IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Penny M. Kelly, Petitioner	:	
	:	No. 1631 C.D. 2010
v.	:	
	:	Submitted: December 30, 2010
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: May 23, 2011

Penny M. Kelly (Claimant) petitions for review of the July 16, 2010, order of the Unemployment Compensation Board of Review (Board), which held that Claimant was ineligible for benefits under section 402(e) of the Unemployment Compensation Law (Law).[1]

Claimant was employed by The Reading Hospital (Employer) as a full-time respiratory therapist from June 25, 2007, until January 17, 2010. (Finding of Fact No. 1.) Claimant's mother provided childcare for Claimant's children but had

[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 provides 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 to prove that a discharged employee was guilty of willful misconduct. Gillins v. Unemployment Compensation Board of Review, 534 Pa. 590, 633 A.2d 1150 (1993).

planned a cruise from December 8, 2009, to December 22, 2009. (Finding of Fact No. 2.) Claimant needed to undergo elective surgery around this time, and she tried to schedule the surgery during the time frame that her mother would be away. (Finding of Fact No. 3.) Claimant initially received a surgery date of December 9, 2009. (Finding of Fact No. 5.) On July 1, 2009, Claimant submitted a request to Employer for paid time off (PTO) and medical leave from December 8, 2009 through December 22, 2009. (Finding of Fact No. 4.) Employer then suggested that Claimant apply for leave under the Family and Medical Leave Act (FMLA).[2] (Finding of Fact No. 6.)

Claimant applied and was approved for FMLA leave starting on December 6, 2009, through January 4, 2010. (Finding of Fact No. 7.) Claimant received a designation notice letter from Employer informing her that the FMLA leave was approved for her own serious medical condition and/or the serious medical condition of an immediate family member. (Finding of Fact No. 8.)

Claimant's surgery was subsequently rescheduled from December 9, 2009, to December 16, 2009. (Finding of Fact No. 9.) Claimant notified Employer of the rescheduling and the need to care for her children, and she agreed to utilize PTO through December 15, 2009. (Finding of Fact No. 10.) However, Claimant's surgery date was again rescheduled from December 16, 2009, to December 30, 2009. (Finding of Fact No. 11.) Claimant began FMLA leave on December 16, 2009, and did not notify Employer of this most recent rescheduling. (Finding of Fact No. 12.) Employer called Claimant on December 29, 2009, and discovered for the first time that Claimant's surgery had been rescheduled for the next day. (Finding of Fact No.

[2] 29 U.S.C. §§2601-2654.

13.) Claimant did in fact undergo surgery on December 30, 2009. (Finding of Fact No. 14.)

On January 3, 2010, Claimant spoke to an Employer representative, explaining that she did not inform Employer of the rescheduled December 30, 2009, surgery date because she still needed the time off to care for her children. (Finding of Fact No. 15.) Childcare is not an appropriate use of FMLA leave. (Finding of Fact No. 16.) Employer's representative informed Claimant that Employer would conduct an investigation. (Finding of Fact No. 17.) Subsequently, on January 11, 2010, Claimant returned to work full duty. (Finding of Fact No. 18.) On January 17, 2010, Employer terminated Claimant's employment for misuse of FMLA leave. (Finding of Fact No. 19.)

Claimant filed a claim for benefits with the Allentown Unemployment Compensation Service Center (Service Center), which determined that Claimant was not ineligible for benefits under section 402(e) of the Law. Employer appealed, and the case was assigned to a referee for a hearing.

Cecelia Buendia-Klopp, a human resources consultant for Employer, testified that Claimant failed to notify Employer of a change in circumstances that no longer justified the FMLA leave, which Buendia-Klopp described as dishonesty on Claimant's part. (N.T. at 3.) Susan Guldin, an administrative assistant in Employer's respiratory care department, testified that she suggested that Claimant take FMLA leave because she believed such leave was necessary for any absence in excess of two weeks. (N.T. at 4.) Guldin stated that, following the first rescheduling of Claimant's surgery, Claimant called, indicated that she still needed the time off, and agreed to utilize PTO time up until the rescheduled surgery date. (N.T. at 4-5.) Guldin said she next spoke to Claimant on December 29, 2009, when she called to see how Claimant

was feeling, and learned that Claimant's surgery had again been rescheduled until the next day. (N.T. at 5.) Guldin advised Claimant that the use of FMLA leave was not appropriate and she later informed a supervisor of the situation. Id.

Maureen Scullion, also a human resources consultant for Employer, testified that she helps Employer administer the FMLA leave process. Id. Scullion indicated that she spoke to Claimant on January 3, 2010, and asked her why she did not call after the surgery was rescheduled for a second time, to which Claimant responded that she needed the time off anyway to take care of her children. (N.T. at 7-8.) Scullion noted that childcare does not meet the guidelines for FMLA leave. (N.T. at 8.)

Stephen MacDonald, Claimant's supervisor, testified that he was aware of the first rescheduling of Claimant's surgery, but not the second. (N.T. at 9.) MacDonald also indicated that Claimant had informed him of issues regarding childcare prior to her surgery. (N.T. at 10.) On cross-examination, MacDonald acknowledged that he was aware that Claimant's mother watched Claimant's children and that her mother was going on a cruise in December. Id.

Finally, Ron Sherman, Employer's director of respiratory care services, also testified that he was unaware that Claimant's surgery had been rescheduled a second time. (N.T. at 11.) Sherman indicated that he first learned of the second rescheduling on December 29, 2009. Id. Sherman noted that Claimant was placed on suspension upon her return to work and was subsequently terminated. Id.

Claimant testified that she originally requested PTO because of her surgery and her mother's cruise, which resulted in a lack of childcare. (N.T. at 17.) Claimant indicated that her original surgery date was changed due to a family emergency with one of her surgeons and the subsequent dates were rescheduled due

to the lack of accreditation of her surgeon at the hospital where the surgery was to be performed. (N.T. at 17, 18.) Claimant testified that she only learned that the December 16, 2009, surgery date would be rescheduled a day or two prior to that date. (N.T. at 18.) On cross-examination, Claimant explained that she did not call Employer after December 16, 2009, because she believed that she was using her PTO during that time and she was already scheduled to be off. (N.T. at 19.) Claimant acknowledged that she spoke with Guldin on December 29, 2009, and informed Guldin that her surgery was scheduled for the next day. (N.T. at 20.)

Ultimately, the referee reversed the Service Center's determination and concluded that Claimant was ineligible for benefits under section 402(e) of the Law. Claimant appealed to the Board, which affirmed the referee's decision. The Board reasoned that absence due to childcare is clearly not covered by FMLA leave and that Claimant knew or should have known that it was necessary to inform Employer of the change in her December 16, 2009, surgery date, especially in light of her call to Employer after the first surgery date was rescheduled. The Board concluded that Claimant's failure to inform Employer and continue on FMLA leave was below the standards of behavior that an employer has the right to expect from an employee. The Board specifically rejected Claimant's testimony that she did not know that she was doing anything wrong.

On appeal to this Court,[3] Claimant argues that the Board erred in concluding that she was ineligible for benefits under section 402(e) of the Law. We disagree.

[3] Our scope 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. Shrum v. Unemployment Compensation Board of Review, 690 A.2d 796 (Pa. Cmwlth.), appeal denied, 548 Pa. 663, 698 A.2d 69 (1997).

Although the Law does not define the term "willful misconduct," our Supreme Court has held that willful misconduct "includes those actions constituting a deliberate violation of the employer's rules or a disregard of the standard of behavior which the employer has a right to expect of an employee." Burchell v. Unemployment Compensation Board of Review, 848 A.2d 1082, 1084 (Pa. Cmwlth. 2004).[4] If the employer presents a prima facie case of willful misconduct, then the burden of proof shifts to the claimant to establish that her actions were justified or reasonable under the circumstances. Downey v. Unemployment Compensation Board of Review, 913 A.2d 351 (Pa. Cmwlth. 2006).

In the present case, Claimant's original request for leave simply indicated that she was having surgery and made no mention of her childcare issues.[5] While Claimant originally requested PTO and medical leave, she later opted for FMLA leave, albeit at Employer's request. Claimant submitted a certification from her treating physician indicating that FMLA leave was necessary because of Claimant's impending surgery and recovery time. Claimant received a designation notice approving her FMLA leave from December 6, 2009, through January 4, 2011, and advising her to immediately notify Employer of any change in the requested leave dates. Employer informed Claimant in an accompanying letter that FMLA leave is only appropriate in situations involving a serious medical condition and/or the serious medical condition of an immediate family member.

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

[5] A copy of this request is included in the original record and was submitted into evidence at the referee's hearing as Employer's exhibit two.

The Board found that Claimant was certainly aware of these provisions, as reflected by her call to Employer following the first change to her surgery date and her request to utilize PTO for the preceding period because of childcare issues. In addition, Claimant does not dispute that she failed to call Employer following the second rescheduling of her surgery. Although Claimant testified that she believed that she did nothing wrong and that she was still using her PTO during this time period, the Board specifically rejected this testimony. The Board's findings and credibility determinations support its conclusion that Claimant's actions constituted willful misconduct in the nature of a disregard of the standards of behavior that an employer has the right to expect from an employee.

Accordingly, we affirm.

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PATRICIA A. McCULLOUGH, Judge

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ORDER

AND NOW, this 23rd day of May, 2011, the July 16, 2010, order of the Unemployment Compensation Board of Review is hereby affirmed.

PATRICIA A. McCULLOUGH, Judge