IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Michael L. Kurasz, | : | |
| Petitioner | : | |
| | : | |
| v. | : | |
| Unemployment Compensation | : | |
| Board of Review, | : | No. 1576 C.D. 2014 |
| Respondent | : | Submitted: January 9, 2015 |

OPINION NOT REPORTED

MEMORANDUM OPINION
PER CURIAM FILED: February 4, 2015

Michael L. Kurasz (Claimant), pro se, petitions this Court for review of the Unemployment Compensation Board of Review's (UCBR) August 20, 2014 order affirming the Referee's decision determining Claimant ineligible for Unemployment Compensation (UC) benefits under Section 402(e) of the UC Law (Law).[1] The issues for this Court's review are: (1) whether the UCBR erred by concluding that Claimant engaged in willful misconduct, and (2) whether the UCBR erred by relying upon a non-existent document.[2] Upon review, we affirm.

Claimant entered into a two-year contract with Defense Logistics Agency (Employer) to work as a full-time management analyst/customer service agent in Afghanistan beginning on August 1, 2011.[3] Employer reassigned Claimant on April 7, 2013 from Afghanistan to Philadelphia pursuant to a Return Placement Agreement. Employer discharged Claimant on March 16, 2014. Claimant filed for

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

[2] Claimant raised two additional issues (that the Referee was not sufficiently acquainted with the facts of this case to make her decision, and that she purportedly did not consider whether Claimant working in Philadelphia would be illegal), however, having determined that there was substantial evidence to support the UCBR's decision, we need not address those issues.

[3] DLA is a world-wide supply agency for the United States Department of Defense.

UC benefits. On April 4, 2014, the Erie UC Service Center (UC Service Center) issued a Notice of Determination (Determination) finding Claimant ineligible for UC benefits under Section 402(e) of the Law. Claimant appealed, and a Referee hearing was held on May 16, 2014. On June 10, 2014, the Referee affirmed the UC Service Center's Determination. Claimant appealed to the UCBR and in doing so attached documents presented for the first time for the UCBR's consideration. On August 20, 2014, the UCBR denied Claimant's request to consider his supplemental evidence, adopted the Referee's findings and conclusions, and affirmed the Referee's decision. Claimant appealed to this Court.[4] Employer intervened.[5]

On December 18, 2014, Claimant filed an application to strike portions of Employer's brief (Application to Strike) on the basis of hearsay. On January 1, 2015, Claimant filed a brief "whereby to rest his case and request order for relief of

[4] "Our scope of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether the findings of fact were unsupported by substantial evidence." *Miller v. Unemployment Comp. Bd. of Review*, 83 A.3d 484, 486 n.2 (Pa. Cmwlth. 2014).

Appended to Claimant's petition for review were numerous documents. The UCBR filed a motion to strike the extra-record evidence. By December 3, 2014 order, this Court granted the motion in part and denied it in part. Consequently, Claimant was permitted to produce and argue the admissibility and/or relevancy of Exhibits B (Return Placement Agreement), D1 and D2 (Claimant's January 21, 2013 correspondence to Employer regarding his 2012 end-of-year performance discussion), E (September 26, 2013 letter from John Szalyga, M.D. regarding Claimant's medical status), F (February 20, 2013 Employer letter directing Claimant's Philadelphia re-assignment), G (Employer's February 13, 2013 letter revoking Claimant's security clearance "based on a repeated offense of being [absent without leave (AWOL)] when returning from leave on 21 Dec 2012."), H (Claimant's Chapter 13 Bankruptcy filing), I (Claimant's Chapter 13 Plan) and J (September 27, 2012 reminder that Claimant's bankruptcy payment of $2,346.37 is due on the 16th of each month).

Claimant filed a request for reconsideration of the Court's December 3, 2014 order which this Court denied on December 12, 2014.

[5] The UCBR did not file a brief.

his unemployment compensation funds" (Application to Rest). On January 5, 2015, this Court ordered those applications to be submitted with the merits of this case.[6]

Claimant argues on appeal that the UCBR erred by concluding that Claimant engaged in willful misconduct because Employer failed to make reasonable accommodations for his pre-existing medical condition, plantar fasciitis, and Employer illegally required him to work in Philadelphia. We disagree.

Section 402(e) of the Law provides that an employee will be ineligible for UC benefits 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 . . . ." 43 P.S. § 802(e). Although not defined in the Law, our courts have described "willful misconduct" as:

> (1) a wanton or willful disregard for an employer's interests; (2) a deliberate violation of an employer's rules; (3) a disregard for standards of behavior which an employer can rightfully expect of an employee; or (4) negligence indicating an intentional disregard of the employer's interest or an employee's duties or obligations.

*Phila. Parking Auth. v. Unemployment Comp. Bd. of Review*, 1 A.3d 965, 968 (Pa. Cmwlth. 2010). Employer has the burden of proving willful misconduct. *Palladino v. Unemployment Comp. Bd. of Review*, 81 A.3d 1096 (Pa. Cmwlth. 2013). "When an employee is discharged for violating a work rule, the employer must prove the

[6] Claimant's Application to Strike challenges Claimant's former manager Richard Morrow's (Morrow) veracity and intent relative to information he supplied to Employer's counsel. The certified record does not reflect that Claimant raised this issue before the Referee. Except for a few limited circumstances not relevant here, this Court is prohibited from considering issues not raised before the UCBR. Pa.R.A.P. 1551(a); *see also Chapman v. Unemployment Comp. Bd. of Review*, 20 A.3d 603 (Pa. Cmwlth. 2011). Accordingly, Claimant's Application to Strike is denied.

Claimant's Application to Rest merely re-stated Claimant's arguments on the merits. In light of this Court's holding, Claimant's Application to Rest is denied.

existence of the rule and the fact of its violation." *Lewis v. Unemployment Comp. Bd. of Review*, 42 A.3d 375, 377 (Pa. Cmwlth. 2012).

> Once the employer has established the rule and its violation, the burden shifts to the claimant to demonstrate either that the rule is unreasonable or that good cause existed to violate the rule. Whether a claimant has good cause to violate an employer's rule or policy is a question of law subject to this court's review and should be viewed in light of all of the attendant circumstances.

*Docherty v. Unemployment Comp. Bd. of Review*, 898 A.2d 1205, 1208 (Pa. Cmwlth. 2006) (citation omitted).

"Absenteeism alone, while grounds for discharge, is not a sufficient basis for denial of unemployment benefits." *Runkle v. Unemployment Comp. Bd. of Review*, 521 A.2d 530, 531 (Pa. Cmwlth. 1987). However, absenteeism could constitute willful misconduct if the following elements are present:

> 1. Excessive absences.
>
> 2. Failure to notify the employer in advance of the absence.
>
> 3. Lack of good or adequate cause for the absence.
>
> 4. Disobedience of existing company rules, regulations, or policy with regard to absenteeism.
>
> 5. Disregard of warnings regarding absenteeism.

*Pettey v. Unemployment Comp. Bd. of Review*, 325 A.2d 642, 643 (Pa. Cmwlth. 1974) (quotation marks omitted); *see also Ferko v. Unemployment Comp. Bd. of Review*, 309 A.2d 72 (Pa. Cmwlth. 1973).

At the Referee hearing, Employer's Philadelphia Customer Operations Director William Terry (Terry) testified that Claimant was transferred to Philadelphia. Terry described that Claimant was initially on leave without pay[7]

[7] Claimant had exhausted his paid leave.

beginning June 2013. Terry recalled that Claimant was notified to return to work in September 2013, but instead of returning, Claimant submitted a doctor's note. Employer nevertheless extended his leave, and Claimant was instructed to return to work on January 13, 2014. Terry explained that because Claimant neither contacted Employer nor reported to work by January 13, 2014, Employer notified Claimant that he was discharged effective March 16, 2014 for being AWOL and failing to properly request leave. Notes of Testimony (N.T.) at 8; *see also* N.T. at 7.

Claimant testified that he suffers from plantar fasciitis in both feet, which is alleviated by walking and aggravated by a sedentary job in which he could not get up and walk around approximately 25% of the time. He explained that he resided in Northern Virginia and had been working in Washington, D.C. when Employer contracted with him to work in Afghanistan, where he thought he could walk more. Claimant stated that he understood by his Return Placement Agreement that Employer could place him anywhere in the United States at the conclusion of his two years of foreign service. He further reported that he was aware that if he was unable to secure a job within his priority placement privilege, he would be assigned to Employer's Philadelphia operation. *See* N.T. at 17-18.

Claimant maintained that he was required to work 10 to 12 hours per day in Afghanistan in a sedentary position. He recalled that he was permitted to stand, which made his feet feel better, but "it's still not walking." N.T. at 15. He testified that when Employer refused to give him a job with more leg work and less desk work, he "requested to have [his] priorit[y] placement privilege a few months early so [he] could start looking for another job . . . that would accommodate [his] physical disability." N.T. at 9. He continued: "Instead of doing that, they cancelled my work contract four months early . . . and ordered me to go to another sedentary position in Philadelphia[.]" N.T. at 9. Claimant described that when Employer returned him from Afghanistan to Philadelphia, it revoked his priority placement privilege and his

security clearance, which rendered him unqualified for many federal jobs. He further reported that Employer "threatened to remove [him] from office if [he] did not work there." N.T. at 10. Claimant stated that he nevertheless accepted the Philadelphia assignment in April 2013 "to give it a try." N.T. at 10.

Claimant reported that, in Philadelphia, his immediate supervisor Tim Adams (Adams) permitted him to walk around as necessary, offered him a standing desk and attempted to work out a transfer for Claimant to Washington, D.C. Claimant admitted that he refused the standing desk because "that's not solving the problem." N.T. at 15. Claimant testified that because Employer refused to assure him, in writing, that he would be permitted to walk around 25% of his work time, he verbally asked Adams for a leave of absence. Claimant recalled Adams suggesting that he apply for leave without pay. Claimant's last day at work in Philadelphia was June 30, 2013.

Claimant explained that his leave of absence was not only for medical reasons, but also due to his ongoing Chapter 13 bankruptcy proceeding. He testified that he could not afford to maintain his Virginia home, and that his out-of-pocket living expenses for Philadelphia would violate his bankruptcy order which he claimed prohibited him from spending substantial sums of money. Claimant stated that although Employer paid for his hotel accommodations near its facility for 60 days between April and June 2013, Claimant had to make the initial out-of-pocket payments for which Employer reimbursed him nearly eight months later.[8]

Claimant's transfer to Washington, D.C. did not materialize during the summer of 2013. Claimant argued that his lack of security clearance and priority placement privilege rendered him unable to compete for jobs, which consequently

[8] Claimant stated that walking between his hotel and the Philadelphia office would have alleviated some of his need to walk at work; however, he would need a bodyguard to do so, since the hotel was in an unsafe neighborhood.

resulted in him not obtaining work during that time. Claimant recounted receiving a letter from Employer instructing him to return to work in Philadelphia at the end of September 2013. He recalled telling Adams that he could not return due to his medical condition. Adams requested medical evidence. Claimant asserted that he communicated regularly with Employer by email, submitted medical evidence of his condition and remained on leave through December 2013. He acknowledged that his doctor released him to return to work on December 27, 2013, and that Adams gave him until January 13, 2014 to appear in Philadelphia. Although Claimant admitted that he was able and available to return to work, because he had no income, he could not raise the money to return to Philadelphia as instructed, and he still had not received Employer's written assurance that he would walk around 25% of his work day.

Based upon the evidence presented, the Referee deemed Claimant ineligible for benefits. She recognized that his "initial separation from [Employer] in July 2013 was voluntary; by the time he filed his UC application, however, [Employer] had terminated him," and he failed to "establish good cause for remaining off work from July 1, 2013 forward." Referee Dec. at 2. The Referee declared that although Claimant testified that his chronic medical condition affected his work ability, he did not present sufficient medical evidence that walking and a standing desk were insufficient accommodations. She highlighted the fact that Claimant was aware from the beginning that Philadelphia would be his work site after he returned from Afghanistan, and that Virginia employment was not guaranteed regardless of his placement privilege and security clearance. Finally, the Referee concluded that although Claimant asserted financial difficulty, "he did not present documentary evidence to show that remaining in his job would be more harmful financially than resigning from it." Referee Dec. at 2.

On appeal to the UCBR, Claimant supplied documentation related to his medical condition and bankruptcy. As a matter of law, the UCBR and this Court are prohibited from considering extra-record evidence on appeal. *See* 34 Pa. Code § 101.106; *Umedman v. Unemployment Comp. Bd. of Review*, 52 A.3d 558 (Pa. Cmwlth. 2012). Thus, the UCBR properly refused the supplemental evidence.

The law is well established that:

> [T]he [UCBR] 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. 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. Where substantial evidence supports the [UCBR's] findings, they are conclusive on appeal.

*Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review*, 949 A.2d 338, 342 (Pa. Cmwlth. 2008) (citations omitted). This Court has explained:

> Substantial evidence is relevant evidence upon which a reasonable mind could base a conclusion. In deciding whether there is substantial evidence to support the [UCBR's] findings, this Court must examine the testimony in the light most favorable to the prevailing party, in this case, [Employer], giving that party the benefit of any inferences which can logically and reasonably be drawn from the evidence.

*Sanders v. Unemployment Comp. Bd. of Review*, 739 A.2d 616, 618 (Pa. Cmwlth. 1999).

Based on the testimony, Claimant and Employer agreed that Employer granted Claimant unpaid leave through January 12, 2014, but Claimant failed to report on January 13, 2014 or provide good cause for not doing so. Since Claimant failed to notify Employer in advance of his January 13, 2014 absence, and he lacked good or adequate cause for the absence, he disobeyed Employer's policy, instructions

and warning, thus, his failure to report to work on January 13, 2014 constituted willful misconduct. *Pettey*; *Ferko*. Viewing the evidence in a light most favorable to Employer, as we must, we hold that there was substantial record evidence to support the UCBR's conclusion that Claimant engaged in willful misconduct.

Claimant also argues that the UCBR erred by relying upon a non-existent document (i.e., one that specifically required his return to Philadelphia). We disagree. The UCBR adopted the Referee's findings and conclusions, which were based upon undisputed testimony that Claimant was subject to the Return Placement Agreement, which Claimant signed and placed into the record, under which Employer could direct Claimant to work within the United States, and Claimant's admission that he understood that he would be returned to Philadelphia. Accordingly, the UCBR did not err by relying upon a non-existent document.

Based upon the foregoing, the UCBR's order is affirmed.

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PER CURIAM

O R D E R

AND NOW, this 4th day of February, 2015, the Unemployment Compensation Board of Review's August 20, 2014 order is affirmed. Claimant's application to strike sections of Defense Logistics Agency's brief is denied. Claimant's application to rest his case and request order for relief of his unemployment compensation funds is denied.