IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Marlene B. Jones, Petitioner	:	
v.	:	No. 1097 C.D. 2008
	:	Submitted: October 17, 2008
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER FILED: December 31, 2008

Marlene B. Jones (Claimant) petitions *pro se* for review of the order of the Unemployment Compensation Board of Review (Board) that affirmed the referee's decision denying benefits to Claimant based on Section 402(e) of the Unemployment Compensation Law (Law), Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e) (willful misconduct). Claimant questions whether the Board's findings are supported by substantial evidence and whether benefits may be denied for allegedly having violated the attendance policy of an employer if the employer did not abide by its own policy.

Claimant worked as a full-time customer care consultant for Precision Response Corporation (Employer). Her husband, Ira V. Harris, also worked for the company. Employer has a written policy under which employees are assessed points for absences. One point is assessed for an absence if the employee calls

Employer. Two points are assessed for being absent without calling Employer (no call/no show). The policy contains a corrective discipline process under which Employer is to give a verbal warning for two points, a written warning for four points, a final written warning for six points and consideration for termination for more than six points. The policy states that employees are dismissed after the third instance of a no call/no show. Employer has a written bereavement policy under which an employee receives up to three regularly scheduled, consecutive workdays of paid leave for an immediate family member's funeral. If additional time is needed, an employee may request accrued paid time off or unpaid time off. Claimant's workdays were Monday, Wednesday, Friday, Saturday and Sunday.

On Monday, November 19, 2007, Claimant called Employer and advised that her brother had died. She was told that she could have up to three days off for the funeral. Under the bereavement policy and her work schedule of having Tuesdays and Thursdays off, Claimant was to return to work on November 24. Claimant did not return on November 24 and 25, but Employer voluntarily extended the bereavement period to cover those days. On November 26 Claimant called and spoke to Employer's operations manager and requested additional time off, which was approved. By December 2 she still had not returned to work. Employer's team leader for attendance marked Claimant as a no call/no show on November 26, 27 and 30 and December 1.[1] On December 3 she was marked as terminated because she was regarded as a no call/no show on more than three prior

[1]Claimant was a no call/no show on November 28 but the team leader testified that because she called Claimant and spoke to her husband, she marked her only as absent. Claimant also was marked no call/no show for December 2, but Employer did not treat her as a no call/no show because there was a low volume of calls that day and a number of customer care consultants were sent home.

occasions. Claimant was not advised of the discharge and called in on December 4 to say that she would return the next day but was told that she was terminated. The UC Service Center *denied* her application for benefits.

After a hearing on February 28, 2008, the referee affirmed the UC Service Center's denial of benefits, and Claimant appealed. The Board remanded for a further hearing to develop the record because Claimant's request to continue the February 28 hearing so her new counsel could be present had been denied. The Board directed that the entire record be returned to the Board after further hearing for its consideration and action. At the hearing on April 24, at which Claimant was represented by counsel, the referee rejected Employer's request to have Claimant supplement the record of the February 28 hearing. Employer's team leader testified along with Claimant and her husband.

The Board resolved all conflicts in relevant testimony in favor of Employer and found its team leader's testimony to be credible. The Board found that after Claimant was a no call/no show on November 24 and 25, Employer's team leader called Claimant on November 26 and left a message for Claimant to call and that Claimant instead called Employer's operations manager and requested to be off work until December 1, which the operations manager approved. The Board also found that Claimant was scheduled to work November 27 but did not do so or call in and was scheduled to work November 28 but again did not do so; that the team leader called and spoke to Claimant's spouse who stated they would return on November 30; that the leave was not extended beyond November 30; that Claimant was a no call/no show *on November 30, December 1 and December 3*; that she was aware of Employer's policy; and that she called on December 4 and was informed of her discharge. The Board concluded that Employer proved willful

misconduct as, among other things, Claimant admitted to being a no call/no show on *November 25 and December 1, 2 and 3*. The Board determined that Claimant failed to prove good cause for violating Employer's policy.[2]

Claimant initially argues that the findings that Employer's operations manager only approved her being off from work until December 1 and that she was a no call/no show on November 25 and December 1, 2 and 3 are erroneous because Employer did not satisfy its burden of proof with respect to those matters. She asserts that the team leader's testimony concerning those matters was not truthful; that the operations manager's approval was for her to call in after December 1 to advise when she would return to work, not for her to return on December 1 as the Board found; that because Employer did not call its operations manager to testify there is no evidence to support the finding that Claimant was to return December 1 and an inference should be drawn that the operation manager's testimony would have supported Claimant's version; and that the record otherwise does not support that she was a no show/no call on those dates.[3] The Board response is that its

[2]The Court's review of the Board's order is limited to determining whether constitutional rights were violated, an error of law was committed, a practice or procedure of the Board was not followed or the findings of fact are supported by substantial evidence in the record. *Glenn v. Unemployment Compensation Board of Review*, 928 A.2d 1169 (Pa. Cmwlth. 2007). Substantial evidence is such relevant evidence that a reasonable mind might consider adequate to support a conclusion. *Walsh v. Unemployment Compensation Board of Review*, 943 A.2d 363 (Pa. Cmwlth. 2008).

[3]The Board argues that assertions in Claimant's brief about her post-discharge efforts to preserve her job and certain exhibits attached to her brief should not be considered by the Court because they are not part of the certified record. One of the exhibits is a June 12, 2008 letter addressed to the "Office of the Chief Clerk" of this Court presenting argument as to why the Board's order should be reversed. That letter was attached to the Court-supplied simplified petition for review form available to *pro se* petitioners that Claimant filed. Claimant refers to that letter for part of the argument section of her brief. The Court notes that its consideration is confined to the contents of the certified record.

findings are supported by substantial evidence and that after Employer satisfied its burden Claimant failed to show good cause, thereby justifying the Board's order.

With respect to the truthfulness of the testimony of Employer's team leader, the Board is the ultimate fact finder and determiner of credibility. It has the authority to resolve evidentiary conflicts and to make all necessary credibility determinations, and it is free to reject even uncontradicted testimony. *See Glenn*; *Daniels v. Unemployment Compensation Board of Review*, 755 A.2d 729 (Pa. Cmwlth. 2000). The fact that Claimant may have produced witnesses who gave a different version of events is not grounds for reversal if substantial evidence exists to support the Board's findings.[4] *Ruiz v. Unemployment Compensation Board of Review*, 887 A.2d 804 (Pa. Cmwlth. 2005). The Board resolved the conflicts in the testimony with regard to the operations manager's approval of Claimant's return.

Claimant's complaint that the Board's finding that she was a no call/no show on three occasions is not supported by the record raises a more serious issue. The Board indicated that she was a no call/no show on four occasions: November 25 and December 1, 2 and 3. As the Board acknowledges at page 11 of its brief, the team leader testified that Employer did not treat and consider December 2 as a no call/no show because a number of customer care consultants were sent home that day due to low call volume. The team leader also testified, and the Board acknowledged, that Employer did not treat and consider November 25 as a no

[4]As for Employer not calling its operations manager as a witness, an adverse inference may not be drawn where the witness is equally available to both parties. *Haas v. Kasnot*, 371 Pa. 580, 92 A.2d 171 (1952). The mere fact that the witness is an employee of the party against whom the adverse inference is sought to be drawn does not establish that the witness is not equally available to the other party. *Hawkey v. Peirsel*, 869 A.2d 983 (Pa. Super. 2005). Claimant could have requested a subpoena to compel the operations manager to appear and testify but did not do so.

call/no show but rather extended the bereavement leave to include November 25. Moreover, Findings Nos. 21, 22, 26 and 27 as to Claimant being a no call/no show on November 27 and 30 are inconsistent with Finding No. 20 that the operations manager approved Claimant being off until December 1.[5] Because the Board's findings are inconsistent with the evidence, this matter must be remanded for clarification (and additional findings as discussed *infra*) and a new decision.

Claimant testified at the hearing that she was not given the warnings that the policy mandates as corrective action, and she states in her brief that she should be allowed to return to work for Employer to comply with the policy. Where an employer promulgates a specific disciplinary system, a discharge under that system may not be deemed to be for willful misconduct if the employer fails to follow the specified process. *PMA Reinsurance Corp. v. Unemployment Compensation Board of Review*, 558 A.2d 623 (Pa. Cmwlth. 1989). The Board made no findings on whether Employer followed its policy by giving warnings to Claimant after the alleged occurrences of her no calls/no shows, and the Board did not mention the issue in its decision. This issue therefore must be addressed upon remand of this matter.

Accordingly, the Board's order is vacated and this matter is remanded to the Board for a clarification of its inconsistent findings of fact and for additional fact finding, if necessary, as to whether Employer complied with its written policy requiring that it provide employees with verbal and written warnings in the case of no call/no show occurrences. The Board shall consolidate Claimant's case with the

[5]Finding No. 20 would appear to negate the team leader's testimony that Claimant was a no call/no show on November 26, 27 and 30. Employer's operations manager was superior to its team leader, being the supervisor of the team leader's supervisor. N.T. at p. 17.

appeal filed by her husband, and the Board thereafter shall issue a new decision based upon its clarification and additional findings, if any, and conclusions reached thereon. The Board also shall expedite its decision on remand.[6]

DORIS A. SMITH-RIBNER, Judge

[6]Claimant's husband also applied for unemployment benefits, but their cases were never consolidated even though they arise from the same events and conversations and the certified record in Claimant's case contains a joint March 9, 2008 letter from Claimant and her husband to the Referee's Office pointing out that their cases are "one and the same" and arise out of their employment by the same employer and being terminated "on the same day for the same reason." They requested a single hearing for both cases, but they were not consolidated. The separate hearings were weeks apart and a different referee presided at each, and the findings adopted by the Board in Claimant's case differ in material respects from the findings in her husband's case. The Court does not have the power to harmonize the two records into a single set of facts reflecting what it believes to have happened in the same conversations and events that control the two cases, so the outcomes of the two cases ultimately can differ. Consolidation of future cases such as those of Claimant and his wife would be more efficient for the referees' office, the Board and the Court. *See* 43 P.S. §825; 34 Pa. Code §101.22.

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ORDER

AND NOW, this 31st day of December, 2008, the order of the Unemployment Compensation Board of Review is vacated, and this matter is remanded for the purposes indicated in the accompanying opinion.

Jurisdiction is relinquished.

DORIS A. SMITH-RIBNER, Judge