IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Teresa M. Kahn,	:	
Petitioner	:	
	:	
v.	:	No. 1717 C.D. 2009
	:	Submitted: February 5, 2010
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: March 17, 2010

Teresa M. Kahn (Claimant) petitions *pro se* for review of the August 7, 2009, order of the Unemployment Compensation Board of Review (UCBR) denying Claimant unemployment compensation benefits pursuant to section 402(e) of the Unemployment Compensation Law (Law).[1] We affirm.

Claimant worked as a front desk receptionist for Richard J. Caron Foundation (Employer), a drug and alcohol treatment facility. Employer has a drug and alcohol policy that prohibits any employee's use and/or possession of alcohol and

[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 a claimant shall be ineligible for benefits for any week in which her unemployment is due to discharge from work for willful misconduct connected with her work.

illegal or unauthorized drugs, including prescription drugs for which the employee does not have a prescription. (O.R., Item No. 9, Ex. E-1.) An employee violating Employer's substance abuse policy is subject to discipline up to and including termination. On February 13, 2009, Employer terminated Claimant for violating the policy by accepting prescription pain medication from co-worker, Heather Sanders.[2]

Following her discharge, Claimant applied for unemployment compensation. However, the local job center denied Claimant's application on grounds that Claimant's actions constituted willful misconduct, making her ineligible for benefits pursuant to section 402(e) of the Law. (O.R., Item No. 5.) Claimant appealed, and an evidentiary hearing was held before a referee; Bonnie Page and Gina Riggs testified on behalf of Employer, and Claimant testified on her own behalf.

Page provided the following relevant testimony with respect to Claimant's separation from employment. On February 13, 2009, Page and Riggs met with Claimant to investigate a report from one of Claimant's co-workers that Claimant had been given a prescription painkiller by Sanders. At the meeting, Claimant eventually admitted that Sanders left a pill for Claimant and had told her to "only take half of it because it'll kick your ass." (N.T. at 4.) However, Claimant said that she had not taken the medication and still had it in her possession. Page and Riggs sent Claimant back to work and interviewed Sanders, who denied giving

[2] In its separation questionnaire, Employer stated that it also terminated Claimant for unprofessional conduct; specifically, Employer alleged that, after Claimant was interviewed regarding the medication incident, she returned to her desk and yelled at a co-worker in front of a patient and the patient's family. (O.R., Item No. 4.) However, because Employer offered no first-hand testimony on this matter, the referee disregarded this alleged unprofessional conduct as a basis for Claimant's discharge. (Referee's op. at 2.)

Claimant any medication. (N.T. at 5.) When Claimant was brought back to continue her interview, she brought an envelope containing the pill that was given to her along with a note telling Claimant, "This is what I told you I would leave you - Please place in purse and Be Quiet @ it! Love ya Heather." (N.T. at 6; O.R., Item No. 9, Ex. E-4.) Claimant was then terminated for violating Employer's substance abuse policy. In that regard, the following exchange took place between Page and Claimant's representative at the hearing.

> CL So the real reason for [Claimant's] discharge was because she allegedly accepted prescription pain medication?
>
> EW1 Correct.
>
> CL Okay. Now how do you know it's prescription pain medication?
>
> EW1 Like I said, because we were told.
>
> CL Who told you?
>
> EW1 Teresa said so when we, when Gina and I interviewed her.
>
> CL This, the Claimant, Ms. Kahn told you it was prescription pain medication?
>
> EW1 Yes.

(N.T. at 8.)[3]

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[3] In her brief testimony, Riggs added nothing new to Page's account. Riggs confirmed that she learned about Claimant's receipt of the pain medication from one of Claimant's co-workers and that, subsequently, Page and Riggs interviewed Claimant and Sanders in regard to that report. Riggs recalled that, at the interviews, Claimant acknowledged being left medication at the desk by

(Footnote continued on next page…)

In support of her claim for benefits, Claimant testified that she recently had broken her ribs, and Sanders suggested that Claimant needed to take something to help her with the pain. According to Claimant, she agreed to accept this help from Sanders, but she expected Sanders to give her something like aspirin or ibuprofen. Claimant stated that she was away at lunch when Sanders left her an envelope that contained a pill and a note; however, Claimant decided not to take the pill because she did not recognize what it was. (N.T. at 14-15.) Claimant acknowledged that she met with Page and Riggs after a co-worker reported the exchange of medication between Claimant and Sanders; however, Claimant disputed Page's account of those meetings. Specifically, Claimant denied using the term "prescription pain medication" during her interview, (N.T. at 16), and she denied saying that Sanders mentioned anything about the pill "kicking your ass if you took it." (N.T. at 18.)

The referee rejected Claimant's testimony that she believed the pill to be an over-the-counter pain reliever, reasoning that Claimant must have been well aware that this was some sort of prescription medication because the accompanying note warned her to conceal the fact that she received it. Considering the nature of Employer's facility, the referee also determined that Employer had a reasonable expectation that its employees would not take or possess prohibited drugs. Thus, the referee agreed that Claimant was ineligible for benefits under section 402(e) of the Law.

(continued…)

Sanders, and Sanders, after an initial denial, finally admitted leaving the pill for Claimant when confronted with the envelope and note. (N.T. at 13.)

Claimant appealed to the UCBR and requested a remand for the referee to receive additional testimony. (O.R., Item No. 11.) Shortly thereafter, Claimant filed a motion with the UCBR, seeking permission to include the transcript and referee's decision from Sanders' unemployment compensation case for use in Claimant's appeal.[4] (O.R., Item No. 12.) In its decision, the UCBR denied Claimant's remand request and adopted the referee's findings and conclusions. Moreover, the UCBR expressly credited Page's testimony that Claimant admitted to receiving the pill and that she believed it to be a prescription pain killer, while rejecting Claimant's testimony that she thought she was being given Tylenol or ibuprofen. Holding that Claimant's admissions to Page were sufficient to support a conclusion of disqualifying willful misconduct, the UCBR affirmed the referee's denial of benefits. (O.R., Item No. 15.) Claimant now petitions this court for review of that order.[5]

Claimant first argues that the record does not contain credible, competent evidence to justify the denial of unemployment compensation benefits.[6]

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[4] The referee in Sanders' case reversed the local service center and granted benefits to Sanders. (O.R., Item No. 12.)

[5] Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with law or whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

[6] We note that Claimant lists seven questions in the Statement of Questions Involved portion of her brief, (Claimant's brief at 6), but she divides the Argument section of her brief into only four sections. Claimant actually raises only three issues for our consideration because five of the questions listed, (nos. 1-3 and 5-6), and two of the arguments presented, (nos. 1-2), are encompassed within our statement of Claimant's first issue.

More specifically, Claimant contends that the UCBR improperly admitted hearsay testimony into evidence over her objection and then relied on that hearsay to find that Claimant admitted receiving a pill she believed to be prescription pain medication.[7] According to Claimant, because she consistently testified that she believed the pill was a non-prescription pain reliever, and because Employer never presented any first-hand evidence that the medication was anything other than an over-the-counter remedy, Employer could not meet its burden of proving that Claimant's actions constituted willful misconduct.[8] We disagree.

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[7] Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *Commonwealth v. Puksar*, 559 Pa. 358, 740 A.2d 219 (1999). In *Walker v. Unemployment Compensation Board of Review,* 367 A.2d 366 (Pa. Cmwlth. 1976), this court set forth guidelines with respect to the use of hearsay to support findings of fact in administrative proceedings: (1) hearsay evidence, properly objected to, is not competent evidence to support a finding of the UCBR; (2) hearsay evidence, admitted without objection, will be given its natural and probative effect and may support a finding of the Board, if it is corroborated by any competent evidence in the record; but (3) a finding of fact based solely on hearsay will not stand.

[8] The courts have defined willful misconduct as the wanton and willful disregard for an employer's interests; a deliberate violation of an employer's rules; a disregard for standards of behavior which an employer can rightfully expect of an employee; or negligence indicating an intentional and substantial disregard for the employer's interest or an employee's duties or obligations. *Glenn v. Unemployment Compensation Board of Review,* 928 A.2d 1169 (Pa.Cmwlth. 2007). The violation of a work rule may be considered willful misconduct, and when an employer claims violation of a work rule, the employer bears the burden of proving the existence of the rule, its reasonableness and violation. *Id.* Once the employer meets its burden, the burden shifts to the claimant to prove good cause for his or her action. *Id.*

Here, the UCBR determined that Employer met its initial burden by showing that Claimant accepted prescription medication in violation of Employer's substance abuse policy. The only justification offered by Claimant was that she believed the pill was Tylenol or ibuprofen. However, because the UCBR did not find Claimant's testimony credible, she could not establish good cause for her action.

Referencing specific portions of Page's testimony, Claimant maintains that Employer's case is based on the properly objected to hearsay statements of Claimant's co-workers, who were not present at the referee's hearing.[9] (Claimant's brief at 10-12.) However, the essential piece of evidence supporting the UCBR's finding is Page's testimony, quoted above, regarding her interview with Claimant. At that point, Page was not repeating an out-of-court statement by a co-worker; rather, Page was supplying Claimant's acknowledgment, made in Page's presence, that the pill Claimant received was prescription medication. (N.T. at 8.) Page's testimony as to that conversation clearly was admissible under the exception to the hearsay rule relating to party admissions against interest and, therefore, could be considered by the UCBR as substantive evidence.[10] *Robinson v. Unemployment Compensation Board of Review*, 546 A.2d 750 (Pa. Cmwlth. 1988); *Louk v. Unemployment Compensation Board of Review*, 455 A.2d 766 (Pa. Cmwlth. 1983). When credited by the UCBR and considered in conjunction with the note accompanying the medication, this

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[9] For example, at one point, Page testified that "[i]t was reported by another coworker of Teresa's that Teresa had told …. her she was given a prescription painkiller by another coworker. …. And that was reported to Gina and Gina called me to let me know what was told to her…." (N.T. at 4.) The referee allowed this testimony, not for the truth of the matter, but for notification purposes. (*Id.*) At another point in her testimony, Page was asked the basis for her understanding of what the medication was, and she stated that it was "[b]ased on when we interviewed the person who gave it to her." (N.T. at 7.) The referee allowed this testimony, not for the truth of the matter, but to show Page's understanding of what the medication was. (*Id.*) When an extrajudicial statement is offered for a purpose other than proving the truth of its contents, it is not hearsay and is not excludable under the hearsay rule. *Commonwealth v. Griffin,* 511 Pa. 553, 515 A.2d 865 (1986).

[10] Claimant argues that this statement cannot be considered an admission because, on cross-examination, Page acknowledged that her post-interview notes did not refer to it. (N.T. at 10.) We cannot agree. Although Page conceded that the statement did not appear in her documentation, Page never recanted her prior testimony that Claimant had made such a statement during the interview.

testimony constitutes sufficient evidentiary support for the UCBR's conclusion of disqualifying willful misconduct. Thus, Claimant's first argument must fail.

We also reject Claimant's argument that the UCBR erred by finding that Claimant was aware of Employer's substance abuse policy. Here, Page testified that Claimant was given a copy of the substance abuse policy when she was hired in January of 2008, (N.T. at 6), and Employer entered Claimant's signed acknowledgment of receipt into evidence. (O.R., Item No. 9, Ex. E-2.) Nevertheless, Claimant maintains that such evidence is insufficient to establish notice because Employer revised its policy in June of 2008 and did not provide her with a copy of the revised policy. However, Page credibly testified that the policy was revised to include random drug testing and that notice of the revision was sent out to all employees via email. (N.T. at 6, 9.) Moreover, even if Claimant were unaware of this revision, it would be irrelevant because she knew about the portion of the policy that related to drug possession and formed the basis for her discharge.

Finally, Claimant argues that the UCBR erred in denying her benefits because Sanders, who was discharged for allegedly giving the prescription medication to Claimant, was found eligible to receive unemployment compensation benefits following a hearing before a different referee. This last argument is in the form of a motion to this court asking that we include and consider the transcript and referee's decision from Sanders' case, (attached as an exhibit to Claimant's brief), in our review here. We understand Claimant's frustration over this seeming injustice; however, this court, when reviewing matters in its appellate capacity, is bound by the

facts certified in the record on appeal.[11] *Tener v. Unemployment Compensation Board of Review*, 568 A.2d 733 (Pa. Cmwlth. 1990).

Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Senior Judge

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[11] Claimant does not argue that the UCBR abused its discretion in denying Claimant's request to remand for further factual development or in denying Claimant's motion to include the transcript and referee's decision from Sanders' unemployment compensation case for use in Claimant's appeal. We note that, under Pennsylvania law, the UCBR has the discretion to decide whether to grant a request for remand. Section 504 of the Law, 43 P.S. §824. Therefore, we will not reverse a decision denying a request for remand absent an abuse of discretion. *Fisher v. Unemployment Compensation Board of Review*, 696 A.2d 895 (Pa. Cmwlth. 1997). The record reflects that Claimant had a full and fair opportunity to present her case before the referee, and, thus, does not indicate that the UCBR abused its discretion.

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O R D E R

AND NOW, this 17th day of March, 2010, the order of the Unemployment Compensation Board of Review, dated August 7, 2009, is hereby affirmed.

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ROCHELLE S. FRIEDMAN, Senior Judge