IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael E. Watkins, Petitioner	:	
v.	:	No. 2715 C.D. 2010
	:	Submitted: May 20, 2011
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: August 11, 2011**

Michael E. Watkins (Claimant) petitions for review from an order of the Unemployment Compensation Board of Review (Board) that denied him unemployment benefits under Section 402(e) of the Unemployment Compensation Law (Law).[1] Claimant agues the Board erred in finding he violated his employer's attendance policy and in determining he committed willful misconduct. Upon review, we affirm.

Claimant worked for Compucraft (Employer) as a full-time fabricator from August 2007, until his last day of work in January 2010. Employer discharged Claimant for violating company policy by failing to report to work and for not calling Employer until after his shift would have ended.

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

The service center initially granted benefits. Employer appealed, and a referee's hearing followed.

At the hearing, Employer presented the testimony of its president, Alfred Erpel (Erpel). In response, Claimant testified on his own behalf. Additionally, Claimant's sister (Sister) testified regarding her efforts to notify Employer that Claimant would be unavailable for work on two specific days. After the hearing, the referee reversed the service center's decision and denied benefits. Claimant appealed.

On further appeal, the Board affirmed. The Board made the following pertinent findings:

> 2. [E]mployer maintains an attendance policy which is contained in the handbook.
>
> 3. The general manager warned [C]laimant about his attendance.
>
> 4. On January 22, 2010, [C]laimant had a court hearing because he was behind in child support. [C]laimant was incarcerated.
>
> 5. [C]laimant was absent from work on January 25, 2010, because he was incarcerated and did not properly report off.
>
> 6. [E]mployer discharged the claimant because of his record of absence.

Bd. Op., Findings of Fact (F.F.) Nos. 1-6. The Board further stated: "[C]laimant had been warned because of his attendance and when there was no change in his

course of conduct, he was discharged." Bd. Op. at 2. Claimant petitions for review.

On appeal,[2] Claimant challenges three of the Board's findings. In addition, he asserts the Board erred in determining he committed willful misconduct.

Matters of credibility and the weight to be given conflicting testimony fall within the Board's exclusive province. Oliver v. Unemployment Comp. Bd. of Review, 5 A.3d 432 (Pa. Cmwlth. 2010). Where substantial evidence supports the Board's findings, they are conclusive on appeal. Bruce v. Unemployment Comp. Bd. of Review, 2 A.3d 667 (Pa. Cmwlth. 2010). Moreover, it is irrelevant whether the record contains evidence supporting findings other than those made by the Board; the proper inquiry is whether the record supports the findings actually made. Id. Also, in reviewing the record to determine whether substantial evidence exists, we must view the record in the light most favorable to the party which prevailed before the Board, giving that party the benefit of all reasonable and logical inferences that can be drawn from the evidence. Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review, 949 A.2d 338 (Pa. Cmwlth. 2008).

Claimant first challenges the following Board findings:

3. The general manager warned [C]laimant about his

[2] Our review is limited to determining whether the necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Oliver v. Unemployment Comp. Bd. of Review, 5 A.3d 432 (Pa. Cmwlth. 2010).

attendance.

5. [C]laimant was absent from work on January 25, 2010, because he was incarcerated and did not properly report off.

6. [E]mployer discharged the claimant because of his record of absence.

F.F. Nos. 3, 5, 6. Claimant argues each of these findings is improperly based on hearsay testimony because Erpel lacked first-hand knowledge of Claimant's attendance issues. He further asserts Erpel's testimony was not corroborated by any other competent evidence. Additionally, Claimant contends his testimony and the testimony of his Sister reveal they contacted Employer on both Friday, January 22nd and Monday, January 25th.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801(c). Hearsay evidence admitted without objection may be given its natural probative effect if any competent evidence in the record corroborates it. Architectural Testing, Inc. v. Unemployment Comp. Bd. of Review, 940 A.2d 1277 (Pa. Cmwlth. 2008); Walker v. Unemployment Comp. Bd. of Review, 367 A.2d 366 (Pa. Cmwlth. 1976).

No hearsay issue exists here. Employer's witness could not identify the specific details of Claimant's situation. For instance, Erpel was unable to identify what days listed on the "vacation/personal day" report were excused absences and what days were unexcused. Referee's Hearing, 10/7/10, Notes of Testimony (N.T.), at 6. However, Erpel testified that, as Employer's president, he

had a general background as to Claimant's attendance issues. Specifically, Erpel testified he spoke with Claimant's supervisor repeatedly about Claimant's absenteeism. N.T. at 12. He testified Employer attempted to work with Claimant because he was an otherwise good worker who cared about his job, but his absenteeism made him unreliable. N.T. at 9. Erpel testified, "It was always time to discharge [Claimant] because of his constant tardiness, and missing days. And, that this was like the final – [Claimant's immediate supervisor] decided that it was beyond the limit of acceptability. And I didn't disagree with [Claimant's immediate supervisor]." N.T. at 6. Erpel's testimony shows he was aware of Claimant's attendance issues, and he worked with Claimant's immediate supervisor to address those issues.

Additionally, Employer's "vacation/personal day" report shows Claimant missed a significant amount of work in the six-month period prior to his discharge. This document shows that from June through December 2009, Claimant missed roughly 21 days. In addition, the document shows Claimant missed an additional number of days while he was incarcerated from June 28 to August 4, 2009. While the exact number of unexcused absences is not entirely clear, Claimant does not dispute the total number of days or that some of them were unexcused.

Further, Employer offered its written attendance policy without objection. That policy provides:

> - Full-time employees are expected to work a 40-hour week not including meal periods ….

> - Employees are expected to report to work on time every day. Whenever you are absent or late, you are required to telephone your Supervisor directly, within one hour of your normal starting time, but no later than 10:00 a.m. When possible, please notify your Supervisor of an intended absence as soon as possible, preferably one week in advance.
>
> - Excessive lateness or absenteeism will result in disciplinary action, up to and including termination of employment.

N.T., Employer Ex. 2, Employer's Employee Handbook. Claimant acknowledged receiving this handbook. N.T., Employer's Ex. 3, Employee Acknowledgement Form.

In short, Employer's evidence sufficiently establishes Claimant's absences were excessive under Employer's policy and that Employer attempted to work with Claimant regarding these issues prior to his discharge. This evidence supports F.F. Nos. 3 and 6.

The record also supports F.F. No. 5, that Claimant was absent on January 25, because he was incarcerated, and he did not properly report off. Claimant testified that on January 22 he came into work early and left early to attend a child support court hearing. N.T. at 9. He did not state whether he had permission to leave. He testified he intended to return to work after the hearing, but he was unable to do so because the court incarcerated him for non-payment of support. He testified his mother and Sister contacted Employer on January 22 to inform it of his status, of his inability to return to work on Friday, and of his unavailability for work on Monday.

Claimant's Sister testified she called Employer in the mid- to late afternoon on January 22 to "let [Employer] know … what was going on." N.T. at 11. Claimant's Sister did not testify if she told Employer on Friday that Claimant would be unable to report to work on Monday. Claimant's sister testified she telephoned again on January 25 at about 9:00 a.m. or 10:00 a.m., to let Employer know Claimant would not be in that day because his family was just raising bail.

Employer's policy required Claimant to call work within one hour of the start of his shift. The record contains no evidence regarding Claimant's normal start time. However, Employer's policy states that employees should notify their supervisors of intended absences as soon as possible. The record supports the Board's finding that Claimant did not comply with this requirement. The Board made a credibility determination that Claimant, on his own and through his Sister, did not inform Employer as soon as Claimant reasonably knew he would be unavailable for work. Thus, the record supports F.F. No. 5.

Claimant next argues the Board erred in determining he committed willful misconduct. He asserts the record lacks evidence that he intentionally failed to comply with Employer's attendance policy requirements. To the contrary, he did everything he could, as early as possible, to comply with those policies.

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). Willful misconduct within Section 402(e) is defined by the courts as: 1) a wanton and willful disregard of an

employer's interests; 2) deliberate violation of rules; 3) disregard of the standards of behavior which an employer can rightfully expect from an employee; or 4) negligence showing an intentional disregard of the employer's interests or the employee's duties and obligations. Grieb v. Unemployment Comp. Bd. of Review, 573 Pa. 594, 827 A.2d 422 (2002); Myers v. Unemployment Comp. Bd. of Review, 533 Pa. 373, 625 A.2d 622 (1997). The employer bears the initial burden of establishing a claimant engaged in willful misconduct. Id. Whether a claimant's actions constitute willful misconduct is a question of law fully reviewable on appeal. Id.

Absenteeism alone is not a sufficient basis for denial of unemployment benefits. Runkle v. Unemployment Comp. Bd. of Review, 521 A.2d 530 (Pa. Cmwlth. 1987). In order for absenteeism to constitute willful misconduct, an additional factor 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 Comp. Bd. of Review, 325 A.2d 642, 643 (Pa. Cmwlth. 1974).

When asserting discharge due to a violation of a reasonable work rule or policy, the employer must prove the existence of the rule or policy and its violation. Caterpillar, Inc. v. Unemployment Comp. Bd. of Review, 550 Pa. 115, 703 A.2d 452 (1997); Ductmate Indus., Inc. v. Unemployment Comp. Bd. of

Review, 949 A.2d 338 (Pa. Cmwlth. 2008).

Although a claimant's incarceration may not itself form the basis for a determination of willful misconduct, failure to comply with an employer's notice of absence policies can provide a basis for willful misconduct. Bruce.

Here, in determining Claimant committed willful misconduct, the Board explained:

> [C]laimant had been warned because of his attendance and when there was no change in his course of conduct, he was discharged. The last absence was because [C]laimant was incarcerated when he was behind [on] child support payments. [C]laimant's absence was not for good cause nor properly reported off. [C]laimant's actions must be considered a deliberate violation of [E]mployer's rules and the discharge, which followed, rendered him ineligible to receive benefits.

Bd. Op. at 2. We discern no error in the Board's analysis. Excessive absenteeism (which includes a prior period of incarceration), coupled with a warning and a further absence, satisfy Employer's burden to prove willful misconduct. An employer can rightfully expect a more reliable work force. Therefore, we affirm.

ROBERT SIMPSON, Judge

Judge Pellegrini concurs in the result only.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael E. Watkins, Petitioner	:	
v.	:	No. 2715 C.D. 2010
Unemployment Compensation Board of Review, Respondent	:	

O R D E R

AND NOW, this 11th day of August, 2011, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge