IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tammy Young, Petitioner	:	
v.	:	No. 1840 C.D. 2009
Unemployment Compensation Board of Review, Respondent	:	Submitted: April 16, 2010

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: May 26, 2010**

Tammy Young (Claimant), representing herself, petitions for review from an order of the Unemployment Compensation Board of Review (Board) denying her unemployment benefits under Sections 402(e) and 402.6 of the Unemployment Compensation Law (Law).[1] Claimant contends that the record does not support the Board's finding that she violated her employer's "call-off" policy and that the Board erred in disqualifying her because her conduct was not willful. Upon review, we affirm.

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[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §§802(e) and 802.6. Section 402(e) of the Law states an employee shall be ineligible for compensation for any week in which her unemployment is due to willful misconduct connected to her work. 43 P.S. §802(e).

Section 402.6 of the Law, added by the Act of October 30, 1996, P.L. 738, provides an employee shall be ineligible for benefits "for any weeks of unemployment during which [he or she] is incarcerated after a conviction." 43 P.S. §802.6. Because Claimant's waiting week came after her period of incarceration, the Board concedes on appeal that it erred in disqualifying Claimant under Section 402.6. However, the Board asserts, such error is harmless because Section 402(e) (willful misconduct) remains a clear basis for disqualification.

I. Background

Claimant worked for PHEAA/AES (Employer) for approximately three years as a customer service representative. Employer terminated Claimant effective the close of business on March 19, 2009 for a violation of its call-off policy. Claimant, incarcerated for noncompliance with an Accelerated Rehabilitative Disposition (ARD) order, failed to either report to work or contact Employer to call off for three consecutive days (March 17, 18 and 19).

Thereafter, Claimant applied for unemployment benefits. The local service center denied her claim under Section 402(e) (ineligibility due to willful misconduct) and Section 402.6 (ineligibility due to incarceration following conviction). Claimant appealed, and a referee hearing followed at which both Employer and Claimant presented evidence. After hearing, the referee issued a decision affirming the service center and denying Claimant benefits under Sections 402(e) and 402.6. In his decision, the referee made the following findings:

> 1. The claimant, for the purposes of this appeal, last worked as a customer service representative on March 14, 2009 at a rate of pay of $14.92 per hour.
>
> 2. The claimant was arrested on an outstanding warrant on March 14, 2009 for criminal charges involving child endangerment.
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> 3. The child endangerment occurred at the claimant's residence in 2006 at which time the claimant was tried and committed to an accelerated rehabilitation program.
>
> 4. The courts failed to pursue the accelerated rehabilitation program for the claimant but the claimant was arrested for non-compliance with the rehabilitation program to which she had been sentenced.

> 5. On the second day of her incarceration, the claimant requested the assistance of a county prison counselor to assist her in contacting her employer to inform them of her incarceration and inability to contact them to report off from work.
>
> 6. The employer's policy requires employees to call off from work at least 30 minutes before their designated starting time and speak to their immediate supervisor or, as a last resort leave a message with a call back number.
>
> 7. Due to prison telephone regulations, the claimant was unable to contact her employer to report off from work.
>
> 8. The claimant was discharged on March 19, 2009 for violation of company policy regarding no call/no show.

Referee Dec., 07/10/2009, at 1-2.

Analyzing the facts, the referee noted that regardless of whether Claimant had knowledge of Employer's call-off policy, Claimant made an attempt to contact Employer through a prison counselor. Id. at 2. However, the prison counselor ultimately failed in her attempt. Id. Thus, due to her incarceration, Claimant could not contact Employer, who then discharged her for the "no call/no show" violation. Id. The referee further reasoned that although Claimant failed to complete ARD through no fault of her own, "[C]laimant did cause her own unemployment through conviction/incarceration and is thus ineligible for benefits under Sections 402.6 and 402(e) of the Law." Id.

Adopting and incorporating the referee's findings and conclusions, the Board affirmed. In its decision, the Board stated:

> The claimant violated a rule of the employer and was incarcerated after being [sic] guilty of criminal charges.

> The claimant was not unemployed through no fault of her own. The Board discounts the claimant's denial of being not guilty of the charges and notes that the human relations office was the appropriate employer department to call off.

Bd. Dec., 09/17/2009, at 1. Claimant petitions for review.[2]

II. Issues

Claimant raises two issues on appeal. Claimant contends the record does not support the Board's Finding of Fact No. 8, that Employer discharged her for a violation of its "call-off" or "no call/no show" policy. Claimant also contends the Board erred in determining her conduct constituted willful misconduct under Section 402(e) of the Law.

III. Discussion

Section 402(e) of the Law provides, "An employe shall be ineligible for compensation for any week … [i]n which his unemployment is due to his discharge … from work for willful misconduct connected with his work …." 43 P.S. §802(e). "Our Supreme Court defines willful misconduct as behavior that evidences a willful disregard of the employer's interests, a deliberate violation of the employer's work rules, or a disregard of standards of behavior that the employer can rightfully expect from its employees." Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review, 949 A.2d 338, 341 (Pa. Cmwlth. 2008) (citing Caterpillar, Inc. v. Unemployment Comp. Bd. of Review, 550 Pa. 115, 703

[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 Corrs. v. Unemployment Comp. Bd. of Review, 943 A.2d 1011 (Pa. Cmwlth. 2008).

A.2d 452 (1997)). The employer bears the initial burden of proving a claimant engaged in willful misconduct. Id. Whether a claimant's conduct rises to the level of willful misconduct is a question of law fully reviewable on appeal. Id.

Where the alleged disqualifying misconduct is the claimant's violation of a work rule, the burden is on the employer to prove the claimant knew the work rule existed and violated it. Bishop Carroll High School v. Unemployment Comp. Bd. of Review, 557 A.2d 1141 (Pa. Cmwlth. 1989). If the employer meets this burden, the burden then shifts to the claimant to establish good cause for violating the rule. Docherty v. Unemployment Comp. Bd. of Review, 898 A.2d 1205 (Pa. Cmwlth. 2006). "Good cause" is defined as an action of the employee that is justifiable or reasonable under the circumstances. Id.

Further, "failure to report for work because of incarceration may constitute willful misconduct as a matter of law under Section 402(e)." Frank v. Unemployment Comp. Bd. of Review, 556 A.2d 15, 17 (Pa. Cmwlth. 1989) (citing Medina v. Unemployment Comp. Bd. of Review, 423 A.2d 469 (Pa. Cmwlth. 1980)). Although incarceration due to a criminal conviction may be a circumstance beyond a claimant's power to change, absence from work due to said incarceration is neither reasonable nor justifiable. Medina. "Certainly an employee who engages in criminal activity punishable by incarceration should realize that his ability to attend work may be jeopardized." Id., 423 A.2d at 471. But cf. Hawkins v. Unemployment Comp. Bd. of Review, 472 A.2d 1191 (Pa. Cmwlth. 1984) (disqualifying misconduct cannot be inferred merely from claimant's absence due to incarceration following arrest and inability to post bail where employer knew of claimant's incarceration; case distinguished from incarceration due to conviction for criminal activity).

Moreover, for purposes of disqualification under Section 402(e), "[i]t is the inability to attend work, not the criminal conduct, which supports the finding of willful misconduct." Weems v. Unemployment Comp. Bd. of Review, 952 A.2d 697, 699 (Pa. Cmwlth. 2008) (citing Medina). In Weems, we determined a nine-month absence from work due to incarceration following an assault conviction constituted an excessive absence without good cause. Similarly, in Medina we determined the claimant's six-month absence from work due to his incarceration for assault supported a finding of absenteeism as willful misconduct.

A. Substantial Evidence

Claimant first contends substantial evidence does not support Finding of Fact No. 8, that Employer discharged her on March 19, 2009, for a violation of Employer's policy regarding no call/no show. More particularly, Claimant asserts the record lacks adequate evidence to support a finding that she failed in her attempt to contact Employer to report off work. Rather, the record clearly shows a prison counselor contacted Employer's Human Resources Department (H.R. Department) on the first day of her absence.

Substantial evidence is defined as evidence that a reasonable mind, without substituting its judgment for that of the fact finder, might accept as sufficient to support the conclusion reached. Tapco, Inc. v. Unemployment Comp. Bd. of Review, 650 A.2d 1106 (Pa. Cmwlth. 2004). In reviewing the record to determine whether substantial evidence exists, we must view the record in the light most favorable to the party that prevailed before the Board, giving that party the benefit of all reasonable and logical inferences that can be drawn from the evidence. Id. In addition, the Board is the ultimate finder of fact in unemployment

cases. Id. Thus, matters of credibility and the weight to be given conflicting testimony fall within the Board's province. Id.

Here, Claimant, in her internet claim indicated "incarceration" as her reason for leaving employment on March 19, 2009. See Certified Record (C.R.) at Item 2 (Internet Initial Claims). Claimant admitted she was convicted of a crime (child endangerment) and that she served 50 days in the Dauphin County Prison (March 14 to May 4, 2009). Id. Claimant further admitted that she was involved in the incident causing her separation from employment and that her actions affected her ability to perform her job. Id. This document was admitted into evidence without objection.

Employer also submitted documentary evidence. In Employer's Notice of Application, Employer indicated it terminated Claimant for job abandonment because she "did not report to or contact employer on 3/17 – 3/18 – 3/19, 2009." See C.R. at Item 3 (Employer's Separation Information). Jeffrey Watford, Employer's Human Resources Business Partner (H.R. Partner), signed this document. See id.

At hearing, H.R. Partner confirmed that Employer discharged Claimant for job abandonment. Notes of Testimony (N.T.), 06/29/2009, at 17. Employer's policy is that three days of "no call/no show" is considered job abandonment. Id. H.R. Partner further testified Claimant had knowledge of Employer's attendance policies via computer. Id. However, when Claimant started three years prior to her discharge, Employer provided employees an actual book. Id.

Claimant testified that she received Employer's personnel manual and that she understood she would be terminated if she did not call in for three days. Id. at 8-10. Claimant further testified the common pleas court never sent her the ARD paperwork, which ultimately resulted in a warrant being issued for her arrest in 2009. Id. at 12. Claimant was incarcerated from March 14 to May 5, 2009. Id. at 5. Claimant pled guilty to the child endangerment charge after her incarceration. Id. at 11.

Claimant and H.R. Partner gave conflicting testimony regarding Claimant's attempts to contact Employer during the three days at issue: March 17-19, 2009. Claimant testified a prison counselor, on either March 16 or 17, contacted Shelly Bowman (H.R. Vice President). Id. at 5. Claimant acknowledged H.R. Vice President denied receiving a call from a prison counselor. Id.

H.R. Partner testified that sometime after Claimant's three days of no call/no show, a prison counselor did contact Shelly Hower (Ms. Hower) in Employer's H.R. Department regarding Claimant. Id. at 19. The counselor intended to fax some paperwork over to be filled out, but Employer never received anything, and no additional calls were made. Id. However, that counselor did not contact H.R. Vice President. Id. Had the counselor contacted H.R. Vice President rather than Ms. Hower, she would have notified H.R. Partner. Id. at 18.

As discussed above, the Board is the ultimate fact-finder in unemployment compensation matters and is empowered to determine witness credibility and resolve all evidentiary conflicts. Tapco. Viewing the record in the light most favorable to Employer as the prevailing party, we conclude substantial evidence supports the Board's finding that Employer discharged Claimant on

March 19, 2009 pursuant to its no call/no show policy. Employer's Notice of Application, signed by H.R. Partner, indicates Employer discharged Claimant for job abandonment after she failed to call off for three consecutive days: March 17, 18, and 19, 2009. C.R. at Item 2. This is corroborated by H.R. Partner's testimony. N.T. at 16-19.

Although Claimant testified a prison counselor contacted someone[3] in Employer's H.R. Department on March 16 or 17, 2009, the Board ultimately found the prison counselor failed in her attempt. Bd. Dec. at 2. As fact-finder, it is within the province of the Board to resolve all conflicts in the evidence and determine the credibility of witnesses. Ductmate; Tapco. Further, it is irrelevant whether the record contains evidence supporting findings other than those made; the proper inquiry is whether there is evidence supporting the findings actually made. Ductmate. Therefore, we reject Claimant's contention that substantial evidence does not support the Board's findings that Employer discharged Claimant on March 19, 2009, for violation of its "no call/no show" policy after Claimant failed to call-off for three consecutive days.

[3] We note Claimant, in her appeal to the Board from the referee's decision, attached a fax from the Dauphin County Prison including a report indicating an unnamed prison counselor or caseworker spoke to Ms. Hower at Employer regarding Claimant on March 16, 2009. See C.R. at Item 9 (Claimant's Petition for Appeal from Referee's Decision/Order w/ Attachments). The fax also indicates Claimant was not eligible for ARD because she failed to satisfy certain financial obligations, a condition of her acceptance into the program.

Claimant failed to offer this document, an out-of-court statement from an unnamed individual, into evidence before the referee. Thus, Employer had no opportunity to object to its admission. In any event, the Board did not err or abuse its discretion by not considering it. See

(Footnote continued on next page…)

B. Willful Misconduct

Claimant also contends the Board erred in determining her conduct constituted willful misconduct under Section 402(e). Claimant asserts she did not violate Employer's "no call/no show" policy because a prison counselor contacted Ms. Hower in Employer's H.R. Department on "day one" of Claimant's absence. She further asserts she was not incarcerated due to a conviction. Therefore, Claimant urges, her conduct cannot be considered willful misconduct.

We disagree as to willful misconduct. As discussed above, failure to report to work because of incarceration may constitute willful misconduct under Section 402(e). Weems; Medina. It is the inability to attend work, not the criminal conduct, which supports a finding of willful misconduct. Weems. Absence from work due to incarceration cannot be considered good cause for a violation of an employer's attendance policy. Id. In both Weems and Medina, the claimants were incarcerated following convictions.

Here, Claimant was arrested on an outstanding warrant and incarcerated in county prison for 50 days pending resolution of criminal charges. Ultimately, Claimant was convicted of the outstanding charges. The Board found that during the incarceration, Claimant violated Employer's "no call/no show" policy. Claimant's incarceration cannot be considered good cause for the violation.

(continued…)

Croft v. Unemployment Comp. Bd. of Review, 662 A.2d 24 (Pa. Cmwlth. 1995) (Board may not consider post-hearing factual communications not previously submitted into evidence).

Discerning no reversible error in the Board's denial of benefits under Section 402(e) of the Law, we affirm.[4]

ROBERT SIMPSON, Judge

[4] We agree with the Board that it erred in disqualifying Claimant under Section 402.6 of the Law (ineligibility due to incarceration) because Claimant's waiting week followed her release from county prison. However, this is harmless error because Claimant is ineligible for benefits under Section 402(e).

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O R D E R

AND NOW, this 26th day of May, 2010, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge