IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ronald B. Beach, Petitioner	:	
v.	:	No. 1291 C.D. 2012
Unemployment Compensation Board of Review, Respondent	:	Submitted: November 16, 2012

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: January 23, 2013**

Ronald B. Beach (Claimant), representing himself, petitions for review of an order of the Unemployment Compensation Board of Review (Board) that affirmed a referee's order denying him unemployment compensation (UC) benefits under Section 402(e) of the Unemployment Compensation Law (Law) (relating to willful misconduct) based on his unavailability for work due to incarceration.[1] Claimant contends the Board erred in denying him benefits for several reasons, including the fact that his employer, Union Drilling Company

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(e). 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. Willful misconduct is defined by the courts as: 1) 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).

(Employer), entered into a pre-employment agreement for work release if needed. Upon review, we affirm.

Background

The Board found the following facts. Claimant worked for Employer as a driller at a final rate of pay of $21.50 per hour. Employer placed Claimant on temporary lay-off on March 23, 2011. Employer's drilling rig was scheduled to be ready for the employees to return to work on May 1, 2011.

During his employment, Claimant had criminal charges pending against him for growing marijuana. On April 20, 2011, Claimant was convicted of the drug-related charges and sentenced to incarceration for nine months. At that time, Employer learned of Claimant's conviction and sentencing. Employer did not agree to work release for Claimant. On April 20, 2011, Employer discharged Claimant for being unavailable for recall as a result of his conviction and incarceration.

Noting that both parties agreed that Employer *discharged* Claimant because he would be incarcerated at the time he would be recalled to work, the Board determined the case would be decided under Section 402(e) (willful misconduct). The Board noted Claimant's drug-related offenses resulted in his unavailability for work due to incarceration. Consequently, the Board found

Claimant ineligible for benefits under Section 402(e). Claimant petitions for review.[2]

Issues

Claimant contends the Board erred (1) by considering Claimant's pre-employment drug charge as if it happened while he worked for Employer; (2) by stating that Claimant violated Employer's drug policy, where Employer never established that it had a drug policy and knew about Claimant's charges when it hired him; (3) by finding Employer terminated Claimant for being incarcerated, where Employer's witness stated that she did not know the date of incarceration or the length of Claimant's sentence; (4) by failing to consider a pre-employment agreement for work release and a letter from Claimant's supervisor offering employment; (5) by failing to consider a disparate treatment claim, where Employer had other employees on work release; and, (6) by failing to consider that Employer never stated its drilling rig actually returned to work, only that it was scheduled to return to work, thereby inferring Employer terminated Claimant for lack of work.

Discussion

First, Claimant contends Employer knew at the time of his hire that drug-related charges were pending against him. Further, Claimant asserts he did not engage in any misconduct while working for Employer.

[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. Dep't of Corr. v. Unemployment Comp. Bd. of Review, 943 A.2d 1011 (Pa. Cmwlth. 2008).

We disagree. Several elements of absenteeism may support a determination of willful misconduct, "including excessive absences and lack of good or adequate case for the absence." Weems v. Unemployment Comp. Bd. of Review, 952 A.2d 697, 698 (Pa. Cmwlth. 2008) (citing Medina v. Unemployment Comp. Bd. of Review, 423 A.2d 469 (1980)). As we stated in Medina, imprisonment is not good or adequate cause for absence because "an employee who engages in criminal activity punishable by incarceration should realize that his ability to attend work may be jeopardized." Weems (quoting Medina, 423 A.2d at 471). "It is the inability to attend work, not the criminal conduct, which supports a finding of willful misconduct." Id.

Here, the Board found: "On April 20, 2011 [Employer] discharged [Claimant] for being unavailable for recall as a result of his conviction and likely incarceration." Bd. Op., 6/13/12, Finding of Fact (F.F.) No. 6. "On April 20, 2011 [Claimant] was in fact convicted and sentenced to nine months in prison for this offense." F.F. No. 7.

The record supports these findings. Employer's Human Resources Officer, Susan McClafferty (HR Officer), testified that Employer terminated Claimant "[b]ecause he was no longer available for work." Notes of Testimony (N.T.), 4/20/12, at 5. HR Officer further stated Employer waited until April 20, 2011, because that is when Employer learned of Claimant's incarceration. Id. Claimant also testified he began serving his nine-month sentence on April 20. Id. at 6. Consequently, we discern no error in the Board's determination that Employer discharged Claimant for willful misconduct. Weems.

Claimant, however, asserts Employer did not know the date of his incarceration. To the contrary, HR Officer testified Employer confirmed Claimant's incarceration by court documents before terminating him. Id. at 4.

Claimant also contends he had a pre-employment agreement for work release with Employer. To that end his supervisor, Rich Rice (Claimant's Supervisor), wrote a letter to Claimant's attorney indicating Employer will have work for him in the near future. Claimant attached this letter to his petition for review and brief as "Claimant's Ex. A." See Claimant's Br. at 14.

Nevertheless, the Board found Employer did not agree to work release for Claimant.[3] F.F. No. 8. The record also supports this finding. First and foremost, there is no evidence of a pre-employment agreement for work release. In addition, Claimant testified Employer did not agree to work release, as reflected by his termination on his first day of incarceration. See N.T. at 12.

Moreover, the letter from Claimant's Supervisor, purportedly dated April 26, 2011, does not indicate any agreement or desire by Employer to hold Claimant's position open pending work release. See Claimant's Br. at 14. To the contrary, HR Officer sent a letter to Claimant's attorney, dated April 27, 2011, indicating Employer terminated Claimant April 20, 2011. See "Claimant's Ex. B,"

[3] An employer need not participate in a work release program. Weems v. Unemployment Comp. Bd. of Review, 952 A.2d 697 (Pa. Cmwlth. 2008).

Claimant's Br. at 15.[4] Consequently, the Board's finding that Employer did not agree to work release for Claimant is supported by the record.

Claimant also contends the Board erred in failing to consider his evidence of disparate treatment. In Geisinger Health Plan v. Unemployment Compensation Board of Review, 964 A.2d 970 (Pa. Cmwlth. 2009), we recognized a claimant who engaged in willful misconduct may still receive UC benefits if he can establish disparate treatment, which requires a showing that: (1) the employer discharged claimant but did not discharge other employees who engaged in similar conduct; (2) the claimant was similarly situated to the other employees who were not discharged; and, (3) the employer discharged the claimant based upon an improper criterion.

Here, Claimant asserts Employer had other employees on work release. Before the referee, Claimant testified one employee, Joe Welker, had "more felonies and worse charges than I ever had." N.T. at 14. In his brief, Claimant names other employees but admits he did not testify about them. However, absent sufficient evidence that Claimant was similarly situated to other employees on work release or that Employer discharged him based upon an improper criterion, Claimant's disparate treatment claim fails. Geisinger Health Plan.

[4] Although Claimant did not formally enter "Claimant's Exs. A and B" into the record, Employer did not object to them and in fact discussed them at the referee's hearing. See Notes of Testimony (N.T.), 4/20/12, at 11-12.

Finally, Claimant contends Employer did not begin drilling again until May 2011, well after his incarceration. Claimant asserts this indicates he was terminated in April 2011 for lack of work, not willful misconduct.

Having determined in accord with Weems that Employer established that it discharged Claimant for willful misconduct (being unavailable for recall as a result of his incarceration for drug-related offenses), we dismiss Claimant's contention that Employer discharged him for lack of work rather that willful misconduct. It is irrelevant whether the record includes evidence that would support findings other than those made by the Board; the proper inquiry is whether the evidence supports the findings actually made. Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review, 949 A.2d 338 (Pa. Cmwlth. 2008). Further, the party prevailing below is entitled to the benefit of all reasonable inferences drawn from the evidence. Id.

For the above reasons, we discern no error in the Board's decision. Accordingly, we affirm.

ROBERT SIMPSON, Judge

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O R D E R

AND NOW, this 23rd day of January, 2013, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge