁵ The UCBR simply did not believe that, while incarcerated, Claimant was unable to contact any family members via their cell phones or remember Employer's call center telephone number.⁶ Although this court might have viewed the testimony differently, we recognize that, in unemployment compensation cases, questions of credibility and evidentiary weight

⁵ Thus, Claimant's allegations of error by the UCBR are unavailing. Claimant specifically challenges the UCBR's Findings of Fact, Nos. 11 and 12 as false. With respect to finding 11, Claimant contends that her bond was paid on March 10, 2009, rather than on March 9, 2009, as found by the UCBR. The evidence is somewhat contradictory on this point, (*see* O.R., Item 2); however, even assuming that Claimant is correct, this is harmless error where the UCBR correctly found that Claimant was not released from jail until March 10, 2009. (UCBR's Findings of Fact, No. 13.) As to finding 12, Claimant insists that she did ask her daughter to contact Employer, albeit using a 1-800 number, but her daughter was unsuccessful. However, the 1-800 number was not the proper number to call to report an absence, and the UCBR did not believe that Claimant forgot the correct number.

Claimant also contends that, in deciding that Claimant was guilty of willful misconduct, the UCBR unreasonably expected Claimant to foretell that getting into a domestic dispute on March 7, 2009, would jeopardize her ability to attend work on March 9th and March 10th. Although we agree that the UCBR held Claimant to an unreasonable standard, we disagree that this error impacts Claimant's entitlement to benefits. The UCBR used this rationale to conclude that Claimant was at fault for her arrest and, thus, did not establish good cause for her *absence* from work. However, Claimant's failure to establish good cause for violating Employer's call-off policy during that absence is an entirely different matter. *See Robinson v. Unemployment Compensation Board of Review*, 431 A.2d 378 (Pa. Cmwlth. 1981) (recognizing that, even if a claimant's imprisonment constituted good cause for his absence, it did not constitute good cause for his failure to contact his employer, as required by the employer's attendance policy).

⁶ Claimant maintains that she was telling the truth when she said that she was unable to contact family members, (stated in the UCBR's Findings of Fact, No. 10), and the UCBR improperly rejected her testimony without satisfactory explanation. Despite Claimant's contention, it is clear that the UCBR can reject even uncontradicted evidence if it deems such evidence to be incredible. *Blackwell v. Unemployment Compensation Board of Review*, 555 A.2d 279 (Pa. Cmwlth. 1989); *cf. Treon v. Unemployment Compensation Board of Review*, 499 Pa. 455, 453 A.2d 960 (1982) (stating that the UCBR cannot reject a *referee's findings* based on uncontradicted evidence without giving its reasons for doing so).

are matters for the UCBR as fact finder and not for a reviewing court. *Stringent v. Unemployment Compensation Board of Review*, 703 A.2d 1084 (Pa. Cmwlth. 1997); *Johnson v. Unemployment Compensation Board of Review*, 427 A.2d 724 (Pa. Cmwlth. 1981). Here, in a proper exercise of its authority, the UCBR evaluated Claimant's testimony and issued findings that, in turn, support the UCBR's conclusion that Claimant is ineligible for benefits under section 402(e) of the Law.

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

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Review,	:	
	:	
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ORDER

AND NOW, this 26th day of May, 2010, the order of the Unemployment Compensation Board of Review, dated September 21, 2009, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Senior Judge