

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Susan B. Folk, :  
                    Petitioner :  
  : :  
                    v. : No. 1861 C.D. 2011  
  : Submitted: June 1, 2012  
Unemployment Compensation :  
Board of Review, :  
                    Respondent :

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge  
          HONORABLE MARY HANNAH LEAVITT, Judge  
          HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE LEAVITT

FILED: January 10, 2013

Susan B. Folk (Claimant) petitions for review of an adjudication of the Unemployment Compensation Board of Review (Board) denying her claim for benefits. In doing so, the Board affirmed the Referee’s decision that Claimant’s failure to report absences from work in accordance with her employer’s call-off policy was willful misconduct that rendered her ineligible for benefits under Section 402(e) of the Unemployment Compensation Law (Law).<sup>1</sup> The Board also affirmed the Referee’s conclusion that Claimant was ineligible under Section

---

<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e). It provides, in relevant part, that “[a]n employe shall be ineligible for compensation for any week . . . [i]n which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work.” 43 P.S. §802(e).

401(d)(1) of the Law<sup>2</sup> because she was not available for work. Claimant argues that the Board erred because it should have remanded her appeal to allow for the testimony of Claimant's psychologist and to correct omissions in the transcript. Finding no merit to Claimant's arguments, we affirm.

Claimant worked as an Early Intervention Advisor for the Pennsylvania Department of Education (Employer) from November 23, 2007, until she was discharged on September 17, 2010. The notice of discharge stated that Claimant did not report to work beginning on August 23, 2010; failed to notify Employer of her absences pursuant to its call-off policy; failed to comply with a direct order to report to work issued on September 3<sup>rd</sup>; and failed to attend a fact-finding meeting held on September 15<sup>th</sup> regarding her continued absence from work.

Claimant applied for unemployment benefits, contending she was unable to work because of a medical condition. She claimed her illness was the result of stress caused by her supervisor's bullying and harassment. The UC Service Center denied her application. Claimant appealed, and a hearing was conducted by a Referee.

At the hearing, Mark Ishman, Claimant's direct supervisor, testified. He explained that when Claimant was hired in 2007, she was based in Harrisburg. Claimant requested to be relocated closer to her home in Philadelphia, and her request was granted. However, in 2010, Claimant was moved back to the Harrisburg office for additional supervision because of a decline in her job

---

<sup>2</sup> Section 401(d)(1) states, in relevant part, that "[c]ompensation shall be payable to any employe who is or becomes unemployed, and who . . . [i]s able to work and available for suitable work." 43 P.S. §801(d)(1).

performance that led to a negative performance review. At approximately that same time, Claimant was granted leave in accordance with the Commonwealth's Sick, Parental and Family Care (SPF) Absence Program. The SPF Absence Program follows the mandates of the federal Family Medical Leave Act,<sup>3</sup> but provides additional and more generous benefits.

The SPF Absence benefits permitted Claimant absences of eight hours per day, two days per week for treatment or evaluation appointments, as well as absences for episodic flare-ups two times per week for two days. Claimant was required to call Ishman between 8:30 and 9:00 a.m. on each day she was going to be absent and specify the classification of her absence as allowable sick days, SPF Absence days, or absence without pay other than SPF. If Ishman was not available between 8:30 and 9:00 a.m., Claimant was directed to call Ishman's supervisor, Maureen Cronin, or one of the other available supervisors.

Despite this directive, Claimant often notified Ishman of her absences by e-mail. Accordingly, Ishman issued a "Memorandum of Instruction" to Claimant, listing her failures to follow the call-off policy by date. Claimant continued to e-mail Ishman, and Ishman replied to these e-mails by reiterating that she needed to telephone him between 8:30 and 9:00 a.m. so that he could document the classification for her absence, as required by the SPF Absence policy.

On August 23, 2010, Claimant did not appear for work and did not call or send an e-mail to explain her absence that day or thereafter. Employer ordered her to return to work on September 3<sup>rd</sup>, but she did not comply. Instead,

---

<sup>3</sup> 29 U.S.C. §§2601-2654.

she sent an e-mail that she was unsure when she would return to work. Ishman then sent a letter to Claimant notifying her of a fact-finding conference on September 15, 2010, to discuss her “alleged insubordination for . . . failure to comply with a direct order, . . . unauthorized/unexcused absences from August 23, 2010 to the present, and failure to follow [her] Division’s call off policy.” Notes of Testimony (N.T.), 12/8/2010, Exhibit-12 (Ex.\_\_). The letter notified Claimant that the fact-finding conference could result in disciplinary action, including termination of employment. Claimant did not appear for the conference. On September 16, 2010, Employer discharged Claimant by letter, which stated that her employment was terminated effective September 17, 2010, for “insubordination for failure to comply with a direct order,” unauthorized absences and failure to follow the call-off policy. N.T. 12/8/2010, Ex. 11.

Marlene Brady, of the Governor’s Office of Administration, which administers the SPF Absence program, testified. Brady testified that Commonwealth employees who apply for SPF Absence benefits are given a written explanation of the program and the employee’s responsibilities. Specifically, employees are instructed to follow the call-off policy adopted by their agency as a condition of eligibility for SPF Absence benefits.

Claimant testified by telephone on the second day of the hearing. She stated that her relationship with Ishman was good during the first three months of employment, but it declined after she moved to Philadelphia. Ishman became more accusatory in tone, and he often rejected her requests for overnight stays when she was traveling for work. In October of 2009, Claimant received a negative performance review from Ishman and Cronin. She testified that she had

never before received negative feedback from her supervisors. In December, Claimant was relocated back to Harrisburg.

Claimant testified that she missed her first day of work in Harrisburg in January of 2010 because of severe stomach pains that required medical treatment. She began seeing a therapist that same month. Claimant attributed her pain to work-related stress created by Ishman. Claimant stated that she was dismissed in retaliation for a complaint she filed with the Equal Employment Opportunity Commission and with her union.<sup>4</sup> Claimant believed that Ishman and Cronin had treated her much more harshly than her coworkers.

Claimant admitted that she violated the call-off policy but explained that she did so because her union representative told her that her agency did not have a call-off policy. She testified that her coworkers simply e-mailed their supervisors when they would be absent. Calling in caused excessive stress because it forced her to talk to Ishman and endure his criticisms and abuse.

Claimant asked to present the testimony of Doris Robinson, Ph.D., Claimant's treating psychologist, which she offered as "essentially corroborative or perhaps cumulative. [Robinson] would be able to testify as to the Claimant's inability to work because of her treatment." N.T., 12/29/2010, at 3. At the end of the hearing, when counsel asked to telephone Robinson, the Referee rejected the request without stating a reason, and Claimant did not object to the ruling.

The Referee denied Claimant unemployment compensation benefits. The Referee found that Employer had a rule requiring employees to call by

---

<sup>4</sup> The Equal Employment Opportunity Commission did not find sufficient evidence to move forward with Claimant's complaint. Though not clear from the record, the filing with the Human Relations Commission had not been completed at the time of the hearing. In any case, resolution of those complaints is not relevant to the case before us.

telephone to report absences; that Claimant was aware of this rule; and was warned that violation of the rule could result in a termination of her employment. Claimant acknowledged that she did not seek permission to use another method of calling off. The Referee concluded that Claimant had committed willful misconduct, which rendered her ineligible for benefits under Section 402(e) of the Law. Claimant's original application for benefits indicated that she was not able to work due to stress, but the Referee observed that availability for work is determined on a week-to-week basis.

Claimant appealed to the Board, and the Board affirmed the Referee. The Board concluded that Claimant committed willful misconduct for violating Employer's work rule requiring her to call Ishman or another supervisor if she was going to be absent from work.<sup>5</sup> Claimant neither told Employer that there was a medical reason why she could not follow the call off rule, nor did she inform any other supervisor of her alleged concerns. Thus, she did not have good cause for violating Employer's rule. The Board also found that Claimant was not available for work based on her original application for benefits under Section 401(d)(1) of the Law, 43 P.S. §801(d)(1).

Claimant then petitioned for this Court's review.<sup>6</sup> Claimant raises two issues. First, she argues that the case should be remanded for testimony from

---

<sup>5</sup> The Board's first decision affirming the Referee was withdrawn upon Claimant's request for reconsideration, which was granted. The Board, after reconsideration, reaffirmed the decision of the Referee.

<sup>6</sup> This Court's review is limited to determining whether the Board's adjudication is in violation of constitutional rights, whether an error of law was committed or whether all necessary factual findings are supported by substantial evidence in the record. *Graham v. Unemployment Compensation Board of Review*, 840 A.2d 1054, 1056 (Pa. Cmwlth. 2004). In an unemployment compensation proceeding, the Board is the ultimate fact finder and is empowered to determine **(Footnote continued on the next page . . .)**

Claimant’s psychologist, which will establish that she is unable to work due to health reasons. Second, she argues that a remand is necessary because the transcript contains numerous inaudible notations during her testimony.<sup>7</sup>

We begin with a review of willful misconduct under the Law. Section 402(e) of the Law provides that “[a]n employe shall be ineligible for compensation for any week . . . [i]n which his unemployment is due to . . . willful misconduct connected with his work.” 43 P.S. §802(e). Although not defined in the Law, the courts have established that it means the following:

- (1) an act of wanton or willful disregard of the employer’s interest;
- (2) a deliberate violation of the employer’s rules;
- (3) a disregard of standards of behavior which the employer has a right to expect of an employee; and
- (4) negligence indicating an intentional disregard of the employer’s interest or of the employee’s duties and obligations to the employer.

*Altemus v. Unemployment Compensation Board of Review*, 681 A.2d 866, 869 (Pa. Cmwlth. 1996). Whether conduct rises to the level of willful misconduct is a question of law to be determined by this Court. *PMA Reinsurance Corp. v. Unemployment Compensation Board of Review*, 558 A.2d 623, 625 (Pa. Cmwlth. 1989). It is the employer’s burden to establish that a claimant’s conduct

---

**(continued . . .)**

the credibility of all witnesses. *Ross v. Unemployment Compensation Board of Review*, 861 A.2d 1019, 1022 (Pa. Cmwlth. 2004).

<sup>7</sup> Claimant presents three issues in her Questions Presented section of her brief. However, her Argument section begins by noting that they overlap and will be argued together. As such, we will address them as stated herein.

constituted willful misconduct. *Department of Corrections v. Unemployment Compensation Board of Review*, 943 A.2d 1011, 1015 (Pa. Cmwlth. 2008). Once employer meets its burden, the burden shifts to the claimant to prove that she had good cause for her actions. *Lausch v. Unemployment Compensation Board of Review*, 679 A.2d 1385, 1391-92 (Pa. Cmwlth. 1996).

In her first issue, Claimant argues that the Board erred by not ordering a remand so she could present the testimony of her treating psychologist, which would have justified her notification of absences by e-mail. The Board counters that Claimant did not address the significance of Robinson's testimony in the argument portion of her brief and, thus, that issue is waived. Further, Claimant offered Robinson's testimony to establish her good cause to be absent, not whether she had a good reason to violate a known work rule. In fact, Claimant conceded Robinson's testimony would be cumulative.

Denial of a remand request will be reversed only where there is a clear abuse of discretion. *Flores v. Unemployment Compensation Board of Review*, 686 A.2d 66, 75 (Pa. Cmwlth. 1996). Here, the Board granted Claimant reconsideration on the specific question of whether Claimant had been improperly denied her right to present the testimony of her treating psychologist. Because Claimant had proffered Robinson's testimony as cumulative and corroborative, the Board denied the remand request.<sup>8</sup> This was not an abuse of discretion.

---

<sup>8</sup> Claimant argues that the Board erred in not allowing the testimony of Robinson to clarify the SPF absences and to establish that Claimant had a compelling and necessitous reason for abandoning work. However, Claimant's argument misses the mark. A necessitous and compelling reason for abandoning employment only arises in voluntary quit situations under Section 402(b) of the Law. 43 P.S. §802(b) ("An employe shall be ineligible for compensation for any week . . . [i]n which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature."). Here, Claimant admitted that she was terminated for **(Footnote continued on the next page . . .)**



Further, Claimant's argument that Robinson's testimony would have established why she did not call her supervisor was not the reason proffered for her testimony at the hearing before the Referee. There, Claimant offered Robinson to prove that her absences from work were justified. A remand to offer this testimony for a different reason would simply give Claimant a second bite at the apple, and this is not a valid reason for a remand. *Primecare Medical, Inc. v. Unemployment Compensation Board of Review*, 760 A.2d 483, 488 (Pa. Cmwlth. 2000).

The only issue was whether Claimant violated a reasonable and established work rule regarding notification of an absence.<sup>9</sup> We reject Claimant's claim that the Board should have ordered a remand so that she could present Robinson's testimony.

In her second issue, Claimant argues that the record is insufficient because the transcript of the December 29, 2010, hearing contains 81 "inaudible" notations during Claimant's testimony. In the absence of a transcript, this Court cannot exercise appellate review. Claimant argues, therefore, that this Court should remand to establish the necessary record. The Board retorts that Claimant has waived this argument.

This Court has established that "inaudibles" in the transcript are a violation of due process only when it affects the meaning, context or import of the

---

**(continued . . .)**

violating a known and reasonable work rule. Thus, whether she had a necessitous and compelling reason is not relevant.

<sup>9</sup> The Board also argues that Claimant raises facts that do not appear in the certified record. The Court is not permitted to consider facts or information that is not part of the certified record on appeal. *Croft v. Unemployment Compensation Board of Review*, 662 A.2d 24, 28 (Pa. Cmwlth. 1995). We agree, and we do not consider facts not appearing in the record. In any case, it does not affect our disposition of this case.

witness's testimony. *Leone v. Unemployment Compensation Board of Review*, 885 A.2d 76, 80 (Pa. Cmwlth. 2005). An issue will be deemed waived when it is not properly raised and developed in the brief, or when the brief is inadequate or defective because an issue is not adequately discussed. *Ruiz v. Unemployment Compensation Board of Review*, 911 A.2d 600, 605 n.5 (Pa. Cmwlth. 2006). This Court will not consider the merits of a waived issue. *Id.*

Here, Claimant's brief identifies inaudibles in the transcript, but it does not explain how the inaudibles in the transcript affect the meaning, context or import of Claimant's testimony. To the contrary, Claimant's recitation of her own testimony in her brief tracks that which appears in the written transcript. Claimant's failure to develop this argument in her brief requires its rejection.<sup>10</sup>

For the above-stated reasons, we affirm the order of the Board.

---

MARY HANNAH LEAVITT, Judge

---

<sup>10</sup> Because Claimant did not challenge the basis of the Board's order finding her ineligible for unemployment compensation benefits, *i.e.*, willful misconduct and unable to work, we do not address the Board's arguments.

