IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carmen L. Turner, Petitioner	:	
v.	:	No. 519 C.D. 2008
	:	Submitted: August 22, 2008
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE FLAHERTY FILED: October 8, 2008

Carmen L. Turner (Claimant) petitions for review from an order of the Unemployment Compensation Board of Review (Board) which affirmed the decision of the referee denying Claimant's petition for benefits, determining that Claimant's discharge from the School District of Philadelphia (Employer) was due to Claimant's willful misconduct under Section 402(e) of the Unemployment Compensation Law (Law).[1] We affirm.

[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:

> (e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work . . .

Claimant worked for Employer as a long-term per diem substitute teacher. Her last day of work was June 20, 2007, after which Claimant was discharged. Claimant applied for unemployment benefits, which application was granted by the job center and the Employer thereafter appealed. A referee conducted a hearing and made the following relevant findings of fact.

Employer discharged Claimant due to excessive absenteeism and tardiness. Claimant had advanced through Employer's progressive discipline process and was on the equivalent of a final written warning, such that additional absenteeism or tardiness would cause her to be discharged.

Claimant had been a long term substitute teacher at Grover Cleveland School (Grover Cleveland) for several months. The teacher that Claimant replaced was on medical leave and was scheduled to return to work on or about February 16, 2007. On February 13, 2007, Claimant learned that her son was given a ten day suspension from his school. Claimant notified Employer that she would be unable to work during her son's ten day suspension. On February 20, 2007, Claimant reported to work for one-half day.

On February 22, 2007, believing that the teacher she had replaced at Grover Cleveland had returned back to the school, Claimant reported to Employer's human resources department to obtain a new assignment. Claimant reported to the human resources department at 8:30 a.m., accompanied by her son, who was still on suspension.

The human resources representative, Ms. Glover, was unable to assign Claimant to a new school and directed Claimant to report back to Grover Cleveland. The principal at Grover Cleveland had requested that Claimant work with the returning teacher and effectuate a smooth transition process. Claimant left

the human resources department at approximately 9:15 a.m. The human resources department is approximately 25 to 30 minutes away from Grover Cleveland.

After leaving the human resources department, Claimant met her son's father, who took Claimant's son for care. Thereafter, because her feet were hurting her, Claimant stopped at a shoe store to purchase new shoes in anticipation of working a full day at Grover Cleveland. Claimant then arrived at Grover Cleveland at 10:45 a.m.

Upon her arrival, the school principal noted that Claimant was late and told her that she would issue a written discipline against her. Claimant admitted to the principal that she stopped to buy shoes because her feet hurt. Employer has a tardiness policy, of which Claimant was aware, which requires an employee to contact Employer and report the expected time of arrival.

Based on the above, the referee determined that Claimant's tardiness in arriving at work on February 22, 2007, constituted willful misconduct. The referee reasoned that Claimant did not call to say she would be late in arriving at the school and, although meeting her son's father so that he could take care of the boy may have been a reasonable excuse for her lateness, stopping to buy shoes was not. On appeal, the Board affirmed the decision of the referee and in so doing, adopted the referee's findings of fact.

On appeal, Claimant initially argues, in essence, that some of the findings are not supported by substantial evidence.[2] Specifically, Claimant takes issue with respect to the transition day of February 22, 2007. The applicable findings state:

[2] Our review is limited to determining whether constitutional rights were violated, errors of law committed or whether the findings are supported by substantial evidence. Sheets v. Unemployment Compensation Board of Review, 708 A.2d 884 (Pa. Cmwlth. 1998).

> 9. Believing that the teacher Claimant replaced at Grover Cleveland School had returned to work, Claimant reported to Employer's human resources department to obtain a new assignment at a new school. Claimant reported to the human resources department at 8:30 a.m. The human resources representative was unable to reassign Claimant and directed her to report back to the Grover Cleveland School.
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> 10. The principal at the Grover Cleveland School had requested Claimant be a part of a transition process and to work with the returning teacher to effect the smooth transition.

Claimant argues that in accordance with her testimony, she was not initially scheduled to work at Grover Cleveland on February 22, 2007. The basis for Claimant's separation from work, however, is not because she arrived at the wrong work place, but that she arrived at her assignment at Grover Cleveland in an untimely manner, without first contacting Employer to notify Employer that she would be late.

Indeed, as indicated by Claimant and found by the referee and the Board, Claimant reported to human resources on February 22, 2007, to obtain a new assignment. No new schools were available and Claimant was instructed to return to Grover Cleveland and aid in the transition process of the returning teacher. The Grover Cleveland principal, Mrs. Karen Richardson Clifford (Mrs. Clifford) testified that a transition process was to transpire in pertinent part as follows:

> EW2 And we had asked Human Resources if we could continue the transition between Ms. Turner and the teacher that was returning so, because report card grades were going in, so we needed a certain amount of work from the children to be submitted for the report cards. So

> Ms. Turner had to complete her progress record book to be able to give that information to the teacher so all of that could be submitted for the report cards.

(Record at p. 24.) Mrs. Clifford's first hand testimony, as to the transition process, is not hearsay and constitutes substantial evidence to support the finding that she requested that Claimant be a part of the transition process.

Claimant also argues that with respect to human resources, although she was told to report to Grover Cleveland, she was never given an exact time as to when she was to report, such that her arrival at Grover Cleveland at 10:45 a.m. does not constitute willful misconduct. On February 22, Claimant reported to Ms. Glover, the placement officer with the human resources department. Because no school was available for Claimant, Ms. Glover sent her back to Grover Cleveland. According to Ms. Glover, she sent Claimant to Grover Cleveland between 9 and 9:15 a.m. (Record at p. 53.) Claimant also admitted that she was released to return to Grover Cleveland at 9:15 a.m. (Record at p. 55.)

According to testimony credited by the referee and the Board, it takes thirty minutes to reach Grover Cleveland from the human resources department. (Record at p. 55.) Claimant, however, by her own admission, did not immediately report to Grover Cleveland. According to Claimant, she first met with her son's father, who took Claimant's son for care. Then, because Claimant's feet were hurting her, she went shoe shopping in anticipation of working a full day at Grover Cleveland. Claimant arrived at Grover Cleveland at approximately 10:45 a.m.

We agree with the referee and the Board that Claimant's conduct in stopping to buy shoes, without first notifying Employer that she would be delayed in her arrival, amounts to willful misconduct. Willful misconduct, although not explicitly defined by statute, has been defined as "an act of wanton or willful disregard of the employer's interests, a deliberate violation of the employer's rules,

a disregard of the standards of behavior which the employer has a right to expect of an employee, or negligence indicating an intentional disregard of the employer's interests or of the employee's duties and obligations to the employer." Lee Hospital v. Unemployment Compensation Board of Review, 589 A.2d 297, 299 (Pa. Cmwlth. 1991). The employer has the burden of proof to establish willful misconduct. Kelly v. Unemployment Compensation Board of Review, 747 A.2d 436, 438 (Pa. Cmwlth. 2000).

Because this case involves a work rule violation, the employer must show the existence of the rule, its reasonableness and the fact of its violation. Offset Paperback v. Unemployment Compensation Board of Review, 726 A.2d 1125 (Pa. Cmwlth. 1999). The burden then shifts to the claimant to show good cause for her action. Id.

Here, the parties stipulated that Employer had advanced Claimant through the progressive disciplinary process with respect to tardiness and absenteeism. (Record at p. 20.) Claimant had received a final written warning. (Record at p. 21.) If an employee will be late in arriving at work, the policy is to call and inform the administrator. (Record at p. 26). In this case, Claimant would have called the principal at Grover Cleveland, Mrs. Clifford.

After reporting to human resources on February 22, 2007, Claimant was instructed to report to Grover Cleveland. Although Claimant maintains she was never told what time to report to Grover Cleveland, Claimant agrees that she was released by Ms. Glover at 9:15 a.m. (Record at p. 55.) According to Ms. Glover, she issued a directive to Claimant that she should return to Grover Cleveland. (Id.) Ms. Glover stated that teachers are paid by the day and that

Claimant was to be paid for a full day, which included her travel time.[3] (Record at p. 52.)

Upon leaving human resources, Claimant then proceeded to meet her son's father so that he could provide care for their son. Because her feet were hurting her, Claimant stopped to purchase a pair of shoes. Although Grover Cleveland is approximately thirty minutes away from the human resources department, Claimant did not report to Grover Cleveland until 10:45 a.m., an hour and a half later. Prior to arriving at Grover Cleveland, Claimant did not inform anyone that she would be late.

We agree with the referee and the Board, that although Claimant may have had good cause for being late in order to meet her son's father so that he could provide care for her son, stopping to buy a pair of shoes does not constitute good cause. Here, Claimant had been previously disciplined for her tardiness and absenteeism, had received a final written warning and was aware of Employer's policy to phone in if an employee would be late. Excessive tardiness, without notice and justification, especially in those instances where an employer had given repeated warnings to the employee, constitutes willful misconduct. Mundy v. Unemployment Compensation Board of Review, 133 A.2d 587 (Pa. Super. 1957). Moreover, an employer has the right to expect employees to maintain regular working hours and comply with office procedures. Unemployment Compensation Board of Review v. Glenn, 350 A.2d 890 (Pa. Cmwlth. 1976).

Here, Claimant engaged in willful misconduct when, after given a school assignment, she chose to go shoe shopping without first reporting such conduct to her Employer as required by Employer's tardiness and absenteeism

[3] Because of the time that she arrived at Grover Cleveland, Claimant was ultimately only paid for a half day. (Record at p. 58.)

policy. Claimant was instructed to report to Grover Cleveland and, if she had good cause to delay her arrival, she should have complied with Employer's policy for reporting tardiness.

Moreover, as stated by Ms. Glover, Claimant was to be paid for the full day, which would have included Claimant's travel. Claimant justified her late arrival at Grover Cleveland by telling the principal that she was late because she stopped to buy shoes. (Record at p. 11.) In Barnett v. Unemployment Compensation Board of Review, 372 A.2d 48 (Pa. Cmwlth. 1977), this court stated that an employee, who was to work a full day, engaged in willful misconduct when he left work early in order to go shopping.

Claimant, who was not represented before the referee, also argues that she was not afforded a full and fair hearing and that a new hearing is necessary. The referee in this case informed Claimant of her "right to be represented by legal counsel … to present testimony and other evidence yourselves as well as through the questioning of your own witnesses. [T]he right to present documents … the right to ask questions about the hearing procedure. And, lastly you both have the right to question or cross examine each other." (Record at p. 2.) Such was in conformance with 34 Pa. Code § 101.21(a) which provides:

> Where a party is not represented by counsel, the tribunal before which the hearing is held, should advise him as to his rights, aid him in examining and cross-examining witnesses, and give him every assistance compatible with the impartial discharge of its official duties.

Claimant claims, however, that the referee did not assist her in examining and cross-examining witnesses. A referee, however, has no obligation to advise an

uncounseled claimant of specific evidentiary questions or points of law. Rohrbach v. Unemployment Compensation Board of Review, 450 A.2d 323 (Pa. Cmwlth. 1982). Further, a referee need not show any greater deference to an uncounseled claimant than that shown a claimant with an attorney. Brennan v. Unemployment Compensation Board of Review, 487 A.2d 73 (Pa. Cmwlth. 1985).

Here, the record evidences that Claimant indeed cross-examined Employer's witnesses and objected to testimony. She further testified on her own behalf and, when asked by the referee whether she had anything to add, took the opportunity to do so. (Record at p. 59.)

Claimant next argues that she is entitled to another hearing because the referee did not allow her union representative to testify. According to Claimant, he was to testify as to "the proper bargaining procedures." (Record at p. 2.) When the referee questioned whether the union representative had any first hand knowledge of her discharge, Claimant agreed that he did not and, when the referee stated that the union representative would, therefore, not be testifying, Claimant agreed stating "[t]hat's fine." (Record at p. 2.) As admitted to by Claimant, the union representative did not have first hand knowledge of her termination. Further, Claimant agreed that the union representative would not testify and a claimant waives an issue by neglecting to raise it and preserve it before the referee. Watkins v. Unemployment Compensation Board of Review, 751 A.2d 1224 (Pa. Cmwlth. 2000).

In accordance with the above, the decision of the Board is affirmed.

JIM FLAHERTY, Senior Judge

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O R D E R

Now, October 8, 2008, the Order of the Unemployment Compensation Board of Review, in the above-captioned matter, is affirmed.

JIM FLAHERTY, Senior Judge