IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stephen E. Ruder,	:	
Petitioner	:	
	:	
v.	:	No. 214 C.D. 2010
	:	Submitted: September 10, 2010
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: October 14, 2010

Stephen E. Ruder (Claimant) appeals from an order of the Unemployment Compensation Board of Review (Board) affirming the decision of the Referee denying him unemployment compensation benefits because he was guilty of willful misconduct pursuant to Section 402(e) of the Unemployment Compensation Law (Law)[1] for failing to follow the proper procedures of Pequea Valley School

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e). That section provides:

> An employe shall be ineligible for compensation for any week –
>
> (e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work, irrespective of whether or not such work is "employment" as defined in this act.

Willful misconduct has been defined as (1) the wanton and willful disregard of the employer's interest; (2) the deliberate violation of rules; (3) the disregard of standards of behavior which an employer can rightfully expect from his employee; or (4) negligence which manifests

(Footnote continued on next page…)

District (Employer) when it came to arriving late to work due to his illness. For the reasons that follow, we affirm the Board.

Claimant was employed by Employer full-time as Head of the Art Department and as a high school art teacher from March 20, 2000, until March 19, 2009. Claimant was diagnosed in 2004 with Crohn's disease.[2] Employer had a tardiness and early release policy for its professional employees, of which Claimant was aware, requiring its employees to immediately contact the school office if they were going to be late or needed to leave early for an unforeseen emergency. Specifically, the Handbook for Professional Employees 2008-2009 for the Pequea Valley High School provided the following under "Teacher Absence:"

> 4. Tardiness Early Release – Professional employees assigned to the high school are expected to report for duty at 7:15 AM each school day and are released from duty at 2:45 PM each school day. Report and release times for professional development days may vary and will be announced by the administration. Should an unavoidable tardiness or need for early release occur due to an unforeseen emergency, **the employee shall immediately contact the school office.** (Emphasis added.)

(continued…)

culpability, wrongful intent, evil design or intentional and substantial disregard for the employer's interests or the employee's duties and obligations. *Sheets, Inc. v. Unemployment Compensation Board of Review*, 578 A.2d 621 (Pa. Cmwlth. 1990).

[2] Rebecca Young, R.N., of General Internal Medicine of Lancaster, testified before the Referee that Crohn's disease is an autoimmune disorder with relaxing remitting episodes which were unpredictable. The disease presented with extreme abdominal pains, diarrhea and fevers. It is associated with infections internally as well as abscesses forming in the pelvic cavity. It could result in long-term hospitalizations and is considered a chronic illness requiring long-term medical management. (September 17, 2009 Hearing Transcript at 38-39.)

The purpose of this policy was to have students supervised at all times.

In August 2007, Employer hired a new principal, Jason Marin (Principal Marin). Several times during the 2007-2008 school year, Claimant called the school's librarian to let her know that he was running late and asked that she or another teacher open his classroom. On October 6, 2008, Claimant left school early in order to go to an emergency doctor's appointment related to his Crohn's disease. Because no one in the school office remembered receiving notification from Claimant regarding his early departure on that date, Principal Marin sent an email to Claimant on October 15, 2008, instructing Claimant to speak directly to him or the assistant principal whenever Claimant needed to arrive late or leave early. Principal Marin provided Claimant with his cell phone number and was instructed to call or text the principal's cell phone at any time, day or night. Claimant was suspended without pay from November 3, 2008, through November 8, 2008, for failing to properly notify Employer of his early departure on October 6, 2008.[3]

On February 5, 2009, on the way to school, Claimant had an episode related to his Crohn's disease and stopped to use a restroom. Because he was running late, he called and spoke to a fellow teacher, Robert Martin (Martin), and asked him to open his classroom. That same date, after properly notifying the school office, Claimant left school early so that he could be admitted to the hospital to drain abscesses he had resulting from his Crohn's disease. Claimant was discharged from the hospital the next day. On February 11, 2009, Claimant attempted to return to work against doctor's orders, but Patrick Hallock (Hallock), the school

[3] Claimant was also suspended for other reasons which are not on appeal.

superintendent, sent Claimant home until he received a physician's note releasing him to return to work.

On March 18, 2009, Claimant allegedly went to Regional Gastroenterology Associates of Lancaster (RGAL) and picked up a "physician's note" indicating he could return to work on March 19, 2009. The note, which was on RGAL letterhead stated:

> Wednesday, March 18, 2009 DOB: 7/21/75
> Stephen E Ruder
> ID#114397
> David M. Smith, MD
>
> **FOLLOW UP**
>
> To Whom It May Concern
>
> Mr. Ruder was seen in our office today after a recent admission to HMC for a perirectal abscess resulting from Crohn's disease. Mr. Ruder suffered complications that ensued following his admission to HMC. Mr. Ruder may return to work on Thursday, March 19. Mr. Ruder should avoid heavy lifting and will require frequent restroom use.

(Exhibit 16 of Original Record.) The note was signed by David M. Smith, M.D. or by one of the nurses in the practice with the authority to sign Dr. Smith's name by what appeared to be an electronic signature or a stamp. On March 19, 2009, Claimant provided a copy of the physician's note to Employer. Employer made several phone calls to RGAL to verify whether the copy of the physician's note submitted by Claimant was legitimate and determined that it was not authentic. Claimant was then discharged for failing to follow proper procedures when arriving

late to work, which caused students to be unattended, and for submitting an inauthentic medical excuse.

Claimant filed a claim for unemployment compensation benefits with Lancaster UC Service Center. It denied Claimant benefits because it found him guilty of willful misconduct for violating Employer's policy by repeatedly failing to notify the school office when he was going to be late for class and by failing to provide medical documentation for his illness when he returned to work. Claimant filed an appeal requesting a hearing before a Referee.

At the hearing, Principal Marin testified that he was aware that Claimant had Crohn's disease which meant that he would need to visit the restroom frequently and urgently, but he still had to follow the school policy. Principal Marin did not have a problem with Claimant's illness, but he asked that all employees arriving late, including himself, notify the high school office so that coverage was in place. "He just needed to follow the procedures so that the students were not unsupervised." (August 25, 2009 Hearing Transcript at 22.) Principal Marin stated that on October 6, 2008, Claimant did not follow procedure even though Claimant alleged that he did contact someone in the office but no one remembered talking to him. As a result, he sent Claimant an email on October 15th indicating to Claimant that he was to contact him, the principal, or the vice principal directly each time he was going to be late or leave early. That way, there would be no miscommunication. He then met with Claimant on October 30th regarding his concerns about his failure to follow procedure on October 6th which was documented in a memo that Claimant later signed. As a result of his October 6th late arrival and failure to call the office, Claimant was suspended for three days without pay. Again, on February 5, 2009, Principal Marin

stated that Claimant was late for work and had not informed him directly or the vice principal. He became aware that no one was in Claimant's classroom from the school secretary who received a phone call from another teacher that the art class was unsupervised. Claimant should have arrived at 9:15 but did not arrive until 9:37. As a result of that incident, Claimant was issued a 10-day suspension without pay. Regarding the return to work note from Dr. David Smith, Principal Marin stated that he initially sent Claimant home on March 18th because Claimant told him that he was returning to work against doctor's order without being released by his physician. Then Claimant presented him with a doctor's note which he, Marin, believed was a copy, not an original, because the note was slightly slanted on the page and did not look like an original. However, when asked if he always received originals from Claimant on any of his doctor's notes, he replied: "No, no, a couple, like from notepads within a doctor's office were originals. But everything else was photocopied." (August 25, 2009 Hearing Transcript at 44.)

The superintendent of the school district, Hallock, testified that he had been employed by the school district for 15 years, four of those years as superintendent. He stated that he had known Claimant for nine of those years. He also noted that the school handbook had been in existence for 30 years stating the same policy regarding notifying the office if the teacher was going to be late or leaving early. Hallock stated that Claimant had been dismissed based on his recommendation as a result of Claimant's three-day suspension in November due to leaving school early to attend to a medical appointment and failing to notify the office; Principal Marin covering his class until he arrived on February 5, 2009; and the unauthenticated doctor's note. Hallock testified that he met with Claimant on February 11, 2009, at which time Claimant told him that he had not been approved to

return to work by his doctor. He then returned on March 19, 2009, with Dr. Smith's note. Hallock stated that he met with Claimant on March 20, 2009. While Claimant was given the 10-day suspension for the February 5th infraction at that meeting, they also discussed Dr. Smith's note. Hallock stated that he specifically asked Claimant if the note was authentic and he did not answer the question. Hallock then asked Claimant if he could contact Dr. Smith regarding the content of the note and not about his health, and Claimant did not authorize the call. Hallock stated that he informed Claimant that the school district had a deadline of March 24th as to whether the note was authentic and this was not met. Consequently, on March 26th, an investigative meeting was set up with the teachers' union and Claimant, but Claimant did not show up for the meeting.

John Bowden (Bowden), Employer's business administrator, testified that Claimant had provided what obviously was a copy to Employer upon his return to work on March 19th, and because it was not an original, its authenticity was questioned. Bowden stated that he spoke with Claimant and gave him 24 hours to either allow Employer to verify it with the doctor's office or to come up with the verification that what he submitted was authentic. "Instead of doing that, he never did that. What he did was he sent us notes from other doctors, different doctors. And then when we moved to dismiss him, because we received verification from this doctor's office that…Dr. Smith, that they had no record of this particular release, nor is it their format that they use. We realized that our investigation was done and we went and moved for dismissal. So this, from March 19th until April 27th of 2009, and we put him on notice on March 19th that we expected a verification. A month and a half passes, we get other kinds of verification, then we receive this note finally

saying, well we gave you the original, it's the only original." (August 25, 2009 Hearing Transcript at 42.)

Marsha Gephart (Gephart) testified that she had been employed by RGAL for nine years, oversaw health information coming and going from the office, and managed 12 people working in the medical records department. She stated that she was familiar with Claimant by name only and had received an email from Bowden on March 19, 2009, asking her to look at the March 18, 2009 communication from Dr. Smith. She looked at that communication and let him know that RGAL did not have that note in their records. She then stated that Bowden again requested if it would be possible to recheck to see if the letter was in the office's records, and she wrote back stating that she could not verify any more information without Claimant's permission. Gephart further testified that she was certain that the note from Dr. Smith was not part of Claimant's chart because not only was it in the wrong format, but she had checked with Dr. Smith and he said that he never wrote it. If he had, it would have been in Claimant's chart. Further, only a few people in the office had access to sign or stamp Dr. Smith's name, and when that was done, Gephart had to co-sign that signature or stamp. However, on cross-examination, Gephart admitted that the office used electronic signatures and stamps and there were triage nurses that she did not supervise. So if a triage nurse had made a note for a patient, it would not have been something she would have supervised. She also stated that when she received personal emails from patients, those emails did not make it into the patient's files. Only in one instance did she mention that an email from Claimant was overlooked and not put into his chart, but in this instance, this note from Dr. Smith was definitely not part of Claimant's record because Dr. Smith did not generate the note.

Edward Rish (Rish), the practice administrator for RGAL, testified that he supervised the administrative staff and also agreed with Gephart that the note from Dr. Smith was not in the format used by RGAL. It was not a note produced by RGAL's office because the format in the note produced by Claimant was "more of a format that would be produced that would document a medical note, a medical encounter where a physician would be communicating with a physician or putting the information into the record, relevant to a patient encounter. But not as a note to excuse, or document a visit by a patient for excuse purposes." (August 25, 2009 Hearing Transcript at 69.) Rish, too, spoke to Dr. Smith who denied writing the note.

Robert Martin (Martin) testified on behalf of Employer stating that he was a high school business teacher working on February 5, 2009, when he happened to be in the library when the phone rang. It was Claimant calling to say he was running late and asked if he could open his classroom for him. Martin stated that he would do that for Claimant and actually walked down to open the classroom, but the door was already open. Martin testified that it was his understanding that if a teacher was running late, standard operating procedure was to call the office or the administrative office. John Trovato, a high school history teacher and a close friend of Claimant's, also testified that he received phone calls from Claimant to open his classroom over the past several years on several occasions. It was his understanding that if he was going to be late or not in the classroom that he would have to report to the school office. Claire Witwer, a teacher of cultural sciences technology at the high school, similarly testified that he had received a phone call from Claimant during the 2008-2009 school year asking him to open his classroom door. However, he told Claimant that he would not open his door because he did not have a key and the policy was to notify the principal. Finally, Virginia Kuklewski (Kuklewski), the

library media specialist a/k/a the librarian, testified that Claimant had asked her to open his class for him a few times during the 2007-2008 school year and five times during the 2008-2009 school year after October 2008 but before February 5, 2009. She stated that he never asked her to report the call to the office, the calls only came after Principal Marin became principal, and she never received calls from any other teacher to open up their class due to tardiness.

Last to testify was Claimant who explained in great detail regarding his illness and the problems it caused him, mentioning that stress caused his disease to flare-up. He stated that he had taken medications in the past but was not currently taking any medications for his Crohn's disease. Claimant also testified that prior to Principal Marin's employment with the school district in 2007, he reported to Dr. Bliss who he got along with and never had any problems with regarding his reporting to the office. In fact, he stated that it was his practice to call the secretaries to let them know he was going to be late and that they would get a teacher to cover for him until he arrived. However, after Principal Marin specified that he was to be called directly, he followed that procedure. Claimant admitted that he mistakenly dialed the library on February 5, 2009, due to how bad he was feeling that morning and due to medication he was taking. Regarding Dr. Smith's note, he stated that he had been off work on unpaid leave and needed to get a return-to-work slip. He called RGAL and left a message with the receptionist and explained what he needed and who he was. The receptionist told him he could come by and pick up the note in a few hours which he did at the health campus. Claimant denied preparing the note himself but admitted that he refused to verify the authenticity of Dr. Smith's note because he later severed his relationship with RGAL.

The Referee found that Claimant was discharged for failing to follow proper procedures when arriving late to work on two occasions and for submitting an inauthentic medical excuse. He concluded that this constituted willful misconduct because on February 5, 2009, Claimant did not contact the principal or vice-principal as required but, instead, called the library to ask a teacher to open his classroom. Although Claimant testified that he did so because he was in the midst of an attack due to his Crohn's disease, the Referee did not find Claimant to be credible. The Referee went on to discus the inauthentic medical excuse stating that she also did not find Claimant's testimony credible in that matter. She found the testimony of Gephart and Rish from RGAL very credible regarding the types of formats used by the practice, and "it is clear that the note which was submitted by the claimant was not authentic. Further corroborating this testimony was the content of the note itself which specifically states that the claimant was seen in the office on March 18, 2009. This clearly implies that the claimant had a follow-up appointment that day. However, the claimant testified that he merely called and left a message for a nurse to generate a medical excuse for the claimant to return to work on March 19, 2009. There is no evidence in the record to show that the claimant was actually seen in the office on March 18, 2009, as indicated on the note itself." (Referee's Decision and Order at 5.) The Referee then denied Claimant benefits and Claimant appealed to the Board, which affirmed. This appeal by Claimant followed.[4]

[4] Our scope of review of the Board's decision is limited to determining whether an error of law was committed, constitutional rights were violated or findings of fact were supported by substantial evidence. *Frazier v. Unemployment Compensation Board of Review,* 833 A.2d 1181 (Pa. Cmwlth. 2003.)

Claimant first contends that the Board erred in denying him benefits because he is disabled due to suffering from Crohn's disease, which affects his daily life, and that he is a protected class under the Family Medical Leave Act (FMLA)[5] and Americans with Disabilities Act (ADA).[6] Due to his disability, his tardiness and inadvertent mistake on February 5, 2009, can be justified and does not constitute willful misconduct.

Initially, we note that whether or not Claimant has a disability that is protected under FMLA and ADA is irrelevant for purposes of determining this case.[7] Employer has never disputed that Claimant has Crohn's disease. The issue has been whether Claimant's failure to properly notify Employer of his late arrival amounted to willful misconduct. While Claimant attempts to paint a picture that he was so incapacitated that it was impossible for him to function and to properly notify Employer that he would be late on February 5, 2009, the Referee did not find Claimant credible. The Referee stated:

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[5] 29 U.S.C. §§2601-2654.

[6] 42 U.S.C. §§12101-12213.

[7] Throughout the entire hearing before the Referee, Claimant's attorney attempted to bring Claimant's "disability" into the hearing during questioning in an effort to create testimony for other cases she was bringing on behalf of Claimant. The Referee repeatedly cautioned her that such questioning was not relevant to this proceeding. Claimant also argues that the Board erred because Claimant was denied a fair and objective hearing due to the Board allowing "Employer to pollute and prejudice the hearing with speaking objections and allowing the employer to assert previously withdrawn issues that the petitioner was denied opportunity to refute." After reading the transcripts in full, it was Claimant's attorney who was guilty of what she accuses Employer of doing. We need not address this claim.

> The claimant was clearly aware that he was required to notify the principal or the assistant principal when he was going to be late for work. The claimant had the presence of mind to speak to a teacher so his classroom could be opened for students. It is, therefore, reasonable to conclude that the claimant would also have the presence of mind to contact the principal as required. At the very least, the claimant could have asked the teacher with whom he spoke to notify the principal or assistant principal that the claimant might be late to work. If the claimant was unable to call the principal because he was in the bathroom, there was certainly the opportunity for him to contact the principal after he left the bathroom. The claimant has failed to show good cause for violating the employer's reasonable directive.

(Referee's September 21, 2009 decision at 5.) Because the Board is the ultimate factfinder and determiner of credibility in unemployment compensation cases, *McCarthy v. Unemployment Compensation Board of Review*, 820 A.2d 1266 (Pa. Cmwlth. 2003), and it affirmed the Referee's decision, we cannot disturb that determination on appeal.[8]

Claimant also argues that the Board erred in concluding that he was guilty of willful misconduct because there was not substantial evidence to prove that the medical note he provided was inauthentic. Claimant argues that RGAL failed to record and keep his medical records private and the United States Office of Civil

[8] Claimant also argues that he was treated differently than other employees who were not disabled because they were not required to contact the principal or vice principal if they were going to be late or leave early. However, he was not treated differently due to his "disability" but because he failed to follow the school's policy. This was evidenced by the testimony given indicating that he only called other teachers and the librarian to open his classroom when he was going to be late rather than the office as required by the school handbook.

Rights determined that RGAL violated his rights under HIPAA by communicating with Claimant's Employer without his authorization, knowledge and consent.

Although Claimant contends that Gephart admitted that the electronic signature on the doctor's note *appeared* to be the electronic signature for Dr. Smith, that does not, in fact, mean that Dr. Smith signed the note in question for Claimant on March 18, 2009. Further, while Gephart at one point in the totality of her testimony stated that she was not certain if the note was authentic, she testified throughout that the doctor's note was not in the proper format and was not how notes were generated from RGAL. Most importantly, the Board found her credible. Similarly, the Referee found Rish credible and did not find Claimant credible. What is irrelevant is the determination of the United States Office of Civil Rights regarding any violation of Claimant's rights under HIPPA. That has nothing to do with whether the return-to-work note signed by Dr. Smith was authentic. Because the Referee did not find the note to be authentic and there was testimony to substantiate that as well as the note itself, there was substantial evidence to support the Board's decision.[9]

Claimant also contends that the Board erred by failing to grant a remand to consider additional evidence that was not available at the time of the first two hearings. Specifically, Claimant requested the Board to grant a remand to consider additional evidence that was not available at the time of the hearings: Claimant would have presented cancellation of a scheduled trip because of his incapacitated

[9] Claimant argues that he provided "supplemental medical documentation" from General Internal Medicine of Lancaster as proof of his return to work which was not accepted by Employer and is a violation of his rights under FMLA. Not only is an issue regarding FMLA not an issue to be raised before this Court, but it is being raised for the first time on appeal and will not be reviewed. Pa. R. A. P. 1551.

health and the United States Office of Civil Rights' acceptance of Claimant's complaint against RGAL.

34 Pa. Code §101.104(d) provides that the Board has the authority to remand the matter to the Referee for a further hearing if necessary so that the parties may present additional evidence "as may be pertinent and material to a proper conclusion of the case." However, the presentation of evidence consisting of a cancelled trip and the acceptance of the United States Office of Civil Rights' acceptance of Claimant's complaint against RGAL does nothing to address the issues relevant to this unemployment compensation claim, and the Board properly denied Claimant's request for a remand.

Claimant also argues that the Board erred because its finding that he did not verify the medical excuse dated March 18, 2009, contravenes the attorney-client privilege and confidential relationship. Claimant explains that he severed his relationship with RGAL the moment it violated his privacy rights under HIPAA. Pursuant to his attorney's advice, he did not contact RGAL when asked to do so. His relationship with his attorney is privileged and protected and no adverse inference can be taken.

What Claimant fails to understand is that his relationship with counsel has no bearing on this matter. What is of importance is that the Board did not find him credible throughout his testimony. His testimony regarding the return-to-work note was just a part of that testimony. In any event, the Referee found the testimony of the individuals from RGAL to be very credible and Claimant not credible at all.

Consequently, the Board did not err in finding that he was guilty of willful misconduct.

Accordingly, the order of the Board is affirmed.

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DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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Petitioner	:	
	:	
v.	:	No. 214 C.D. 2010
	:	
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

O R D E R

AND NOW, this 14th day of October, 2010, the order of the Unemployment Compensation Board of Review, dated January 19, 2010, at No. B-493903, is affirmed.

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DAN PELLEGRINI, JUDGE