

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Steve V. Cummings, :
Petitioner :
v. : No. 807 C.D. 2012
Unemployment Compensation : SUBMITTED: August 17, 2012
Board of Review, :
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE LEADBETTER

FILED: October 15, 2012

Claimant Steve V. Cummings petitions *pro se* for review of an order of the Unemployment Compensation Board of Review (Board) that affirmed the decision of a referee and denied him unemployment compensation benefits, concluding that his actions constituted 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).

The facts as found by the referee are as follows.² Claimant worked as a full-time merchandise processor for Employer Ross from August 2004 to August 2011, when Employer granted him a leave of absence in order to visit his mother in Liberia. Claimant was scheduled to return to work on October 24, 2011, but was unable to do so due to becoming ill in Liberia on October 19th. Employer has a policy providing that, “any associate who fails to return to work on the first day following the expiration of a leave of absence will be deemed to have resigned his employment with the employer.” Referee’s Finding of Fact No. 6. When Claimant failed to return to work on October 24th, Employer sent him a letter indicating that if he failed to return by November 1st, Employer would consider him to have resigned. Accordingly, when Claimant failed to report to work on November 1st, Employer terminated his employment. Claimant returned to the United States on November 2nd.

The Lancaster UC Service Center initially determined that Claimant was ineligible for benefits. After a hearing at which Claimant and Employer’s HR manager appeared, the referee concluded that Claimant’s illness constituted good cause for his failure to return to work. The referee further determined, however, that Claimant failed to notify Employer of his inability to return to work due to his illness. In so determining, the referee accepted as credible the testimony of Employer’s witness that neither Claimant nor his wife contacted Employer. Accordingly, the referee found Claimant to be ineligible for benefits under Section

² With the substitution of Liberia for Siberia in the referee’s Finding of Fact No. 2, the Board adopted and incorporated the referee’s findings and conclusions in their entirety.

402(e) of the Law. The Board affirmed and Claimant's timely petition for review to this Court followed.³

Section 402(e) provides, in pertinent part, that an employee 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” The term “willful misconduct” has been defined to include: (1) the deliberate violation of work rules; and (2) the disregard of standards of behavior which an employer can rightfully expect of its employee. *Glatfelter Barber Shop v. Unemployment Comp. Bd. of Review*, 957 A.2d 786, 792 (Pa. Cmwlth. 2008).

The employer bears the initial burden of proving that the claimant engaged in willful misconduct. *Yost v. Unemployment Comp. Bd. of Review*, 42 A.3d 1158, 1162 (Pa. Cmwlth. 2012). If the willful misconduct charge is based upon a violation of a work rule, the employer must prove the existence of the rule and its deliberate violation. *Id.* at 1162. Once the employer establishes a *prima facie* case of willful misconduct, the burden then shifts to the claimant to demonstrate good cause for his conduct. *Id.* The claimant has good cause if his action “is justifiable or reasonable under the circumstances.” *Fruemento v. Unemployment Comp. Bd. of Review*, 466 Pa. 81, 87, 351 A.2d 631, 634 (1976). If the claimant establishes good cause, the conduct is “not in disregard of standards that the employer had a right to expect.” *Rossi v. Pa. Unemployment Comp. Bd. of Review*, 544 Pa. 261, 267, 676 A.2d 194, 197-98 (1996).

On appeal, Claimant reiterates his position that his wife called Employer and notified it that he would be unable to return to work on time due to

³ In July 2012, the Board indicated that it would not be filing a brief.

illness. Although his wife did not appear at the hearing, he maintains that she would be willing to testify to that conversation.⁴ Accordingly, he requests that this Court reverse the Board's decision. We decline to do so.

Even though Claimant's illness constituted good cause for failing to return to work on the first day after his leave expired, Claimant also had to establish that he notified Employer that he would be unable to return.⁵ Employer's witness acknowledged that a telephone call from Claimant's wife would have been sufficient to satisfy that obligation, but the wife did not testify and the Board accepted as credible the testimony of Employer's witness that "we didn't have any communication from him or his wife." C.R., Item No. 8, January 23, 2012 Transcript, N.T. at 9. Specifically, Employer's witness testified as follows in response to the referee's question as to what happened when Claimant failed to return to work on October 24th:

We made several phone calls to the number he provided on his leave of absence request form. We never got an answer. We got a message stating that the phone number

⁴ In his petition for review, Claimant averred that "[u]nfortunately, my wife was not at the hearing because I didn't know what to expect at the hearing" and "neither did I expected [sic] my employer to have rebutted my testimony that I informed them through my wife." Claimant's May 3, 2012 Petition for Review. In the notice of hearing, Claimant was advised that he could have witnesses testify on his behalf. In that regard, he was instructed to "bring witnesses who directly observed, heard, or participated in the matters about which they are to testify" and to "arrange for them to be present" Certified Record (C.R.), Item No. 7, Notice of Hearing. In addition, when the referee restated at the hearing that the notice of hearing, in pertinent part, provided that the parties had the right to present witnesses, Claimant responded that he understood that right. C.R., Item No. 8, January 23, 2012 Transcript, Notes of Testimony (N.T.) at 1. A claimant who chooses to proceed *pro se* in the proceedings below does so at his own risk. *Beddis v. Unemployment Comp. Bd. of Review*, 6 A.3d 1053, 1060 (Pa. Cmwlth. 2010).

⁵ Employer's leave of absence policy also requires "[a]n associate who plans to return to work upon the expiration of an approved leave [to] notify his/her supervisor in advance, preferably seven (7) calendar days before his/her return date." C.R., Item No. 8, Exhibit 2 at 7.

was not set up to receive voicemail messages and we weren't able – never able to make contact with him. We did then send a letter giving him additional time indicating that we needed to hear from him no later than November 1st or his employment would be separated and it would be based on a voluntary resignation due to not returning from a leave of absence. We had never heard from him prior to that date, therefore we separated his employment.

Id.

Credibility and evidentiary weight are determined by the Board, and its findings of fact are conclusive on appeal when the record, in its entirety, contains substantial evidence supporting those findings. *Oliver v. Unemployment Comp. Bd. of Review*, 5 A.3d 432, 438 (Pa. Cmwlth. 2010). The Board credited Employer's witness that neither Claimant nor his wife contacted Employer and we cannot overturn that credibility determination on appeal. *Fitzpatrick v. Unemployment Comp. Bd. of Appeal*, 616 A.2d 110, 111 (Pa. Cmwlth. 1992). Accordingly, we affirm.

BONNIE BRIGANCE LEADBETTER,
Judge

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Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 15th day of October, 2012, the order of the Unemployment Compensation Board of Review is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
Judge