IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jay A. Ryan Jr.,	:	
Petitioner	:	
	:	
v.	:	No. 626 C.D. 2014
	:	Submitted: October 24, 2014
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED:** January 8, 2015

Jay A. Ryan Jr. (Claimant), representing himself, petitions for review of an order of the Unemployment Compensation Board of Review (Board) denying his claim for unemployment compensation (UC) benefits under Section 402(e) of the Unemployment Compensation Law (Law).[1] The Board determined Cumberland Valley Motors (Employer) discharged Claimant for a violation of its attendance policy after Claimant took a day off work to attend his father's memorial golf tournament despite being specifically denied permission to do so. The Board also determined Claimant's conduct constituted insubordination. Claimant contends the Board erred in finding him ineligible for UC benefits under Section 402(e) because his actions did not rise to the level of willful misconduct. Upon review, we affirm.

[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 states an employee shall be ineligible for compensation for any week in which his unemployment is due to willful misconduct connected to his work.

Background

Claimant worked for Employer as a full-time business manager from October 2012, until his last day of work on August 15, 2013. He worked solely on commission.

Employer had a policy requiring regular attendance of its employees unless they received permission to be off work. Claimant was aware of Employer's attendance policy. In July 2013, Claimant either left work early, or was late to work, every day for a week. In response, Employer gave Claimant a written disciplinary warning regarding his poor attendance.

Thereafter, Claimant sent Employer's president, Monique Ullom (President), an e-mail requesting Employer schedule him off work on August 16, 2013. Claimant indicated he planned to attend his father's memorial golf tournament. President, however, denied Claimant's request on the basis that he had no available vacation time. On August 16, Claimant did not appear for work. Instead, Claimant chose to go to the golf tournament. In response, Employer discharged Claimant for insubordination and poor attendance.

Claimant applied for UC benefits, which the Department of Labor and Industry's (Department) local UC service center denied. Claimant appealed, and the Board issued the parties a notice of a scheduled referee's hearing. See Certified Record (C.R.) at Item #9. Claimant appeared at the hearing and testified. However, Employer did not appear at the hearing.

Although the referee did not find Claimant's testimony credible, he noted Employer had the burden to establish Claimant's actions rose to the level of willful misconduct. Accordingly, the referee issued a decision reversing the Department's initial determination and ruled Claimant not ineligible for benefits under Section 402(e). See C.R. at Item #13 (Referee's Decision/Order, 10/16/13).

Employer timely appealed the referee's order, claiming it did not receive notice of the hearing. Pursuant to a remand order, Claimant and Employer's President appeared and testified regarding the merits of the case and as to whether Employer had good cause for its non-appearance at the initial hearing.

In March 2014, the Board issued a decision finding Employer did not receive notice of the hearing. On the merits, the Board reversed the referee's decision and ruled Claimant ineligible for UC benefits under Section 402(e) of the Law. In explaining its decision, the Board stated:

> The Pennsylvania Courts have held that a deliberate refusal to comply with an employer's rule or policy ordinarily constitutes willful misconduct. The employer must prove the existence of the rule or policy and that it was violated, then the burden shifts to the claimant to prove good cause for the violation or that the policy was unreasonable.
>
> Here, [Employer] bore, and carried, the burden of establishing it had a policy requiring employees to attend work regularly, and that [Claimant] was aware of this policy, having already received verbal and written warnings with regard thereto. Nevertheless, [Claimant] violated the policy deliberately on August 16, 2013, when he took the day off work even after being specifically denied permission by [Employer]. Not only is such conduct a violation of [Employer's] attendance

> policy, but it is insubordination. This is precisely the type of behavior which amounts to willful misconduct as a matter of law. As such, the Board finds and concludes that [Employer] established willful misconduct under Section 402(e) of the Law, rendering [Claimant] ineligible for [UC] benefits.

Accordingly, the Board denied Claimant's request for UC benefits. Claimant petitions for review.[2]

Discussion

Claimant contends the Board erred in ruling him ineligible for UC benefits under Section 402(e) where his actions did not rise to the level of willful misconduct. To that end, Claimant asserts President e-mailed him approval of his request to take the day of August 16, 2013 off to attend his father's memorial golf tournament. Because Employer approved his last absence, Claimant argues his actions did not constitute willful misconduct. See Runkle v. Unemployment Comp. Bd. of Review, 521 A.2d 530 (Pa. Cmwlth. 1987) (where claimant's doctor advised her to remain home with the flu, her last absence could not support a discharge for willful misconduct).

In the present case, the Board made the following findings:

[2] 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. Doyle v. Unemployment Comp. Bd. of Review, 58 A.3d 1288 (Pa. Cmwlth. 2013). Substantial evidence is evidence which a reasonable mind would accept as adequate to support a conclusion. Umedman v. Unemployment Comp. Bd. of Review, 52 A.3d 558 (Pa. Cmwlth. 2012).

> 5. [Claimant] sent an email to [President] requesting that he be scheduled off work on August 16, 2013, so that he could attend a golf tournament.
>
> 6. [President] denied the request.
>
> 7. On August 16, 2013, [Claimant] did not appear at work, choosing instead to go to the golf tournament.

Bd. Op., 3/19/14, Findings of Fact (F.F.) Nos. 5-7.

Initially, we note Claimant failed to specifically challenge any of the Board's findings of fact. As such, they are conclusive on appeal. Steinberg Vision Assocs. v. Unemployment Comp. Bd. of Review, 624 A.2d 237 (Pa. Cmwlth. 1993). Regardless, our review of the record reveals these findings are supported by substantial evidence.

At the second referee's hearing, President testified Employer discharged Claimant for failing to come to work on August 16, 2013 after she denied his request to take that day off. Referee's Hr'g, Notes of Testimony (N.T.), 1/23/14, at 9-11. President also denied ever telling Claimant he could have that day off. Id. at 10. Employer also submitted into evidence Claimant's e-mail requesting the day off and President's reply e-mail, dated July 19, 2013, denying Claimant's request. See N.T., 1/23/14, Employer's Ex. 3.

Claimant, however, submitted into evidence an e-mail message purportedly from President dated August 8, 2013. The e-mail states:

> Jay,

> I have reconsidered your request. You will be off August 16 for your father's golf tournament. Instead, you will work your regularly scheduled day off on Wednesday August 14.

N.T., 1/23/14, Claimant's Ex. C-1.

Further, Claimant testified President told him he could switch these days and attend the golf tournament. N.T., 1/23/14, at 25-26. Claimant also testified President sent him the e-mail message approving the day off. Id. at 26.

To the contrary, President testified on rebuttal as follows:

> Q. That document that's been marked as Claimant Exhibit 1, this email, did you send that email?
>
> A. No, I absolutely did not.

Id. at 30.

As evidenced by its decision, the Board determined Claimant took off work on Friday, August 16, 2013, and attended the golf tournament despite being denied permission to miss work on that day. F.F. Nos. 5-7. The Board reasoned this constituted a violation of Employer's attendance policy and insubordination. Bd. Op. at 2-3.

In UC cases, the Board is the ultimate fact-finder. Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review, 949 A.2d 338 (Pa. Cmwlth. 2008). As such, it is empowered to resolve all issues of witness credibility, conflicting evidence and evidentiary weight. Id. Further, it is irrelevant whether the record

includes evidence that would support findings other than those made by the Board; the proper inquiry is whether the evidence supports the findings actually made. Id. In addition, the party prevailing below is entitled to the benefit of all reasonable inferences drawn from the evidence. Id.

Here, the Board, in making its findings, evidently found President's testimony more credible than Claimant's testimony. Although the Board did not make explicit credibility determinations, it is not required to do so where both parties submitted evidence on the critical issues. Hasely v. Unemployment Comp. Bd. of Review, 553 A.2d 482 (Pa. Cmwlth. 1989). Rather, the Board made an implicit credibility determination when it accepted as fact President's testimony that she denied Claimant's request to take August 16 off, and that he took that day off anyway for the golf tournament.

The Board's denial of benefits is also in accord with applicable law. Our Supreme Court defines willful misconduct 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 Comp. Bd. of Review, 703 A.2d 452 (Pa. 1997). When asserting discharge due to a violation of a work rule, an employer must establish existence of the rule, its reasonableness, and its violation. Lausch v. Unemployment Comp. Bd. of Review, 679 A.2d 1385 (Pa. Cmwlth. 1996).

Here, President testified Claimant violated Employer's policy that an employee report to work when regularly scheduled unless granted permission to be off work. F.F. No. 2; N.T., 1/23/14, at 10-11. This policy is set forth in Employer's handbook, which Claimant acknowledged reading. Thus, Claimant was aware of this policy. F.F. No. 3; N.T., 1/23/14, at 10-11. Nonetheless, Claimant took off work on Friday, August 16, 2013, and attended the golf tournament despite being denied permission to miss work on that day. F.F. Nos. 5-7.

Absenteeism alone does not constitute willful misconduct. Vargas v. Unemployment Comp. Bd. of Review, 486 A.2d 1050 (Pa. Cmwlth. 1985). However, "an employee who [is] absent without permission and without good cause [engages] in willful misconduct, notwithstanding the fact that [he] notified [his] employer in advance that [he] intended to miss work." Smith v. Unemployment Comp. Bd. of Review, 429 A.2d 119, 120 (Pa. Cmwlth. 1980); see also Lee Hosp. v. Unemployment Comp. Bd. of Review, 589 A.2d 297 (Pa. Cmwlth. 1991) (nurse's action in failing to report to work for her weekend shift to study for exams after her employer denied her request for that weekend off, constituted willful misconduct); Hymon v. Unemployment Comp. Bd. of Review, 466 A.2d 275 (Pa. Cmwlth. 1983) (taking two days off after having been denied those days off constituted a disregard of standards of behavior that employer has a right to expect of an employee); White v. Unemployment Comp. Bd. of Review, 450 A.2d 770 (Pa. Cmwlth. 1982) (unjustified absence for even one day is grounds for the denial of benefits).

In accord with the applicable case law, we hold Claimant's decision not to come to work on August 16, 2013, despite being denied permission to take that day off, constitutes willful misconduct.[3] Smith; Lee Hosp.; Hymon; White. Consequently, we discern no error or abuse of discretion by the Board determining Claimant ineligible for benefits under Section 402(e) of the Law. Therefore, we affirm the Board's order.

ROBERT SIMPSON, Judge

[3] As a final note, Claimant does not argue he had good cause to violate Employer's directive to report to work. Nonetheless, Claimant obviously deemed it important to attend his father's annual memorial golf tournament. However, our review of the case law on this issue indicates that Claimant's attendance at an annual family golf tournament does not constitute good cause for violating Employer's directive. Examples of good cause for missing work include: illness, Pennsylvania Liquor Control Board v. Unemployment Compensation Board of Review, 648 A.2d 124 (Pa. Cmwlth. 1994); family emergencies, Maldonado v. Unemployment Compensation Board of Review, 503 A.2d 95 (Pa. Cmwlth. 1986); and, inclement weather, Freedom Valley Federal Savings and Loan v. Unemployment Compensation Board of Review, 436 A.2d 1054 (Pa. Cmwlth. 1981). Attendance at a special annual golf tournament, even one in memory of a family member, does not fall within the category excusing intentional violation of a known work rule.

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O R D E R

AND NOW, this 8th day of January, 2015, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge