IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stephanie Washington,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 541 C.D. 2010
	:	
Unemployment Compensation Board of Review,	:	Submitted: August 20, 2010
	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: October 29, 2010**

Stephanie Washington (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board), which affirmed the decision of an Unemployment Compensation Referee (Referee) denying her benefits under Section 402(e) of the Unemployment Compensation Law (Law).[1] The Board found Claimant ineligible for benefits because she violated the three-

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

day no call/no show policy of AETNA Life Insurance (Employer) and failed to establish good cause for her actions.

Claimant applied for unemployment compensation benefits after becoming separated from her employment with Employer. The Unemployment Compensation Service Center (Service Center) issued a determination finding Claimant not ineligible for benefits under Section 402(e). Employer appealed the Service Center's determination, and the Referee conducted an evidentiary hearing at which Claimant and two witnesses for Employer appeared and testified. Following the hearing, the Referee reversed the Service Center's determination and found Claimant ineligible for benefits under Section 402(e). Thereafter, Claimant appealed to the Board. After giving consideration to the entire record, including the testimony submitted at the Referee's hearing, the Board entered an order dated February 2, 2010, adopting and incorporating the Referee's Findings of Fact (FOF) and Conclusions of Law, and holding that Claimant was ineligible for benefits pursuant to Section 402(e). The Board adopted the following Findings of Fact:

> 1. The claimant was last employed with AETNA Life Insurance performing full-time underwriting support at a pay rate of $16.66 per hour. The claimant was employed from August 18, 2008 and her last day of work was April 29, 2009.
>
> 2. The employer became aware of a customer complaint from a telephone call on April 24, 2009; the employer prepared a one time written warning to give to the claimant.
>
> 3. The claimant did not agree with the written warning and refused to sign it; the claimant became upset with the sales and service supervisor.

4. The claimant's supervisor told the claimant to go home and cool off.

5. Before she left the office, the claimant sent an email to the director of the department and the representative of Human Resources Department to advise them that her supervisor sent her home "on administrative leave effective now."

6. The claimant did not return to work.

7. The employer tried to call the claimant but the two telephone numbers listed were disconnected; the employer left several messages for the claimant at the emergency contact number listed in her file.

8. The claimant did not return calls to the employer and did not report to work.

9. The employer maintains a policy which provides that three days of no call/no show is considered a voluntary termination from employment.

10. On May 4, 2009, the employer sent the claimant a letter terminating her employment for three days of no call/no show.

11. The employer's letter directed the claimant to call by close of business May 8, 2009.

12. On May 8, the claimant attempted to call her supervisor after she received the letter; the supervisor was not in the office and did not return a call to her.

13. The claimant spoke to the human resources representative on May 11, 2009 and became aware that employer discharged the claimant because of the no call/no show for three days.

14. The claimant violated the employer's policy.

(FOF ¶¶ 1-14.) In making the above-stated findings of fact, the Referee expressly credited the testimony of Employer's witnesses, found that Claimant did not establish good cause for her failure to report to work or contact Employer in the

three days after April 29, 2009, and also found that Claimant's actions clearly rose to the level of disqualifying willful misconduct in connection with her work. (Referee Decision at 2.) The Board affirmed the decision of the Referee. Claimant now petitions this Court for review.[2]

On appeal, Claimant argues that: (1) the Board's Findings of Fact are not supported by substantial evidence; and (2) the Board committed an error of law in determining that Claimant engaged in willful misconduct.

I. Challenges to Findings of Fact

We first examine Claimant's argument that the record does not support the Board's FOF. In particular, Claimant challenges Findings of Fact 6 (that Claimant did not return to work), 8 (that Claimant did not return calls to the employer and did not report to work), and 14 (that Claimant violated Employer's policy).

With regard to Findings of Fact 6 and 8, Claimant argues that: she was instructed to go home because she was placed on administrative leave; she was not told when to return or when to contact Employer; at no time was she instructed to return to work; she did not receive any messages from Employer; and did not

[2] This "Court's review is limited to determining whether constitutional rights were violated, whether an error of law was committed, whether a practice or procedure of the Board was not followed or whether the findings of fact are supported by substantial evidence in the record." Western & Southern Life Ins. Co. v. Unemployment Compensation Board of Review, 913 A.2d 331, 334 n.2 (Pa. Cmwlth. 2006). Substantial evidence is defined as "such relevant evidence which a reasonable mind would accept as adequate to support a conclusion." Guthrie v. Unemployment Compensation Board of Review, 738 A.2d 518, 521 (Pa. Cmwlth. 1999).

intentionally fail to return calls from Employer. (Claimant's Br. at 9.) Based on these arguments, Claimant also disagrees with Finding of Fact 14 that she violated Employer's no call/no show policy because she was on administrative leave. (Claimant's Br. at 10.)

There is no dispute that on her last day of work, after Employer's presentation to Claimant of a one time warning letter related to a customer complaint, Claimant refused to sign the letter and was upset with her supervisor. (Hr'g Tr. at 9, 10, 15 R.R. at 18a, 19a, 24a; FOF ¶ 3.) There is conflicting testimony about what occurred subsequently. Claimant's immediate supervisor, Sean Murray, testified that he told Claimant to go home and cool off in the middle of her shift on the afternoon of April 29, 2009. (Hr'g Tr. at 7, 9, 10, R.R. at 16a, 18a, 19a.) When Mr. Murray went back to Claimant's work station, where she was in the process of typing an email to human resources about this incident, he advised her to come back to his office so he could tell her that she needed to report back in the morning. (Hr'g Tr. at 12, 14, 16, R.R. at 21a, 23a, 25a.) Mr. Murray testified that he never put Claimant on administrative leave. (Hr'g Tr. at 20, R.R. at 29a.) He stated that Claimant did not report to work or call to say she was not coming to work on Thursday, April 30, 2009 or Friday, May 1, 2009, even though she was scheduled to work on those days, or on any day thereafter until she left him a message on May 8, 2009, indicating that she was calling Employer's human resources department. (Hr'g Tr. at 11, 12, R.R. at 20a-21a.)

Employer's Sales Manager, Christal Zagar, testified that she tried to call Claimant on April 29, 2009, at the two contact phone numbers from Claimant's

employee file, but the phone numbers were disconnected. (Hr'g Tr. at 8, R.R. at 17a.) She asked Mr. Murray to follow up and provided him with the emergency contact number Claimant had provided to Employer. (Hr'g Tr. at 8, R.R. at 17a.) Mr. Murray testified that he called Claimant at 5:58 p.m. on April 29, 2009, using the emergency phone number Ms. Zagar provided from the Claimant's employee file. (Hr'g Tr. at 11, R.R. at 20a.) Mr. Murray spoke with Claimant's father and said it was important for Claimant to call him. (Hr'g Tr. at 11, R.R. at 20a.) He called this emergency number again on April 30 around 2:30 p.m. and spoke with Claimant's father, explaining that he could not discuss specific details with Claimant's father, but needed Claimant to call him back. (Hr'g Tr. at 11, R.R. at 20a.) Mr. Murray called again on May 1 at 3:30 p.m. and was told that Claimant was unavailable to talk with him. (Hr'g Tr. at 11, R.R. at 20a) He reemphasized the importance of a phone call from Claimant. (Hr'g Tr. at 11, 12, R.R. at 20a-21a.)

Claimant disagreed that Mr. Murray told her to go home and cool off, and testified that he told her that she was "out of here on paid administrative leave now." (Hr'g Tr. at 15, R.R. at 24a.) Claimant indicated that she then went to her desk and sent an email to the director and to Human Resources, (Hr'g Tr. at 15, R.R. at 24a) and that after she sent the email, Mr. Murray came to her desk, told her to leave, and she left. (Hr'g Tr. at 16, R.R. at 25a.) Claimant testified that she did not go to work the day after she was sent home because she was expecting to hear something from the Human Resources director, but she never heard from anyone. (Hr'g Tr. at 16, R.R. at 25a.) Claimant said she did not call Employer because she did not know she was supposed to. (Hr'g Tr. at 17, R.R. at 26a.)

Claimant stated that she received a termination letter, dated May 4, 2009, from Employer on May 5 or May 6, but did not call Mr. Murray until May 8, when she learned that he was on vacation. (Hr'g Tr. at 17, 18, R.R. at 26a, 27a.) Claimant acknowledged that her contact telephone numbers were disconnected. (Hr'g Tr. at 20, R.R. at 29a.) By Claimant's own testimony, she did not call Employer until May 8, when she left a voicemail for Mr. Murray, and did not actually speak with Employer regarding this matter until May 11, when she contacted Human Resources. (Hr'g Tr. at 18, R.R. at 27a, FOF ¶ 13.)

Essentially, Claimant asks this Court to adopt her version of the facts. "[T]he Board is the ultimate fact finder in unemployment compensation matters and is empowered to resolve all conflicts in evidence, witness credibility, and weight accorded the evidence." Ductmate Industries, Inc. v. Unemployment Compensation Board of Review, 949 A.2d 338, 342 (Pa. Cmwlth. 2008). Thus, as long as the Board's factual findings are supported by substantial evidence, those findings are conclusive on appeal. Geesey v. Unemployment Compensation Board of Review, 381 A.2d 1343, 1344 (Pa. Cmwlth. 1978). That a claimant may have given "a different version of the events, or . . . might view the testimony differently than the Board, is not grounds for reversal if substantial evidence supports the Board's findings." Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994). Moreover, it is irrelevant whether the record contains evidence to support findings other than those made by the fact finder; the critical inquiry is whether there is evidence to support the findings actually made. Minicozzi v. Workers Compensation Appeal Board (Industrial Metal Plating, Inc.), 873 A.2d 25 (Pa. Cmwlth. 2005). Where substantial evidence

supports the Board's findings, they are conclusive on appeal. Pennsylvania Liquor Control Board v. Unemployment Compensation Board of Review, 879 A. 2d 388, 390 (Pa. Cmwlth. 2005). The prevailing party below is entitled to the benefit of all reasonable inferences drawn from the evidence. Landy & Zeller, Attorneys at Law v. Unemployment Compensation Board of Review, 531 A.2d 1183 (Pa. Cmwlth. 1987).

After reviewing the record, we conclude that the challenged Findings of Fact, adopted by the Board, are supported by substantial evidence. The testimony of Mr. Murray and Ms. Zagar support that Claimant did not return or report to work and that Claimant did not return Employer's calls for more than three days. While there is some ambiguity regarding whether Claimant was placed on administrative leave when she left in the middle of her shift on April 29, it is clear that Employer immediately attempted to recall Claimant that very afternoon by calling her on that day, again on April 30, and for a third time on May 1, to no avail.[3]

We also conclude that there is substantial evidence to support Finding of Fact 14, which found that Claimant violated Employer's no call/no show policy.

[3] Despite Mr. Murray's testimony that he did not place Claimant on paid administrative leave (Hr'g Tr. at 20, R.R. at 29a), the May 4, 2009, letter discharging Claimant indicated that Claimant was on administrative leave. (Letter from Employer to Claimant (May 4, 2009), Employer's Ex. 4, R.R. at 37a). However, as the May 4 letter and the record indicate, Employer attempted to call Claimant, at the phone numbers Claimant provided to Employer, multiple times on April 29, April 30, and May 1, to inform her to report back to work. (Letter from Employer to Claimant (May 4, 2009), Employer's Ex. 4, R.R. at 37a; Hr'g Tr. at 11, 12, R.R. at 20a, 21a.) Thus, to the extent Claimant may have been placed on administrative leave, it appears that the leave was for a very short duration.

Employer has a written rule providing that an unreported absence of three consecutive work days is considered a voluntary resignation of employment. (FOF ¶ 9; Employer Policy and Procedure Manual at 22, Employer Ex. 1, R.R. at 32a; Hr'g Tr. at 6, R.R. at 15a.) Claimant was aware of this rule because she signed for receipt of the policy. (Acknowledgment of Receipt (August 22, 2008), Employer Ex. 2, R.R. at 33a, 34a). At the hearing, Claimant did not object to the introduction of the Acknowledgment of Receipt as evidence. (Hr'g Tr. at 6, R.R. 15a.) Employer also presented testimony from Ms. Zagar and Mr. Murray that, pursuant to Employer's policy, an unreported absence of three consecutive work days may be deemed a voluntary resignation of employment. (Hr'g Tr. at 6, 13, R.R. at 15a, 22a.) Mr. Murray also testified that Claimant did not return to work after April 29, 2009, until May 11, 2009, when she met with Human Resources. (Hr'g Tr. at 11, 12, R.R. at 20a, 21a.) Claimant acknowledged that she did not return to work or call Employer after leaving work on April 29, 2009. (Hr'g Tr. at 5, 16, 17, R.R. at 14a, 25a, 26a.) Accordingly, there is substantial evidence in the record to support the finding that Claimant violated Employer's no call/no show work rule.

II. Willful Misconduct

Section 402(e) provides that a claimant will not be eligible for unemployment compensation when "h[er] unemployment is due to h[er] discharge or temporary suspension from work for willful misconduct connected with h[er] work." 43 P.S. § 802(e). Although the Law does not define the term "willful misconduct," our Supreme Court has defined it 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. Caterpillar, Inc. v. Unemployment Compensation Board of Review, 550 Pa. 115, 123, 703 A.2d 452, 456 (1997). Where a claimant's willful misconduct is alleged to be the result of a violation of a work rule, the burden is on the employer to prove that the claimant was made aware of the existence of the work rule and that the claimant violated the rule. Bishop Carroll High School v. Unemployment Compensation Board of Review, 557 A.2d 1141, 1143 (Pa. Cmwlth. 1989). Once the employer meets its burden of showing willful misconduct, the burden then shifts to the claimant to establish good cause for her actions. Id. "A claimant has good cause if h[er] …actions are justifiable and reasonable under the circumstances." Docherty v. Unemployment Compensation Board of Review, 898 A.2d 1205, 1208-09 (Pa. Cmwlth. 2006). Whether certain conduct constitutes willful misconduct is a question of law subject to appellate review. Caterpillar, 550 Pa. at 123, 703 A.2d at 456.

In this case, there is substantial evidence to support the Board's findings that Claimant violated Employer's three day no call/no show work rule. Employer also met its burden of showing that Claimant was aware of this work rule, as indicated above by the testimony and record. This work rule violation constitutes willful misconduct unless Claimant can show good cause for her actions. Docherty, 898 A.2d at 1208-09.

Claimant argues that her actions in not returning to work were justifiable and reasonable because on April 29, 2009, she was placed on administrative leave, told to go home, and that she would be contacted by Human Resources. (Claimant's Br. at 10.) She further asserts that she was not aware of any telephone calls or

messages from Employer between April 29 and May 8, 2009, and that the only reason she did not call Employer or return to work after April 29, 2009 was because she was on paid administrative leave until further notice. (Claimant's Br. at 10, 11.) Claimant also argued that she did not receive any communication from Employer until she received a letter dated May 4, 2009, instructing her to contact Employer. (Claimant's Br. at 10.) However, the Referee and Board credited Employer's evidence that Mr. Murray and Ms. Zagar attempted to contact Claimant numerous times between April 29 and May 1, 2009, and left multiple messages for Claimant to contact Employer immediately to no avail. Claimant offers no explanation of why her father would not have relayed Employer's messages. Additionally, we note that, despite knowing that Employer could not reach her at her primary telephone numbers, which were disconnected, she maintained that she still had no obligation to contact Employer regarding her return to work.

Moreover, the May 4, 2009 letter requested Claimant to contact Employer immediately, but in no case later than May 8. Despite testifying that she received the letter on May 5 or May 6, Claimant admitted to waiting until May 8, the last possible day, before contacting Employer. (Hr'g Tr. at 17, 18, R.R. at 26a, 27a.) Claimant offers no explanation for this delay. (Hr'g Tr. at 17, 18, R.R. at 26a, 27a.) We note that an employee must take the minimal steps to preserve her employment relationship, which, at a minimum, would have required Claimant to inform Employer when and if she was returning to work. Benitez v. Unemployment Compensation Board of Review, 458 A.2d 619, 620 (Pa. Cmwlth. 1983). Claimant did not take those minimal steps, as evidenced by her leaving her

employment on April 29 and not calling Employer until May 8, or speaking with Employer until May 11, twelve days after she left work on April 29 and five or six days after Claimant received the termination letter. (Hr'g Tr. at 17, 18, R.R. at 26a, 27a.) Based on these factors, we conclude that Claimant failed to meet her burden of proving that she had good cause for violating Employer's work rule.

Accordingly, we hold that the Board did not err in finding Claimant ineligible for benefits under Section 402(e) of the Law, and we affirm the Board's order.

RENÉE COHN JUBELIRER, Judge

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	:	
Respondent	:	

O R D E R

NOW, October 29, 2010, the order of the Unemployment Compensation Board of review in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge