

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Oladele Agoro, :
Petitioner :
v. :
: No. 1208 C.D. 2009
: Submitted: February 12, 2010
Unemployment Compensation Board of :
Review, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: March 12, 2010

Oladele Agoro (Claimant) petitions *pro se* for review of the order of the Unemployment Compensation Board of Review (Board) affirming the decision of the Unemployment Compensation Referee (Referee) finding him ineligible for benefits under Section 402(e) of the Unemployment Compensation Law¹ (Law) and denying his request for remand. Discerning no error, we affirm the Board.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e). That section provides in pertinent part:

An employe shall be ineligible for
compensation for any week –

(e) In which his unemployment is due to his
discharge or temporary suspension from work for

(Footnote continued on next page...)

Claimant was employed with Independence Blue Cross (Employer) for approximately six years and was last employed as a customer service representative at the Philadelphia call center. During Claimant's period of employment, Employer had in place a member services policy prohibiting manipulation of the phone system, which included inappropriately placing customers on hold. Claimant received several corrective actions for violating this policy. On November 12, 2008, Claimant's Supervisor found out that he put a customer on hold and then went to use the restroom, which was considered manipulation of the phone system and a violation of Employer's policy. Employer met with Claimant about the incident and he was terminated on December 1, 2008, for this violation.

(continued...)

willful misconduct connected with his work, irrespective of whether or not such work is "employment" as defined in this act.

While the term "willful misconduct" is not specifically defined in the Law, the Supreme Court of Pennsylvania has provided the following definition:

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

Grieb v. Unemployment Compensation Board of Review, 573 Pa. 594, 827 A.2d 422 (2003) (citing *Navickas v. Unemployment Compensation Review Board*, 567 Pa. 298, 787 A.2d 284 (2001)). To show willful misconduct, an employer must present evidence that the employee's conduct was intentional and deliberate, not just that the employee committed a negligent act. *Grieb*, 573 Pa. at 600, 827 A.2d at 426. The court must consider all the facts and circumstances when making this determination, including the employee's proffered reasons for noncompliance.

Claimant filed an unemployment compensation claim alleging his actions did not violate Employer's policy and that he was being targeted. The Department of Labor and Industry's Office of UC Benefits (Department) issued a notice of determination on December 31, 2008, finding Claimant's actions did not show a willful disregard of Employer's interests and did not constitute negligence, therefore he was deemed eligible for benefits under Section 402(e). Employer appealed that determination and a hearing was scheduled before the Referee. Claimant was duly notified of the date, time and location of the hearing, but failed to appear. The Referee stated on the record that the Claimant's Notice of Hearing was not returned as undeliverable and the Claimant had not contacted her to request a postponement, a continuance, or to explain his absence.

Jessica Moyer (Ms. Moyer), HR Business Partner, testified on behalf of Employer that Claimant's employment was terminated for disregard of job assignment because he placed a caller on hold and proceeded to go to the bathroom, which was a violation of Employer's member services manipulation of telephones policy. Claimant's Supervisor at the time of the incident, Sonya Smith-Hardmon (Supervisor Smith-Hardmon), testified that when she returned to the call center floor on November 12, 2008, she noticed Claimant's desk was vacant and that a green light was blinking on his phone, indicating that a caller was on hold. Supervisor Smith-Hardmon could not locate Claimant on the call center floor and then observed him exiting the restroom. She questioned Claimant about the incident, at which time he allegedly admitted that he put a caller on hold before using the restroom because he had to go and could not wait any longer. She also stated that Claimant should have asked the caller if he could research the caller's inquiry and then telephone the caller back or he should have found a supervisor to provide assistance, rather than placing the caller on hold.

Supervisor Smith-Hardmon testified that she previously warned Claimant on September 4 and 12, 2008, because she found him in the lunch room when he should have been handling phone calls. She told Claimant that this behavior was unacceptable. Claimant's personnel file also indicated that a previous supervisor witnessed him at the soda machine while a live call was holding, for which he received a verbal warning and was told that additional instances would result in corrective action, up to and including termination. Supervisor Smith-Hardmon also testified that she distributed Employer's phone manipulation policy to her staff, including Claimant, on at least three different occasions.

The Referee found Claimant ineligible for benefits under Section 402(e) of the Law because his actions were in deliberate violation of Employer's rules and therefore amounted to willful misconduct. She found that Claimant placed a customer on hold and then went to the restroom, without offering to call the customer back or request help from a supervisor in accordance with company procedures. She also found that Claimant was aware or should have been aware of Employer's policy against manipulation of the phone system because the policy was explained during his orientation and he was repeatedly placed on corrective action due to placing customers on hold. Because Claimant was discharged for violating Employer's rules, the Referee reversed the determination of the Department and disapproved Claimant's benefits under Section 402(e). Claimant appealed to the Board, challenging his denial of benefits and requesting a remand because he was sick and unable to attend the hearing before the Referee on February 10, 2009. The Board affirmed the Referee's decision and denied Claimant's request for a remand hearing, finding there was no evidence he made

any effort to inform the Referee of his alleged illness or request a continuance prior to the hearing. Claimant's request for reconsideration was denied and this appeal followed.²

In his brief, Claimant argues that Employer did not have a specific policy or procedure in place regarding the emergency use of the restroom during his period of employment. According to Claimant, he did not violate any of Employer's rules when he placed a caller on hold in order to use the restroom therefore his actions did not amount to willful misconduct and his unemployment compensation benefits should be reinstated. However, Claimant failed to raise this issue or object to any of the Board's specific findings and legal conclusions in his petition for review filed with this Court, as required by Rule 1513(d) of the Pennsylvania Rules of Appellate Procedure.³ Claimant's petition for review contains the following objection to the Board's decision:

I believe the board is in error because on February 10, 2009 I failed to attend the hearing held by the referee because I took ill. I made several attempt's [sic] to contact the referee office by phone call and by email to request for continuance but I never heard

² The Court's scope of review in this matter is limited to determining whether there was an error of law or constitutional violation, whether any practice or procedure of the Board was not followed, and whether the necessary findings of facts were supported by substantial evidence. *Procito v. Unemployment Compensation Board of Review*, 945 A.2d 261 (Pa. Cmwlth. 2008).

³ Rule 1513(d) requires that an appellate jurisdiction petition for review contain, among other things, "a general statement of the objections to the order or other determination." Pa. R.A.P. 1513(d).

from the referee office. Prove [sic] of email was send [sic] to board along with my appeal letter.

This Court has repeatedly declined to consider issues raised in a claimant's brief but not in his petition for review. *Deal v. Unemployment Compensation Board of Review*, 878 A.2d 131 (Pa. Cmwlth. 2005); *Tyler v. Unemployment Compensation Board of Review*, 591 A.2d 1164 (Pa. Cmwlth. 1991). Because Claimant's petition for review makes no mention of his claims that he did not violate Employer's policy and his actions did not amount to willful misconduct, these issues are waived.

The sole argument that Claimant adequately preserves is that the Board erred in denying his request for a remand. Claimant states he became ill the day of the hearing and placed several phone calls and e-mails to the Referee to request a continuance or re-opening, but his requests were allegedly ignored. However, Claimant did not attend the scheduled hearing before the Referee, did not contact the Referee's office prior to the hearing to request a continuance, and did not provide written notice explaining his absence prior to the release of the Referee's decision. The hearing was held on February 10, 2009, but Claimant did not call the Referee's office until the next day, at which time he was told the hearing had already taken place without him. During this phone call he did not inform the Referee's office of his alleged illness, attempt to explain his absence, or request that the proceedings be reopened. This phone call was the only contact Claimant had with the Referee's office. He allegedly sent an e-mail to the Referee the day after the hearing, February 11, 2009, explaining that he was ill and requesting the hearing be reopened. However, Claimant sent the e-mail to the wrong address therefore it was never received. As the party requesting the

continuance, Claimant bore the burden of ensuring the Referee received his e-mail request. The Board has discretion to decide whether or not to grant a request for remand. *Skowronek v. Unemployment Compensation Board of Review*, 921 A.2d 555 (Pa. Cmwlth. 2007). Given all of the above facts, the Board did not abuse its discretion in denying Claimant’s remand request.⁴

Because Claimant made no effort to inform the Referee of his illness and request a continuance before the hearing was held, the Board properly found that Claimant did not present “proper cause”⁵ for remand.

For the foregoing reasons, the Board’s order is affirmed.

DAN PELLEGRINI, Judge

⁴ Claimant filed a Petition for Reconsideration after the Board denied his request for remand, this time alleging that he attempted to contact the Referee’s office on the actual day of the hearing. However, a claimant cannot raise an issue for the first time in a petition for reconsideration if that issue was not previously presented to the Board.

⁵ The Board’s rule of procedure 101.24 governs a request for a remand for the taking of additional evidence by a party who did not attend the scheduled hearing. It provides that the Board may grant such a request for “proper cause.” 34 Pa. Code §101.24.

