

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anitra Gipson,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2487 C.D. 2009
	:	SUBMITTED: June 11, 2010
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: October 13, 2010

Anitra Gipson (Claimant) petitions, *pro se*, for review of the order of the Unemployment Compensation Board of Review (Board) that denied her request for remand and affirmed the referee's decision denying her unemployment compensation benefits under Section 402(e) of the Unemployment Compensation Law (Law).¹ Claimant argues that the Board erred in concluding that her conduct rose to the level of willful misconduct, rendering her ineligible for benefits under Section 402(e) of the Law. Claimant, who failed to appear at the hearing before the referee, also challenges the Board's denial of her request for remand. The

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(e). Section 402(e) provides in pertinent part that an employee shall be ineligible for compensation for any week "[i]n which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work"

Board argues that Claimant waived her challenge to the Board's refusal to remand due to her failure to raise it in the petition for review.

Claimant was employed by Aqua America (Employer) as a customer service representative from October 27, 2008 until June 8, 2009, when Employer terminated her employment. The Office of UC Benefits approved Claimant's application for unemployment benefits for the week ending June 20, 2009, determining that she was not ineligible for benefits under Section 402(e) of the Law. Employer appealed, and on September 2, 2009, Claimant and Employer were notified of a hearing scheduled for September 14, 2009 before the referee. Claimant did not appear at the hearing, and only Employer presented the testimony of its witnesses regarding the following events, which led to the termination of Claimant's employment.

On June 4, 2009, Employer's customer service supervisor, Gregory Keyes, sent Claimant an e-mail, stating:

[Y]ou have not logged on at the start of your 8:30 shift. In fact, you have not logged on at 8:30 once in over the past two weeks. Please note that we require you to be here before the start of your shift. ... If you can not make it here for the start of your shift, then we can change your schedule to something a little more suitable. Let me know if you have any questions.

Notes of Testimony (N.T.) at 2; Supplemental Reproduced Record (S.R.) at 29.

At Claimant's request, Keyes met Claimant at the end of her shift on June 5.

Keyes testified:

As we started out of the call center, Anitra started to call me a boy and to tell me that I wasn't much of a man. ... She was upset that I emailed her. ... During her exchange of words, she swore and cursed and approached me in a threatening manner with her fist clenched. And I tried to remind her that we were still in the call center to which she replied she was off the clock and that she

could say whatever she wants to me. She again cursed and walked out of the building.

Id. at 2-3; S.R. at 29-30. Claimant did not report to work on the next scheduled workday, June 8. By letter dated June 8, 2009, Employer informed Claimant that she was discharged effective immediately for using profanity to her supervisor and for "no call, no show" that day. S.R. at 16. Employer's senior human resources personnel testified that Claimant was discharged for her verbal assault on her supervisor and failure to call off or report to work on June 8.

In a decision mailed on September 15, 2009, the referee reversed the Office of UC Benefits' determination and denied Claimant benefits under Section 402(e) of the Law. The referee stated that Claimant's conduct "was so egregious in nature that discharge was a natural result." Referee's Decision at 2. Claimant appealed the referee's decision and also sent the Board a letter, stating that she did not receive the notice of hearing mailed on September 2. She attached to the letter documents submitted to the Office of UC Benefits, containing her statement that she was unable to call Employer on June 8 to report her absence because she was hospitalized. She also attached the hospital record, showing that she was admitted to the hospital for bipolar disorder on June 8 and discharged on June 15. The Board acknowledged its receipt of Claimant's request for a remand hearing. Stating that Claimant had not credibly alleged proper cause for remand, the Board subsequently denied Claimant's request for remand and adopted and affirmed the referee's decision. Claimant appealed the Board's decision, and Employer intervened in her appeal.

An employer contesting a claimant's eligibility for benefits under Section 402(e) of the Law has the initial burden of proving that the claimant

engaged in willful misconduct.² *Patla v. Unemployment Comp. Bd. of Review*, 962 A.2d 724 (Pa. Cmwlth. 2008). Once the employer establishes a *prima facie* case of willful misconduct, the burden then shifts to the claimant to demonstrate good cause for his or her conduct. *Id.* The claimant has good cause if his or her action "is justifiable or reasonable under the circumstances." *Frumento v. Unemployment Comp. Bd. of Review*, 466 Pa. 81, 87, 351 A.2d 631, 634 (1976). Whether the claimant's conduct rose to the level of willful misconduct is a question of law subject to plenary review by this Court. *Dep't of Corr. v. Unemployment Comp. Bd. of Review*, 943 A.2d 1011 (Pa. Cmwlth. 2008).

Employer's work rules prohibited "[v]erbally or otherwise abusing a customer or fellow employe." S.R. at 17. Employer's work rules further provided: "[i]t is the employee's responsibility to notify his/her Manager or Supervisor of any absence, foreseeable or unforeseeable, no later than the beginning of his/her work shift, on the 1st day of the absence and each day absent unless on an approved disability or FMLA leave." *Id.* at 18. A violation of the work rules "may lead to disciplinary action up to and including termination or in some cases immediate termination." *Id.* at 17.

An employee's use of abusive, vulgar or offensive language directed at his or her supervisor evidences a disregard of the standards that an employer can rightfully expect of its employees. *Leone v. Unemployment Comp. Bd. of Review*, 885 A.2d 76 (Pa. Cmwlth. 2005). In addition, "failure to report absences[,] by

² The term "willful misconduct" has been defined as: (1) the wanton and willful disregard of the employer's interests; (2) the deliberate violation of work rules; (3) the disregard of standards of behavior which an employer can rightfully expect of its 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. *Glatfelter Barber Shop v. Unemployment Comp. Bd. of Review*, 957 A.2d 786 (Pa. Cmwlth. 2008).

itself, can properly be held to constitute willful misconduct." *Moore v. Unemployment Comp. Bd. of Review*, 483 A.2d 1062, 1063 (Pa. Cmwlth. 1984). Claimant does not dispute the referee's findings, adopted by the Board, that she used "expletives directed towards [her supervisor], berated him, and engaged in a threatening manner" and that she "did not call or show for work on her next scheduled day of work." Referee's Findings of Fact Nos. 4 and 5. Those findings, supported by the testimony of Employer's witnesses, establish that Claimant was discharged for willful misconduct, rendering her ineligible for benefits under Section 402(e) of the Law.

Claimant argues that she had "a compelling reason" for her conduct. Claimant's Brief at 6. She asserts that she suffered from "a severe manic episode" of bipolar disorder and was "on high dosages of the wrong medication" at the time of her confrontation with her supervisor. *Id.* In order to establish that a mental disorder constitutes good cause for conduct in question, the claimant must present expert testimony. *Dep't of Navy v. Unemployment Comp. Bd. of Review*, 632 A.2d 622 (Pa. Cmwlth. 1993); *Brady v. Unemployment Comp. Bd. of Review*, 539 A.2d 936 (Pa. Cmwlth. 1988). Here, Claimant failed to appear at the hearing to establish through expert testimony that her conduct was attributable to her mental disorder and medication.

Further, Claimant has waived her challenge to the Board's denial of her request for remand. A petition for review filed in the Court's appellate jurisdiction must contain, *inter alia*, "a general statement of the objections to the order or other determination." Pa. R.A.P. 1513(d). In the petition for review, Claimant stated: "I believe the [Board's] decision should be reversed because I have medical documentation proving I was hospitalized on June 8, 2009, and was

unable to contact my employer. My outburst with my supervisor was due to my manic episodes of Bipolar Disorder. I am currently in treatment." In the petition for review, Claimant only attempted to state good cause for her conduct on June 5 and failed to raise her objection to the Board's denial of her remand request. Where, as here, an issue is not raised in the petition for review but addressed in the brief, or where an issue is raised in the petition for review but is not addressed in the brief, the issue is waived and will not be considered by the Court. *Jimoh v. Unemployment Comp. Bd. of Review*, 902 A.2d 608 (Pa. Cmwlth. 2006).

Assuming, *arguendo*, that Claimant has properly preserved her challenge to the Board's denial of her remand request, the record still supports the Board's decision. The Board has discretion to decide when a rehearing is necessary and what issues will be addressed on remand. *Flores v. Unemployment Comp. Bd. of Review*, 686 A.2d 66 (Pa. Cmwlth. 1996). Generally, a rehearing is granted to allow a party an opportunity to present evidence which was not available at the time of the original hearing. *Id.* Denial of a remand request will be reversed only for a clear abuse of discretion. *Id.*

A party seeking to reopen the case after failing to attend a hearing must satisfy 34 Pa. Code § 101.24(a), which provides in relevant part:

If a party who did not attend a scheduled hearing subsequently gives written notice, which is received by the tribunal prior to the release of a decision, and it is determined by the tribunal that his failure to attend the hearing was for reasons which constitute "proper cause," the case shall be reopened. Requests for reopening, whether made to the referee or Board, shall be in writing; shall give the reasons believed to constitute "proper cause" for not appearing; and they shall be delivered or mailed ... to the tribunal ... or to the ... Board

In requesting a remand hearing, Claimant stated: "I did not receive the notice that there would be a hearing. The UC staff person re-mail them to me." S.R. at 7. Claimant, however, does not dispute the Board's statement in its order that the notice of hearing was sent to her last known address of record and was not returned as undeliverable, which creates a presumption that she had proper notice. *Gaskins v. Unemployment Comp. Bd. of Review*, 429 A.2d 138 (Pa. Cmwlth. 1981). Claimant's mere allegation that she did not receive properly mailed notice is insufficient to establish proper cause for reopening a case. *Mihelic v. Unemployment Comp. Bd. of Review*, 399 A.2d 825 (Pa. Cmwlth. 1979). Claimant failed to present to the Board any factual allegations which may support her remand request.³ Hence, the Board did not abuse its discretion in denying Claimant's request for remand.

Accordingly, the order of the Board is affirmed.

BONNIE BRIGANCE LEADBETTER,
President Judge

³ In her brief, Claimant now claims that she was out of town when the hearing notice was sent to her on September 2. To support her claim, she attached to her brief copies of Amtrak tickets for her trip to Dallas, TX on August 31 and her return trip to Philadelphia on September 19. Those copies, however, were not submitted to the Board. It is well-established that the Court may not consider information which is attached to a brief but is not part of the record certified to this Court. *Croft v. Unemployment Comp. Bd. of Review*, 662 A.2d 24 (Pa. Cmwlth. 1995).

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Board of Review,	:	
	:	
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ORDER

AND NOW, this 13th day of October, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge