IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard G. Beck,	:	
Petitioner	:	
	:	No. 2001 C.D. 2014
v.	:	
	:	Submitted: March 27, 2015
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: June 26, 2015

Richard G. Beck (Claimant) petitions *pro se* for review of the October 7, 2014 order of the Unemployment Compensation Board of Review (Board) affirming a referee's decision and holding that Claimant is ineligible for unemployment compensation benefits pursuant to section 402(e) of the Unemployment Compensation Law (Law).[1] We affirm.

Claimant worked as an environmental services aide for Canterbury Place (Employer) from November 1, 2013, until May 3, 2014. Claimant called off from work on January 7, January 8, February 2, and March 22, 2014. Subsequently,

[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 benefits for any week in which his unemployment is due to his discharge from work for willful misconduct connected with his work.

Claimant was absent and did not call off from work on March 29, March 30, and May 4, 2014.[2] Employer discharged Claimant on May 15, 2014, for violating Employer's attendance policy. (Referee's Findings of Fact Nos. 1-2, 4, 6.)

As the policy specifically provides: "Instances of no call/no show (absent from work for an entire scheduled shift without proper notification as defined by department policy) will continue to be treated as grounds for termination after 2 (two) occurrences unless there is already an accumulation of points and therefore it would result in termination after 1 (one) occurrence." (C.R. Item No. 8, Employer's exhibit 3.) Employer's policy also provides that "[o]rientation period employees will receive one orientation period warning after 3 points are reached according to the above policy. The next two occurrences (2 points) after the orientation period warning is given will result in termination of employment."[3] (C.R. Item No. 8, Employer's exhibit 3.) Under Employer's policy, one "no call/no show" results in an accumulation of nine points. (C.R. Item No. 8, Employer's exhibit 3.)

The local service center found that Claimant had not been warned about his attendance, and, thus, his actions did not constitute willful misconduct. Accordingly, the local service center determined that Claimant was not ineligible for benefits under section 402(e) of the Law. Employer appealed, and a referee held a hearing on August 1, 2014.

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[2] The referee found that Claimant did not report or call off from work on "April 4." (Referee's Finding of Fact No. 4.) However, the referee's discussion, the testimony at the hearing, and Claimant's discharge letter all refer to Claimant's last absence as in "May." (Referee's decision at 2; Certified Record Item No. 3, Referee's exhibit 4; Notes of Testimony at 6, 8.) Thus, it appears that "April" is a typographical error.

[3] The orientation period lasts for an employee's first six months of employment. (C.R. Item No. 8, Employer's exhibit 3.)

Charlene Brown (Brown), Employer's Supervisor of Environmental Services, testified that under Employer's policy, employees are required to either call her or Dean Coroian (Coroian), Employer's Director of Environmental Support Services, at least two hours prior to their shift if they cannot work that day. Brown noted that a text message is not an acceptable method for an employee to call off from work. Brown testified that Claimant did not call off from work on March 29, March 30, and May 4, 2014, and that she did not receive any text messages from Claimant on those days. Brown added that her work cell phone has voicemail and that leaving a voicemail is an acceptable method for employees to call off from work. Brown stated that Claimant never left a voicemail notifying her that he could not come in to work. (Notes of Testimony (N.T.) at 7-9.) Coroian testified that employees may inform him when they cannot make it to work and that he also did not receive any calls or text messages from Claimant on March 29, March 30, or May 4, 2014. (N.T. at 8.)

Cyndy Walsh (Walsh), Employer's Human Resources Manager, testified that, based on Employer's documentation, Claimant had reviewed and was aware of Employer's time and attendance policy. Walsh stated that when an employee does not call off and does not show up for work, that employee receives a final written warning if there are no prior disciplinary measures on the employee's record and is terminated from employment if the employee has a history of disciplinary incidents. She confirmed that Claimant did not call and did not show up for work on March 29, March 30, and May 4, 2014. Walsh further testified that she searched Brown's and Coroian's phones and saw no calls from Claimant even though Claimant gave her highlighted phone records noting his calls to Brown and Coroian. (N.T. at 5-6, 9-10.)

Claimant testified that he tried to call Employer when he could not work but the phone kept ringing and never went to voicemail. Claimant stated that he printed out his phone records and gave them to Walsh as proof that he attempted to call off from work and sent text messages notifying Employer. Claimant testified that he sent a text message to Employer because Employer would not answer the phone, but he acknowledged that a text message was not an appropriate method for notifying Employer that he could not work. (N.T. at 8.)

Claimant added that he spoke to Coroian on the phone after he did not show up for work.[4] Claimant informed Coroian that, because Employer never answered his phone call, he sent a text message to inform Employer that he could not make it to work. Claimant stated that he sent Coroian a copy of the text message upon his request and did not hear back from him after sending it. Claimant added that "most" of his call-offs were legitimate, as he had to care for his sick son. (N.T. at 8-9.)

By decision and order dated August 1, 2014, the referee determined that Employer proved that Claimant did not properly call off from work on March 29, March 30, and May 4, 2014. The referee found the testimony of Employer's witnesses to be credible and noted that both Brown and Coroian testified that they never received a phone call or text message from Claimant informing them that he could not come to work on those days. The referee further noted that Claimant failed to bring documentation of his alleged phone calls and text messages to the hearing. Accordingly, the referee concluded that Claimant was ineligible for benefits under section 402(e) of the Law. Claimant appealed to the Board.

[4] We note that Claimant did not reference the exact date that he spoke to Coroian on the phone.

By decision and order dated October 7, 2014, the Board adopted and incorporated the referee's findings and conclusions, and, thus, affirmed the referee's order. Claimant filed a request for reconsideration of the Board's decision, appending his phone records to the request, which the Board denied. (C.R. Item Nos. 12, 14.)

On appeal to this Court,[5] Claimant argues that the Board's determination that he is ineligible for benefits under section 402(e) of the Law is not supported by substantial evidence.

Initially, we note that, although the Law does not define the term willful misconduct, our courts have defined it as including: "(1) the wanton and willful disregard of the employer's interests; (2) *the deliberate violation of rules*; (3) the disregard of standards of behavior which an employer can rightfully expect from its employee; or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer's interests or the employee's duties and obligations." *Guthrie v. Unemployment Compensation Board of Review*, 738 A.2d 518, 521 (Pa. Cmwlth. 1999) (citing *Kentucky Fried Chicken of Altoona, Inc. v. Unemployment Compensation Board of Review*, 309 A.2d 165, 168-69 (Pa. Cmwlth. 1973)) (emphasis added). The burden of proving willful misconduct rests with the employer. *Guthrie*, 738 A.2d at 521. Whether an employee's conduct constitutes willful misconduct is a question of law subject to this Court's review. *Id.*

An employer seeking to prove willful misconduct based on a violation of a work policy must establish the existence of a reasonable work policy and its

[5] Our scope of review is limited to determining whether constitutional rights have been violated, whether an error of law has been committed, and whether findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704.

violation by the employee. *Id.* at 522. The employer must also establish that the claimant's actions were intentional or deliberate. *Philadelphia Parking Authority v. Unemployment Compensation Board of Review*, 1 A.3d 965, 968 (Pa. Cmwlth. 2010). In addition, where an employer promulgates a specific disciplinary system, it is incumbent upon the employer to follow that system. *PMA Reinsurance Corporation v. Unemployment Compensation Board of Review*, 558 A.2d 623, 626 (Pa. Cmwlth. 1989). Generally, the employer's failure to follow its policy in discharging an employee results in a failure to establish that the discharge was for willful misconduct. *Id.*

Absences alone, although possibly grounds for discharge, do not necessarily constitute willful misconduct. *Vargas v. Unemployment Compensation Board of Review*, 486 A.2d 1050, 1051 (Pa. Cmwlth. 1985). At least one of the following elements must be present to justify the denial of benefits: (1) excessive absenteeism; (2) failure to notify the employer in advance of the absence; (3) lack of good or adequate cause for the absence; (4) disobedience of an employer's policy; or (5) disregard of warnings. *Id.* at 1052. "An employer has the right to expect [its] employee[s] to maintain regular working hours and to comply with office procedures." *Unemployment Compensation Board of Review v. Glenn*, 350 A.2d 890, 892 (Pa. Cmwlth. 1976).

Once the employer meets its burden, the burden of proof shifts to the employee to prove that he had good cause for his actions. *Guthrie*, 738 A.2d at 522. The employee establishes good cause where his actions are justified or reasonable under the circumstances. *Frumento v. Unemployment Compensation Board of Review*, 351 A.2d 631, 634 (Pa. 1976). Whether a claimant has good cause to violate a work policy is a question of law subject to our review and should be viewed in light

of all of the attendant circumstances. *Docherty v. Unemployment Compensation Board of Review*, 898 A.2d 1205, 1208 (Pa. Cmwlth. 2006).

In this case, the referee found the testimony of Employer's witnesses credible and resolved all conflicts in favor of Employer. In unemployment cases, the Board is the ultimate fact-finder, empowered to make all determinations as to witness credibility and evidentiary weight. *Peak v. Unemployment Compensation Board of Review*, 501 A.2d 1382, 1385 (Pa. 1985). We will not disturb the Board's credibility determinations on appeal. *Melomed v. Unemployment Compensation Board of Review*, 972 A.2d 593, 595 (Pa. Cmwlth. 2009). In determining whether substantial evidence supports the Board's decision, this Court must examine the testimony in the light most favorable to the prevailing party, giving that party the benefit of all reasonable inferences that can be logically and reasonably drawn therefrom. *Taylor v. Unemployment Compensation Board of Review*, 378 A.2d 829, 831 (Pa. 1977).

Employer established through its credible testimony and evidence that it had a time and attendance policy, that Claimant reviewed and was aware of the policy, and that Claimant failed to comply with the policy by not calling off from work on March 29, March 30, and May 4, 2014. Contrary to Claimant's repeated assertions, Brown and Coroian both credibly testified that neither received any text messages from Claimant on the days that he did not show up for work. The only justifications that Claimant gave for not reporting or properly calling off from work were that his son was sick and Employer would not answer his phone calls. However, Claimant did not provide the specific dates that his son was sick at the hearing, and he also acknowledged that sending a text message to inform Employer that he cannot work is not an appropriate method for calling off from work.

Because Claimant did not present evidence of his phone records at the hearing, we may not consider them on appeal. *Tener v. Unemployment Compensation Board of Review*, 568 A.2d 733, 738 (Pa. Cmwlth. 1990) (holding that both the Board and this Court are bound by the evidence submitted to the referee and certified in the record on appeal). Based on the evidence in the record, we conclude that the Board properly held that Claimant is ineligible for benefits under section 402(e) of the Law.

Accordingly, we affirm.

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PATRICIA A. McCULLOUGH, Judge

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ORDER

AND NOW, this 26th day of June, 2015, the October 7, 2014 order of the Unemployment Compensation Board of Review is affirmed.

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PATRICIA A. McCULLOUGH, Judge