IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Chambersburg Hospital, Petitioner	:	
v.	:	No. 954 C.D. 2011
	:	Submitted: October 7, 2011
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** December 8, 2011

Petitioner Chambersburg Hospital (Employer) petitions for review of an order of the Unemployment Compensation Board of Review (Board). The Board affirmed the Unemployment Compensation Referee's (Referee) decision that Claimant was eligible for benefits under Section 402(e) of the Unemployment Compensation Law (Law).[1] For the reasons set forth below, we affirm.

Jennifer Lake (Claimant) applied for unemployment compensation benefits after being discharged from her employment as a certified nurse's assistant at Chambersburg Hospital. The Lancaster UC Service Center (Service Center) determined that Claimant was eligible for unemployment compensation benefits under Section 402(e) of the Law. Employer appealed the Service Center's determination, and a hearing was held before a Referee on December 20, 2010.

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

Following the hearing, the Referee issued a decision, in which she affirmed the Service Center's determination and found Claimant to be eligible for unemployment compensation benefits.

Employer appealed the Referee's order to the Board, which ultimately affirmed the Referee's decision.[2] 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 full-time certified nurse's assistant by Chambersburg Hospital from May 21, 2007, at a final rate of $17.99 per hour. Her last day of work was August 12, 2010.
>
> 2. The employer's policy provides that employees calling off sick must be at home resting quietly. They cannot be performing inside or outside activities. Calling off sick when an employee is not is cause for discharge in accordance with the collective bargaining agreement.
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> 3. The collective bargaining agreement allows for sick leave to be used for bona fide incapacity or emergency doctor or dentist visits. Accepting sick leave pay under other circumstances is cause for discharge or other discipline.
>
> 4. The claimant was aware of the employer's policies.
>
> 5. On August 1, 2010, an employee received an e-mail with a picture of the claimant sitting in a car. The note implied that the claimant was going to call off work.

[2] We note that the beginning portion of the hearing before the Referee on December 20, 2010 was not recorded. Due to an error in recording, the Board ordered a remand hearing on March 21, 2011, for the purpose of recording testimony that had already been heard. New evidence was not considered at the remand hearing. (Reproduced Record (R.R.) at 29a-32a.)

6. On August 1, 2010, the claimant called off from work for August 2 and 3, 2010, due to a flare up of chronic neck pain.

7. The employee reported the e-mail and picture to the employer.

8. During its investigation, the employer heard rumors that the claimant was, instead, at the beach.

9. On August 4, 2010, the claimant's supervisor called her and told her that she would need a doctor's excuse for her time off.

10. Later that day, the claimant presented a doctor's note to the employer that stated that the claimant was under the doctor's care from August 2 through August 3, 2010, and could return to work on August 6, 2010.

11. The employer terminated the claimant's employment alleging fraudulent use of sick time.

(R.R. at 74a-75a.)

Based on the above listed findings, the Board concluded that Employer failed to establish that Claimant was terminated for willful misconduct. (*Id.*) Specifically, the Board reasoned that while it was undisputed that sick leave is to be used for illness and that Claimant was aware of that policy, Employer failed to prove that Claimant misused her sick leave. (*Id.*) The Board found that Employer's testimony consisted solely of a picture from an unknown source of Claimant in her car and rumors that Employer heard about Claimant being at the beach as opposed to being ill. (*Id.*) The Board concluded that none of the evidence presented proved that Claimant was at the beach rather than at home sick. (*Id.*) The Board, therefore, found Claimant eligible for benefits under the provisions of Section 402(e) of the Law. (*Id.*)

On appeal, Employer presents two arguments for review. First, Employer essentially argues that based on the testimony presented, the Board should have concluded that Claimant misused her sick leave. Employer seems to misapprehend this Court's standard and scope of review. 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. We note that Employer does not challenge any of the Board's findings of fact. 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, 276, 501 A.2d 1383, 1388 (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). 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). As a result, we are bound by the Board's findings. Simply because evidence of record *could* have produced an alternative outcome does not mean that substantial evidence does not exist. Accordingly, Employer's argument that this Court should reweigh the evidence to find in its favor is beyond our scope of review.

We next address Employer's contention that the Board erred in concluding that Employer failed to prove willful misconduct.[3] Section 402(e) of

[3] 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).

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.

To support its position that Claimant violated the sick leave policy, Employer presented four representatives. Employer presented the testimony of Brooke Schellhase, Employer's Human Resources Coordinator. (R.R. at 32a.) Ms. Schellhase testified that, pursuant to Employer's policy, an employee calling off due to illness is expected to be home resting. (*Id.* at 39a.) Additionally, employees found violating this policy are subject to disciplinary action up to and including termination. (*Id.*) Ms. Schellhase also testified that the sick leave policy is included in the employee handbook and when changes are made to the handbook, employees receive a copy of those changes and are required to sign a receipt of acknowledgment. (*Id.* at 40a.) According to Ms. Schellhase, Employer

concluded, after investigation,[4] that Claimant may have been at the beach as opposed to being ill. (*Id.* at 43a.) Ms. Schellhase testified that she believed Claimant fraudulently used sick time. (*Id.*) Claimant's termination followed. (*Id.*)

Employer also presented Cathy Puhl, Manager of Benefits and Compensation, to testify about the investigation of Claimant's sick leave. (*Id.* at 45a.) Ms. Puhl testified that Claimant's manager, Barbara Messner, communicated a potential issue regarding Claimant's sick leave. (*Id.* at 46a.) As a result of Claimant's alleged misuse of sick time, Ms. Puhl and other Employer representatives gathered information from several employees and viewed a text message sent to a co-worker from an unknown third party. (*Id.*) Additionally, Ms. Puhl met with Claimant about misusing her sick time and Ms. Puhl testified that while Claimant "admit[ted]" she was at the beach, she "did not admit" the exact day she returned home from the beach. (*Id.*) Later, Claimant communicated to Ms. Puhl that she returned home late Friday night.[5] (*Id.* at 48a.) After the investigation, Claimant's termination followed on August 12, 2010. (*Id.* at 47a.)

Next, Employer presented Patricia Ickes, a Certified Nurse's Aide, and former co-worker of Claimant. (*Id.* at 52a-53a.) Ms. Ickes testified to receiving, from a mutual friend, a picture text message depicting Claimant in a car. (*Id.* at 53a-54a.) Ms. Ickes received the message on August 1, 2010. (*Id.* at 55a.) The text accompanying the picture indicated that Claimant would be calling off work. (*Id.* at 54a.) After receiving the message, Ms. Ickes forwarded the message to her supervisor, Barbara Messner, to inform her of the situation. (*Id.*) Ms. Ickes

[4] This investigation included talking to Claimant's supervisors and colleagues. (R.R. at 43a.)

[5] Based on the dates that Claimant called off work, this would have been July 30, 2010.

also testified that, prior to receiving the message, she heard "the usual floor gossip" that Claimant planned on going to the beach. (*Id.* at 56a.)

Finally, Employer presented testimony of Claimant's immediate supervisor, Barbara Messner, who corroborated Ms. Ickes testimony. Ms. Messner testified that she talked to Ms. Ickes regarding the picture text message and heard "rumors" that Claimant was going to be at the beach. (*Id.* at 7a, 9a.) Ms. Messner requested a doctor's note from Claimant on August 4, 2010, after Claimant had called off due to illness. (*Id.* at 58a.) After receiving the request, Claimant provided Ms. Messner with a physician's note stating that Claimant was under a doctor's care on August 2, 2010 and August 3, 2010. (*Id.* at 8a, 21a.)

At the hearing, Claimant testified on her own behalf. Claimant testified that she reported her sick leave in accordance with Employer's policy. (*Id.* at 13a.) Claimant disputed the validity of the picture message, testifying that the picture could have been taken at any point in time and is, essentially, irrelevant. (*Id.* at 12a.) In addition, Claimant presented a doctor's note to her supervisor, Ms. Messner, within two hours of Ms. Messner's request. (*Id.*) Claimant noted a history of chronic illnesses, including diabetes and chronic neck pain, and testified that she had never been previously disciplined when taking sick leave. (*Id.* at 15a.)

Based upon the testimony summarized above, the Board concluded that Employer failed to prove that Claimant had violated Employer's sick leave policy by fraudulently misusing her sick time. Throughout the hearing, Employer failed to present any direct evidence that Claimant was actually at the beach as opposed to being ill. The best evidence presented at the hearing was a picture text message of Claimant sent to Ms. Ickes. However, Ms. Ickes received this message on August 1, 2010, from a "mutual friend" who informed Ms. Ickes that Claimant

would be calling off. (*Id.* at 53a-54a.) Ms. Ickes had no direct evidence that Claimant was actually at the beach on August 1, 2010, and only knew she would be calling off based on an obscure text message from a third party. Furthermore, while Ms. Ickes received the picture text message on August 1, 2010, there is no evidence that the photo was actually taken on August 1, 2010. In any event, a picture of Claimant in a vehicle does not prove that Claimant lied about her whereabouts on August 2, 2010, and August 3, 2010.

Any remaining evidence consists solely of "rumors" and "floor gossip" of other employees. Moreover, Claimant presented Employer with a doctor's note upon request which definitively indicated that Claimant was under a physician's care on August 2, 2010, and August 3, 2010, the dates in which Claimant used sick leave. Employer never disputed the validity of the note Claimant presented. Finally, there were factual disputes between Claimant's and Ms. Puhl's testimony.[6] The Board, however, resolved any conflicts in evidence in Claimant's favor, which is well within its discretion. *DeRiggi*, 856 A.2d at 255. Based on the testimony presented, Employer failed to establish a violation of the sick leave policy and, therefore, failed to prove willful misconduct.

Employer further attempts to argue that, because Claimant did not directly deny any allegations that she fraudulently misused her sick time, her silence effectively qualified as an admission. Employer argues that this alleged

[6] A dispute arose at the hearing regarding a conversation between Claimant and Ms. Puhl that took place on the date of Claimant's termination. Ms. Puhl testified that, in Employer's parking lot, Claimant stated, "I wonder who would have said anything . . . it must have been Theresa." (R.R. at 50a.) In response, Claimant emphatically stated that Ms. Puhl brought up Theresa's name and "in no way shape or form did [she] mention any[one] squealing on [her]." (R.R. at 15a.)

admission proves a violation of Employer's policy regarding sick leave. This argument is without merit.

Employer relies on *L. Washington & Associates v. Unemployment Comp. Bd. of Review*, 662 A.2d 1148 (Pa. Cmwlth. 1995), for the proposition that one's silence may constitute an admission. The "failure of a party to reply to a statement made in his presence or at hearing, is significant only where the nature of the statement, and the circumstances under which it was made, are such as render a reply natural and proper." *L. Washington*, 662 A.2d at 1149. (quoting *Levin v. Van Horn*, 412 Pa. 322, 194 A.2d 419 (1963)). However, this Court has limited the application of *L. Washington* in *Carson v. Unemployment Compensation Board of Review*, 711 A.2d 582 (Pa. Cmwlth. 1998), where we explained that in order for this proposition to apply, an employer must ask a claimant about the allegation prior to hearing or at the hearing in front of the referee. *Carson*, 711 A.2d at 585. Specifically, this Court opined:

> Our [previous] holdings are not to be considered a lessening of employer's burden of proof in a willful misconduct case. It is not appropriate to require a claimant to deny uncorroborated, hearsay allegations raised by an employer at a hearing, particularly when the burden of proof lies with the employer.

Id.

Here, Employer is asking this Court to require Claimant to deny uncorroborated hearsay allegations. At no time during the hearing did Employer or Employer's counsel directly ask Claimant her whereabouts on the days she called off. (R.R. 13a-17a.) As *Carson* points out, "we will not penalize claimant for the tactical errors made by employer in this case." *Carson*, 711 A.2d at 585. *L. Washington* would be applicable if Employer confronted Claimant during the

hearing about her specific dates at the beach, but this was not the case. In addition, the record suggests that while Employer may have questioned Claimant about her beach trip prior to the hearing, Claimant did not stay silent in response. During Ms. Puhl's questioning at the hearing, the relevant testimony indicated the following:

> Q: During the course of that meeting [with Claimant], did Ms. Lake have an opportunity, in fact, to address whether or not she had been at the beach instead of being at home ill?
>
> A: I did ask her. She never came out and told me specifically where she was at.
>
> Q: Okay. Did she deny the allegations specifically in terms of being at the beach?
>
> A: No, she did not.
>
> Q: Okay. Who else was at this meeting?
>
> A: And, in fact-can I restate that? She did admit she was at the beach. She would not admit the exact day she came home.
>
> Q: Okay. All right.
>
> A: She was at the beach-it wasn't just about Monday and Tuesday. I think her last day of work-for me to be able to confirm that was either that Wednesday or Thursday. And there were discussions at work that she is going to the beach. And, in fact, once got there would be calling off ill. And, in my investigation with her, she did admit she was at the beach, but did not-would not confirm when she arrived home.
>
> Q: Okay. When you say would not confirm when she arrived home, did she specifically deny that

she returned home on one of the days that she had called off sick?

A: She had-her, her information to me was that she, pardon me, that she arrived home very late Friday night.

(R.R. at 48a.)

According to Ms. Puhl's testimony, Claimant responded that she arrived home late Friday night. Claimant, therefore, did not remain silent when asked about her trip to the beach. Moreover, it does not appear from the record that Employer ever specifically inquired as to whether Claimant was at the beach on the days she called off sick. Employer offered no other direct evidence to prove that Claimant violated the sick policy by being at the beach as opposed to being at home resting. Employer's evidence consists of "rumors," "floor gossip," and a picture text message of Claimant in a car sent on a day that she was not scheduled to work; none of the evidence presented proves that Claimant violated the sick leave policy.[7]

Because Employer failed to prove a violation of Employer's policy in accordance with Section 402(e) of the Law, the Board correctly concluded that Claimant was eligible for benefits.

[7] We specifically note that Employer, in its reply brief, attempts to circumvent its original argument by providing an alternative argument. Employer argues that it met its burden of proof because Employer only had to establish that Claimant was not ill, rather than prove that Claimant was at the beach. This argument fails because, not only did Employer fail to prove that Claimant was at the beach, Employer also failed to prove that Claimant lied about her illness. The record is barren of any evidence that Claimant lied about having chronic neck pain on August 2, 2010, and August 3, 2010. Moreover, Claimant had a doctor's note stating that she was under a doctor's care on August 2, 2010 and August 3, 2010. Employer is either asking this Court to ignore Claimant's doctor's note or conclude that the doctor falsified the note and make our own finding that Claimant was not ill. This we will not do.

For the foregoing reasons, we affirm.

P. KEVIN BROBSON, Judge

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O R D E R

AND NOW, this 8th day of December, 2011, the order of the Unemployment Compensation Board of Review is hereby AFFIRMED.

P. KEVIN BROBSON, Judge