

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Leeann C. Campbell, :
Petitioner :
 :
v. : No. 1944 C.D. 2010
 : SUBMITTED: March 18, 2011
Unemployment Compensation :
Board of Review, :
Respondent :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: June 14, 2011

Leeann C. Campbell petitions for review of the order of the Unemployment Compensation Board of Review (Board), which affirmed the order of the Referee denying unemployment compensation benefits because Campbell's appeal was untimely. We affirm.

Campbell was employed as a Registered Nurse by Pinnacle Health System. Campbell was discharged on January 15, 2010, after allegedly posting an inappropriate statement relating to her employment on a publicly accessible page of Facebook.com. Campbell subsequently applied for benefits, and received the Job Center's determination, dated April 13, 2010, that she was ineligible. This determination included a notice that an appeal needed to be filed within fifteen

days, in this case by April 28, 2010. Campbell's appeal was postmarked April 30, 2010.

The Referee held a hearing on the timeliness issue. The only witness at the hearing was Dayasha Pina, a paralegal for Campbell's counsel. Pina testified that her office had received the determination in a timely manner, and that she had prepared an appeal. She further testified that she had attempted to file the appeal by fax on the 26th, but that her three attempts all failed after the fax machine returned a busy signal. On the 28th, the day the appeal was due, she again made three attempts to file via fax, but again received only a busy signal. At this point, she decided to file the appeal by mail. She testified that she prepared the letter late in the day on the 28th and mailed it on the 29th. At all relevant times, Campbell's counsel was on vacation and unreachable. At no point did Pina attempt to file the appeal electronically or in person.

Finding that the filing was late, the Referee dismissed the appeal. On appeal from that determination, the Board affirmed, finding Campbell had failed to establish the non-negligent cause required for permitting a *nunc pro tunc* appeal. An appeal to this court followed.

On appeal, Campbell argues that she has met the requirements for a *nunc pro tunc* appeal. Generally, such an appeal will be allowed in cases of fraud, administrative breakdown on the part of the court, or, as established in *Bass v. Bureau of Corrections*, 485 Pa. 256, 401 A.2d 1133 (1979), the non-negligent conduct of the appellant's attorney or his staff. See *Cook v. Unemployment Comp. Bd. of Review*, 543 Pa. 381, 671 A.2d 1130 (1996). Campbell argues that Pina's testimony establishes that the appeal was late due to the non-negligent conduct of her attorney's staff.

The regulations governing unemployment compensation appeals provide that:

A party filing an appeal by fax transmission is responsible for delay, disruption, interruption of electronic signals and readability of the document and accepts the risk that the appeal may not be properly or timely filed.

34 Pa. Code § 101.82(b)(3)(ii). The very next subsection of the Code, 34 Pa. Code § 101.82(b)(4), dealing with appeals submitted by electronic transmission other than fax transmission, contains substantially similar language. That language was interpreted by this court in *Roman-Hutchinson v. Unemployment Compensation Board of Review*, 972 A.2d 1286 (Pa. Cmwlth. 2009). In that case, the claimant alleged that an appeal had been filed by email prior to the deadline, but it was never received by the Board. The Board did, however, receive the appeal by fax after the deadline had expired. The Board ruled the appeal untimely, and in an appeal to this court, the claimant, like Campbell in this case, invoked *Bass*, arguing that the appeal was late because of counsel's non-negligent conduct. This court ruled that "because the regulation expressly provides that Claimant assumed the risk of an untimely filing when she chose to file her appeal by email, the rationale in *Bass*...is inapplicable here." *Roman-Hutchinson*, 972 A.2d at 1289. Similarly, the risk of untimely filing was assumed by Campbell when her attorney's office attempted to file by fax, and the Board was therefore correct to hold that the requirements for a *nunc pro tunc* appeal had not been met.

Even absent such a regulation, Campbell would not meet the standards for a *nunc pro tunc* appeal. Her attorney's employee did more than assume the risk that a faxed appeal had not gone through; she had actual knowledge that the attempted transmissions had failed. She had ample opportunity

between the three unsuccessful faxes on April 26th to mail the appeal by April 28th if further attempts to fax were unavailing, but she simply failed to make reasonable efforts to insure that the deadline was met.

For all the forgoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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| | : | |
| Respondent | : | |

ORDER

AND NOW, this 14th day of June, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge