IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mary Theresa Gutosky,	:	
Petitioner	:	
v.	:	No. 386 C.D. 2011
	:	Submitted: August 26, 2011
Unemployment Compensation Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** October 14, 2011

Petitioner Mary T. Gutosky (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board), which affirmed the Unemployment Compensation Referee's (Referee) decision that Claimant was ineligible for benefits under Section 402(e) of the Unemployment Compensation Law (Law)[1] for reasons of willful misconduct. For the reasons set forth below, we affirm.

Claimant applied for unemployment compensation benefits after being discharged from her employment as a Logistics Analyst for Federal Resources Corporation, working under contract for the Tobyhanna Army Depot. The Scranton UC Service Center (Service Center) determined that Claimant was

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

ineligible for unemployment compensation benefits under Section 402(e) of the Law. Claimant appealed the Service Center's determination, and a hearing was held before a Referee. Following the hearing, the Referee issued a decision, in which he affirmed the Service Center's determination and found Claimant to be ineligible for unemployment compensation benefits.

Claimant appealed the Referee's order to the Board, which affirmed the Referee's decision. In doing so, the Board issued its own findings of fact and conclusions of law. The Board made the following findings:

> 1. The claimant was last employed as a Logistics Analyst by Federal Resources Corporation, working under contract for the Tobyhanna Army Depot, from August 18, 2008 at a final rate of $22.32 per hour and her last day of work was May 28, 2010.
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> 2. The employer's attendance policy provides that if employees are going to be absent due to illness, they should notify their on site manager as far in advance as is feasible under the circumstances, via e-mail or a phone call, but before the start of their workday.
>
> 3. The claimant was or should have been aware of the employer's attendance policy.
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> 4. On November 12, 2009, the employer sent an e-mail to employees advising that employees should be using its electronic system for preapproval of paid leave requests.
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> 5. On April 7, 2010, a human resources representative met with the claimant and verbally counseled her for calling off work immediately prior to her scheduled starting time and for not using the employer's electronic system for

requesting paid leave in advance of her absences.[2]

6. The claimant was directed to provide a reason for her absence when reporting off work.

7. On June 1, 2010, the employer intended to give the claimant a performance improvement plan in regard to her attendance in that the claimant was still failing to request preapproved leave through its electronic system in advance of her absences.

8. On June 1, 2010, the claimant failed to report for work for her scheduled shift at 7 a.m.

9. At 6 a.m. on June 1, 2010, the claimant sent her manager an e-mail indicating she "won't be in today, I'll see you tomorrow."

10. The claimant did not provide a reason for her absence.

11. On June 1, 2010, the claimant was suffering from pain and problems with her menstrual cycle.

12. On June 2, 2010, the claimant planned on working a half day and leaving at 1:30 p.m. for a 3 p.m. doctor's appointment in regard to problems with her menstrual cycle.

13. The claimant had notified her manager of her June 2 doctor's appointment two weeks in advance of the appointment and placed it on her calendar at work but did not submit an electronic request for paid leave.

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[2] We note that Claimant objects to the Board's finding in number 5 as hearsay in her petition for review. Claimant, however, failed to include this issue in the statement of questions presented and failed to brief this issue. The issue, therefore, is waived. Pa. R.A.P. 2116; *Van Duser v. Unemployment Comp. Bd. of Review*, 642 A.2d 544 (Pa. Cmwlth. 1994); *Coraluzzi v. Cmwlth.*, 524 A.2d 540 (Pa. Cmwlth. 1987).

14. On June 2, 2010, the claimant did not report for her scheduled 7 a.m. shift because she was still suffering from pain and problems with her menstrual cycle.

15. At 5:28 a.m. on June 2, 2010, the claimant sent her manager an e-mail indicating she "won't be in today, having womanly problems, going to doctors."

16. On June 2, 2010, the employer discharged the claimant for her absenteeism on June 1 and June 2, 2010, which it considered to be unexcused.

(Board's Decision and Order, attached to Claimant's brief.)

Based on the above listed findings, the Board concluded that Employer established that it discharged Claimant for willful misconduct and that Claimant failed to credibly establish good cause for not providing a reason for her work absence. (*Id.*) The Board reasoned that although Claimant properly reported her absences on June 1 and June 2 prior to the start of her shift via email, Claimant failed to give a reason for her absence on June 1, in violation of Employer's directive that she must provide a reason for her absence when reporting off work. (*Id.*) In addition, the Board explained that Claimant failed to establish justification for her failure to comply with Employer's reasonable directive. (*Id.*) Claimant now petitions this Court for review.

On appeal,[3] Claimant presents two arguments for review. First, Claimant argues that the Board erred in determining that substantial evidence existed in the record to support the findings that Claimant was discharged for

[3] This Court's standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704.

failing to follow the proper procedure for reporting absences. Second, Claimant argues that the Board erred in concluding that her actions constituted willful misconduct.

Substantial evidence is defined as relevant evidence upon which a reasonable mind could base a conclusion. *Johnson v. Unemployment Comp. Bd. of Review*, 502 A.2d 738, 740 (Pa. Cmwlth. 1986). In determining whether there is substantial evidence to support the Board's findings, this Court must examine the testimony in the light most favorable to the prevailing party, giving that party the benefit of any inferences that can logically and reasonably be drawn from the evidence. *Id*. A determination as to whether substantial evidence exists to support a finding of fact can only be made upon examination of the record as a whole. *Taylor v. Unemployment Comp. Bd. of Review*, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). The Board's findings of fact are conclusive on appeal only so long as the record taken as a whole contains substantial evidence to support them. *Penflex, Inc. v. Bryson*, 506 Pa. 274, 286, 485 A.2d 359, 365 (1984).

Bill McCarthy, a supervisor for Employer, testified as to the proper procedure for reporting time off and taking sick days. Mr. McCarthy testified that the procedure for reporting regular time off is done through an automated or electronic system. (Certified Record (C.R.), Item 21, p. 6.) In addition, if an employee needs to take a sick day, the employee is required to call or email the employee's immediate supervisor and provide an explanation for the absence. (*Id.* at p. 12.) Mr. McCarthy testified that Claimant had a history of not following proper procedures regarding absences and, on many occasions, failed to report to work without providing any explanation. (*Id.* at p. 7.) He further explained that Claimant was notified through an employee-wide email on November 12, 2009,

that employees must use the electronic system for reporting time off and further testified that Claimant was directed to provide an explanation when reporting off or calling in sick. (*Id.* at p.12.) It is undisputed that on June 1 and June 2, 2010, Claimant emailed her supervisor to note that she would not be reporting for work. (*Id.* at Exhibit C-2.) It is further undisputed that Claimant provided no explanation for her absence on June 1, 2010, and did not use the electronic system for reporting her absence on June 2, 2010. (*Id.*)

In response, Claimant argues that nothing in the employee handbook or documented email requires notice to the supervisor of the reason for an absence, and Claimant testified that she was never counseled to provide a reason for absences. (*Id.* at p. 21; Claimant's Brief at p. 7.) Claimant further argues that she did not have access to the electronic system from her residence, and, as a result, she was unable to properly report her absence on June 2, 2010. (Claimant's Brief at p. 7.) Despite Claimant's testimony to the contrary, the Board found credible the testimony of Employer's witness, Mr. McCarthy, that Claimant was fully aware of the requirement of providing a reason when taking a sick day and using the electronic system for reporting planned time off. In an unemployment case, it is well settled that the Board is the ultimate fact finder and is, therefore, entitled to make its own determinations as to witness credibility and evidentiary weight. *Peak v. Unemployment Comp. Bd. of Review*, 509 Pa. 267, 501 A.2d 1383, 1386 (1985). The Board is also empowered to resolve conflicts in evidence. *DeRiggi v. Unemployment Comp. Bd. of Review*, 856 A.2d 253, 255 (Pa. Cmwlth. 2004). Here, the Board resolved any conflict of testimony in favor of Employer. The testimony of Mr. McCarthy established that Claimant was notified to provide reasons for her absences and failed to follow that procedure on June 1, 2010, when

she emailed Mr. McCarthy. Moreover, Claimant acknowledges that she knew two weeks previously that she would be taking time off on June 2, 2010, but still failed to use the electronic system to report that time off. (C.R., Item 21 at p. 19.) Employer's testimony supports the Board's finding that Claimant acted contrary to Employer's directive.

We next address Claimant's contention that the Board erred in concluding that her conduct rose to the level of willful misconduct.[4] Section 402(e) of the Law provides, in part, that an employee shall be ineligible for compensation for any week in which "his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work." The employer bears the burden of proving that the claimant's unemployment is due to the claimant's willful misconduct. *Walsh v. Unemployment Comp. Bd. of Review*, 943 A.2d 363, 369 (Pa. Cmwlth. 2008). The term "willful misconduct" is not defined by statute. The courts, however, have defined "willful misconduct" as:

> (a) wanton or willful disregard of employer's interests, (b) deliberate violation of the employer's rules, (c) disregard of standards of behavior which an employer can rightfully expect of an employee, or (d) negligence indicating an intentional disregard of the employer's interest or an employee's duties and obligations.

Grieb v. Unemployment Comp. Bd. of Review, 573 Pa. 594, 600, 827 A.2d 422, 425 (2003). An employer, seeking to prove willful misconduct by showing that the claimant violated the employer's rules or policies, must prove the existence of the rule or policy, and that the claimant violated it. *Walsh*, 943 A.2d at 369. All pertinent circumstances are considered in determining whether an employee's

[4] Whether or not an employee's actions amount to willful misconduct is a question of law subject to review by this Court. *Nolan v. Unemployment Comp. Bd. of Review*, 425 A.2d 1203, 1205 (Pa. Cmwlth. 1981).

actions constituted willful misconduct. *Rebel v. Unemployment Comp. Bd. of Review*, 555 Pa. 114, 117, 723 A.2d 156, 158 (1998). A single incident of misconduct may support the denial of benefits. *Jones v. Unemployment Comp. Bd. of Review*, 373 A.2d 791, 972 (Pa. Cmwlth. 1977).

Here, the Board found that Employer had a policy in place that required Claimant to use an electronic system to report planned time off and to provide a reason for sick days. It is undisputed that Claimant neither provided a reason for her absence on June 1, 2010, nor did she use the electronic system for her June 2, 2010, planned absence. The Board also found that Claimant was or should have been aware of this policy. Based on these findings, Employer met its burden to prove the existence of its absenteeism policy and that Claimant violated the policy when she failed to provide an explanation for her absence on June 1, 2010, and failed to use the electronic system to record her planned absence June 2, 2010. Based on *Walsh*, the Board properly concluded that Claimant's lack of explanation for her absence and failure to use the electronic system constituted willful misconduct.

Because Employer established a *prima facie* case for violating the policy, it must now be determined whether Claimant established good cause for her actions. While the employer bears the burden of proving that a claimant's behavior constitutes willful misconduct, it is the claimant who bears the burden of proving good cause for her actions. *Kelly v. Unemployment Comp. Bd. of Review*, 747 A.2d 436, 438-39 (Pa. Cmwlth. 2000). To prove good cause, the claimant must demonstrate that her actions were justifiable and reasonable under the circumstances. *Id*. With regard to her June 1, 2010 absence, Claimant argues that "due to the personal nature of [her] sickness" it was too embarrassing to explain to

a male supervisor the reason for calling off work. (Claimant's Brief at p. 7.) Yet, she was not overly embarrassed to inform her supervisor on June 2, 2010, that she would be calling off due to "womanly problems." (C.R., Item 21, Exhibit C-3.) In addition, Claimant could have made a blanket statement that she was sick or having a health problem, but she failed to provide any explanation whatsoever for her absence. (C.R., Item 21, p. 20.) Claimant does not deny that she did not provide an explanation for her absence on June 1, 2010, but rather contends that she was unaware of any such policy to do so. However, as previously noted, the Board is also empowered to resolve conflicts in evidence, and here, the Board resolved any conflict in favor of Employer.[5] *DeRiggi*, 856 A.2d at 255. Therefore, based on the evidence presented, Claimant's lack of explanation for her June 1, 2010 absence was not justified or reasonable under the circumstances to constitute good cause.

Regarding her June 2, 2010 absence, Claimant again does not dispute that she failed to use the electronic system, but contends that she was unable to do so because she did not have access to the system from her personal residence. (Claimant's Brief at p. 7.) At the same time, Claimant testified that she knew that she would have to leave early on June 2, 2010, for up to two weeks prior to that date, but she still failed to use the system. (C.R., Item 21, p. 19.) Because Claimant had advanced notice of the need to take time off on June 2, 2010, her

[5] Specifically, as summarized above, Employer established that Claimant was personally directed to use the electronic system and provide an explanation for calling off before her shift. Employer further explained that there had been previous problems with Claimant's failure to either use the electronic system for reporting time off or for her lack of explanation when calling off work. (C.R., Item 21, p. 15.) Moreover, Employer testified it intended to implement a performance improvement plan for Claimant, beginning on June 1, 2010, as a result of earlier failures to follow Employer's directives, but that Employer never executed the improvement plan due to Claimant's discharge. (*Id.*)

lack of access to the system immediately prior to June 2, 2010, does not constitute good cause.

Employer's testimony, as summarized above and as accepted by the Board, established a policy in place for providing an explanation when reporting an absence and using the electronic or automated system for reporting planned time off. Although "absence alone does not constitute willful misconduct," a violation of an employer's policy on reporting absences can be grounds for discharge. *Welded Tube Co. of Am. v. Unemployment Comp. Bd. of Review*, 401 A.2d 1383, 1385 (Pa. Cmwlth. 1979). Moreover, as this Court held in *Buscemi v. Unemployment Compensation Board of Review*, 485 A.3d 1238, 1240 (Pa. Cmwlth. 1985), "[e]ven a justified absence from work can amount to willful misconduct if the employee fails to comply with a reporting requirement of which he is aware." Therefore, even if Claimant's absences were due to a justifiable health issue and may not have been sufficient alone to constitute willful misconduct, Claimant's failure to provide an explanation for her absence and her failure to use the electronic system when reporting her planned time off constitutes willful misconduct because she failed to comply with the reporting requirements Employer established. *Id.* Based on the facts here and in view of the relevant case law, the Board did not err in concluding that Claimant failed to prove good cause for failure to provide an explanation for her absence on June 1 and failure to use the electronic system for her June 2 appointment.

Accordingly, the order of the Board is affirmed.

P. KEVIN BROBSON, Judge

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O R D E R

AND NOW, this 14th day of October, 2011, the order of the Unemployment Compensation Board of Review is hereby AFFIRMED.

P. KEVIN BROBSON, Judge