IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Penn-Delco School District, Petitioner	:	
v.	:	No. 537 C.D. 2008
Unemployment Compensation Board of Review, Respondent	:	Submitted: September 5, 2008

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: November 17, 2008**

Penn-Delco School District (Employer) petitions for review of an order of the Unemployment Compensation Board of Review (Board) reversing a referee's decision and granting benefits to Marisa Elskamp (Claimant). Employer argues the Board made findings of fact and credibility determinations contrary to the referee that were not supported by substantial evidence. Employer also argues the Board erred in determining Claimant's absenteeism and failure to attend a mandatory meeting did not constitute willful misconduct. The Board contends it was within its authority to make findings and credibility determinations contrary to the referee. The Board also argues Claimant had good cause for her absenteeism and for her failure to attend the meeting and therefore did not commit willful misconduct. We affirm.

The Board made the following findings. Claimant worked for Employer as a part-time bus driver. On March 23 and 26, 2007, Claimant called-off sick indicating she would be out "for awhile" and requested leave under the Family Medical Leave Act of 1993[1] (FMLA). Bd. Op., Finding of Fact (F.F.) No. 2.

Employer responded by letter denying Claimant's eligibility under the FMLA and instructing Claimant to request medical leave in writing, including the basis for and duration of the requested leave, with a doctor's note certifying her condition, all pursuant to a collective bargaining agreement (CBA) between Employer and Claimant's union. Shortly thereafter, Claimant faxed the requested information to Employer, noting her doctor released her to return to work on July 11, 2007.

In a letter dated May 24, 2007, Employer denied Claimant's request for a leave of absence, citing the CBA article prohibiting leaves of absence to enable an employee to seek or accept employment elsewhere. Employer instructed Claimant to return to work on May 29, 2007. Claimant did not return to work when instructed.

Employer subsequently informed Claimant by letter that she was required to attend a mandatory meeting on June 6, 2007, to notify her of allegations regarding her failure to report to work. Claimant did not attend the meeting as she believed Employer was "setting her up." F.F. No. 8.

[1] 29 U.S.C. §§ 2601–2954.

Employer notified Claimant by letter that it would recommend her termination to the school board for failing to report to work since March 27, 2007, and for not attending the mandatory meeting. Employer discharged Claimant at its June 27, 2007 school board meeting.

Claimant subsequently applied for unemployment compensation benefits, which were denied by the local service center. On Claimant's appeal, a referee upheld the denial of benefits on the ground Claimant's absenteeism and failure to attend the mandatory meeting amounted to willful misconduct rendering her ineligible for benefits under Section 402(e) of the Unemployment Compensation Law (Law).[2] Claimant appealed to the Board. Making independent findings of fact, the Board granted benefits. Employer now appeals to this Court.

On appeal,[3] Employer argues the Board exceeded its authority by making findings of fact contrary to the referee's findings. In addition, Employer argues Claimant's failure to return to work after the denial of her request for a leave of absence constituted willful misconduct. Employer also argues Claimant's failure to attend the mandatory meeting was an unreasonable refusal to follow an employer's directive and therefore constitutes willful misconduct.

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[2] Section 402(e) of the Unemployment Compensation Law, Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(e).

[3] 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. Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review, 949 A.2d 338 (Pa. Cmwlth. 2008).

At the outset, we note, the Board is the ultimate fact-finder in unemployment compensation cases. Hessou v. Unemployment Comp. Bd. of Review, 942 A.2d 194 (Pa. Cmwlth. 2008). "[T]he weight to be given the evidence and the credibility to be afforded the witnesses are within the province of the Board as finder of fact …." Peak v. Unemployment Comp. Bd. of Review, 509 Pa. 267, 272, 501 A.2d 1383, 1386 (1985). "The Board's findings are conclusive on appeal so long as the record, taken as a whole, contains substantial evidence to support those findings." Hessou, 942 A.2d at 198. The fact that one party may view testimony differently than the Board is not grounds for reversal if the facts found are supported by substantial evidence. Daniels v. Unemployment Comp. Bd. of Review, 755 A.2d 729 (Pa. Cmwlth. 2000). Further, we must "examine the testimony in the light most favorable to the party in whose favor the fact-finder has ruled, giving that party the benefit of all logical and reasonable inferences from the testimony …." Penn Hills Sch. Dist. v. Unemployment Comp. Bd. of Review, 496 Pa. 620, 630, 437 A.2d 1213, 1218 (1981).[4]

Relying on Treon v. Unemployment Compensation Board of Review, 499 Pa. 455, 453 A.2d 960 (1982), Employer first argues the Board exceeded its

[4] We also note our Supreme Court's decision in Leon E. Wintermyer, Inc. v. Workers' Comp. Appeal Bd. (Marlowe), 571 Pa. 189, 203, 812 A.2d 478, 487 (2002), holding that "review for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in every case in which such question is properly brought before the court." However, "where there is substantial evidence to support an agency's factual findings, and those findings in turn support the conclusions, it should remain a rare instance in which an appellate court would disturb an adjudication based upon capricious disregard." Id. at 204 n.14, 812 A.2d at 488 n.14. Capricious disregard is a deliberate disregard of competent evidence that one of ordinary intelligence could not possibly avoid in reaching the result. Remaley v. Workers' Comp. Appeal Bd. (Turner Dairy Farms, Inc.), 861 A.2d 405 (Pa. Cmwlth. 2004).

authority in making credibility determinations and findings of fact contrary to those of the referee based upon undisputed facts. This argument lacks merit.

In Treon, the Board rejected a referee's finding that was based on the consistent, uncontradicted testimony of one witness. Id. Our Supreme Court held the Board could not disregard a referee's findings of fact based on consistent, uncontradicted testimony without stating its reasons for doing so. Id. However, the Court explicitly limited its holding, noting "[i]n this case … we are concerned not with findings made by the Board, but with findings made by the referee which the Board failed to adopt." Id. at 460, 453 A.2d at 962. Further, "[t]he Board certainly had the right to disbelieve [the claimant's] testimony, even though that testimony was uncontradicted." Id. Our Supreme Court found error in the Board's unexplained failure to adopt a crucial finding of the referee that was based on uncontradicted evidence.

Employer mistakenly relies on Treon for the proposition that the Board must defer to the referee's findings. Employer fails to recognize that where factual matters are in dispute, and both sides offer testimony, the Board is "the ultimate finder of fact with power to substitute its judgment for that of its referees …." Peak, 509 Pa. at 270, 501 A.2d at 1385; see also Hercules, Inc. v. Unemployment Comp. Bd. of Review, 604 A.2d 1159, 1163 (Pa. Cmwlth. 1992) (describing the Board as the ultimate finder of fact with the power to resolve evidentiary conflicts and questions of credibility); M.A. Bruder & Sons, Inc. v. Unemployment Comp. Bd. of Review, 603 A.2d 271, 275 (Pa. Cmwlth. 1992)

(noting the Board's freedom to reject the referee's findings where there is conflicting evidence).

In this case, both Claimant and two of Employer's representatives testified and submitted evidence before the referee. There were conflicting factual issues relating to the sufficiency of Claimant's medical documentation, the reasonableness of Employer's demand, and Claimant's refusal to attend the meeting. Given the conflicting testimony, the Board properly exercised its role as fact-finder, and its findings are conclusive if supported by substantial evidence.

Employer next argues Claimant's absenteeism amounted to willful misconduct. We disagree.

Claimants are ineligible for unemployment compensation when they have been discharged for willful misconduct connected with their work. 43 P.S. §802(e). While the Law does not define willful misconduct, our Supreme Court defines it as:

> (a) wanton or willful disregard for an employer's interests; (b) deliberate violation of an employer's rules; (c) disregard for standards of behavior which an employer can rightfully expect of an employee; or (d) negligence indicating an intentional disregard of an employer's interest or an employee's duties or obligations.

Grieb v. Unemployment Comp. Bd. of Review, 573 Pa. 594, 600, 827 A.2d 422, 425 (2003) (citation omitted).

This Court holds that chronic absenteeism coupled with a failure to report absences constitutes willful misconduct. Lacomis v. Unemployment Comp. Bd. of Review, 525 A.2d 442 (Pa. Cmwlth. 1987). However, excessive absenteeism, when properly reported and justified, is not willful misconduct, and illness is a proper justification. See Sprague v. Unemployment Comp. Bd. of Review, 647 A.2d 675, 680 (Pa. Cmwlth. 1994) (six properly reported absences based on illness did not constitute willful misconduct); Tri-Corp v. Unemployment Comp. Bd. of Review, 432 A.2d 1158, 1159–60 (Pa. Cmwlth. 1981) (properly reported two week leave for illness did not constitute willful misconduct).

Here, the Board determined Claimant's absenteeism did not constitute willful misconduct, explaining (with emphasis added):

> In March of 2007, [C]laimant requested a leave of absence and sent in the documents required by [E]mployer. [E]mployer did not respond to [C]laimant's request until May 24, 2007. The Board therefore finds that between March 27, 2007 and May 24, 2007, [C]laimant had good cause to be absent from work and properly notified [E]mployer. In the May 24, 2007, letter, [E]mployer indicated that [C]laimant's request for a leave of absence was denied. [E]mployer did not give a specific reason for the denial, but cited the CBA article that prohibits leaves of absence to enable an employee to seek or accept employment elsewhere. In light of this letter, which makes no reference to a deficiency in the medical documentation supplied by [C]laimant, the Board rejects as not credible [E]mployer's witness' testimony that [C]laimant's leave was denied due to the fact that she did not provide sufficient medical documentation to support the leave. Because [E]mployer did not introduce any evidence that [C]laimant was, in fact, seeking or accepting work elsewhere, the Board finds that [C]laimant had good cause to not return to work on May 29, 2007, or thereafter; specifically, she

> had not yet been released by her doctor to return to work, of which [E]mployer was aware. The Board therefore finds insufficient evidence of willful misconduct in [C]laimant's failure to return to work since March 24, 2007.

Bd. Op. at 3. The Board's necessary determinations are supported by substantial evidence. See R.R. at 43a (doctor's note describing Claimant's medical condition and predicting a 12-week duration); R.R. at 88a-90a (Claimant's testimony regarding her illness). The Board expressly resolved issues of credibility and evidentiary weight in favor of Claimant, and we cannot disturb these determinations. Peak. Based on the Board's resolution of the disputed factual issues, we discern no error in the Board's ultimate determination that Claimant's absenteeism did not constitute willful misconduct. Sprague; Tri-Corp.

As a final issue, Employer argues Claimant's failure to attend the mandatory meeting constitutes willful misconduct. Again, we disagree.

"Where an employee is discharged for refusing or failing to follow an employer's directive, both the reasonableness of the demand and the reasonableness of the employee's refusal must be examined." Dougherty v. Unemployment Comp. Bd. of Review, 686 A.2d 53, 54 (Pa. Cmwlth. 1996). Where the action of the employee is justifiable or reasonable under the circumstances, it cannot be considered willful misconduct. Simpson v. Unemployment Comp. Bd. of Review, 450 A.2d 305 (Pa. Cmwlth. 1982). "In other words, if there was 'good cause' for the employee's action, he cannot be deemed guilty of willful misconduct." Id. at 308.

Here, it is undisputed that Employer scheduled a mandatory meeting with Claimant on June 6, 2007, and Claimant did not attend. F.F. Nos. 7, 8. Claimant testified she did not attend because she believed she was being "set up" by Employer. R.R. at 102a. Claimant based this belief on previous negative experiences with Employer where she was lied to, intimidated, and harassed; Employer's witness denied the allegations. R.R. at 101a-103a.

The Board determined Employer's mandatory meeting directive was unreasonable in light of Claimant's medical documentation which had not yet released her to return to work. Bd. Op. at 4. The Board also concluded Claimant had good cause to refuse Employer's unreasonable request. Id. The Board's determinations are supported by substantial evidence. Accordingly, we affirm the Board's conclusion that Claimant's failure to attend the mandatory meeting did not constitute willful misconduct. See Thompson v. Unemployment Comp. Bd. of Review, 723 A.2d 743, 744 (Pa. Cmwlth. 1999) (finding claimant's illness to be good cause for violating employer rule requiring absent employees to find replacement workers); Kindrew v. Unemployment Comp. Bd. of Review, 388 A.2d 801, 802–03 (Pa. Cmwlth. 1978) (finding an employer's requirement that claimant attend work or face dismissal unreasonable if claimant were ill).

Based on the foregoing, we affirm.

ROBERT SIMPSON, Judge

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O R D E R

AND NOW, this 17th day of November, 2008, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge