

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert Holmes,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2414 C.D. 2010
	:	
Unemployment Compensation Board	:	Submitted: July 8, 2011
of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: August 23, 2011

Robert Holmes (Claimant), pro se, petitions for review of an Order of the Unemployment Compensation Board of Review (Board), which affirmed the Unemployment Compensation (UC) Referee's (Referee) determination finding Claimant ineligible for benefits under Section 402(e) of the Unemployment Compensation Law (Law).¹ The Board determined that Claimant was ineligible for benefits because he committed willful misconduct by using abusive and offensive language and by violating a work rule that prohibited sexual harassment.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 802(e).

Claimant applied for UC benefits after becoming separated from his employment with JBS Packerland, Inc. (Employer). The UC Service Center found Claimant ineligible for benefits pursuant to Section 402(e) of the Law and Claimant appealed. The Referee conducted an evidentiary hearing on July 23, 2010. Those who testified were Claimant, Employer's Post Employment Specialist, and Employer's Supervisor. Based on the testimony and evidence presented at the hearing, the Referee made the following findings of fact:

1. The claimant was last employed with JBS Packerland working on the [k]ill floor^[2] fulltime at a pay rate of \$10.14 per hour. The claimant was employed from September 24, 2007 and his last day of work was May 19, 2010.
2. The employer maintains a policy which prohibits sexual harassment.
3. The claimant was or should have been aware of the employer's policy.
4. The claimant's supervisor spoke to the claimant regarding the claimant's co-worker who complained about the claimant's behavior.
5. The claimant complained to the supervisor, to the foreman and to human resources about the co-worker's behavior.
6. On March 19, 2010, the claimant's co-worker complained that the claimant bothered her.
7. The claimant's co-worker, her supervisor, and the claimant's supervisor approached the claimant.
8. The claimant said to the supervisor, "F--- her," he did not want anything to do with her, "she is a lesbian."

² It appears from the transcript that Claimant worked in a slaughterhouse for Employer.

9. The employer suspended and then discharged the claimant.
10. The claimant violated the employer's work rules.

(Referee Findings of Fact (FOF) ¶¶ 1-10.) The Referee concluded that “[t]he [C]laimant’s conduct clearly rose to the level of disqualifying willful misconduct” and that the “comments made to the supervisor were unsolicited and [Claimant] was not being provoked when he made them.” (Referee Decision/Order at 2.) On appeal, the Board adopted, in whole, the factual findings and the legal conclusions of the Referee. (Board Op. at 1.) Claimant now petitions this Court for review.³

Initially, we note that Claimant’s brief does not comply with various Pennsylvania Rules of Appellate Procedure, which “delineate explicit requirements for writing appellate briefs, as well as the penalty for failing to comply with these rules.” Grosskopf v. Workmen’s Compensation Appeal Board (Kuhns Market), 657 A.2d 124, 125 (Pa. Cmwlth. 1995). However, because this Court can adequately discern most of Claimant’s arguments on appeal, we will conduct appellate review.

On appeal, Claimant argues⁴ that his due process rights were violated because: (1) there was not specific evidence entered into the record showing that

³ This “Court’s review is limited to determining whether constitutional rights were violated, whether an error of law was committed, whether a practice or procedure of the Board was not followed or whether the findings of fact are supported by substantial evidence in the record.” Western & Southern Life Ins. Co. v. Unemployment Compensation Board of Review, 913 A.2d 331, 334 n.2 (Pa. Cmwlth. 2006). Substantial evidence is defined as “such relevant evidence which a reasonable mind would accept as adequate to support a conclusion.” Guthrie v. Unemployment Compensation Board of Review, 738 A.2d 518, 521 (Pa. Cmwlth. 1999).

⁴ We have reordered Claimant’s arguments on appeal for purposes of clarity.

Claimant had made complaints against the co-worker who accused him of sexual harassment; and (2) Employer improperly terminated Claimant.

“It is well settled that the essential elements of due process in an administrative proceeding are notice and an opportunity to be heard.” Groch v. Unemployment Compensation Board of Review, 472 A.2d 286, 287-88 (Pa. Cmwlth. 1984). The rule that governs the procedures of the hearing before referees in unemployment compensation hearings provides:

(a) Where a party is not represented by counsel the tribunal before whom the hearing is being held should advise him as to his rights, aid him in examining and cross-examining witnesses, and give him every assistance compatible with the impartial discharge of its official duties.

(b) The tribunal shall determine the order in which the evidence shall be presented in hearings. Within the discretion of the tribunal, the parties shall be permitted to present evidence and testimony which they believe is necessary to establish their rights.

34 Pa. Code § 101.21. “The referee has a responsibility, therefore, to assist a pro se claimant at a hearing so that the facts of the case necessary for a decision may be adequately developed.” Bennett v. Unemployment Compensation Board of Review, 445 A.2d 258, 259 (Pa. Cmwlth. 1982). In advising a pro se claimant, the referee must “act reasonably in assisting in the development of the *necessary* facts, and any failure to develop an adequate record must be prejudicial to the claimant.” Id. at 260 (emphasis in original).

Claimant’s first argument that he was denied due process because the Referee did not require Employer to present Claimant’s employment records

detailing complaints he made about the co-worker into the record is unavailing. At the hearing, Employer's Post Employment Specialist testified that Claimant could have reported the harassment by his co-worker to human resources in order for Employer to have written documentation, but Claimant never did so. (Hr'g Tr. at 10.) Moreover, if Claimant wanted to submit documents into the record alleging complaints against the co-worker, Claimant had an obligation to bring the documents to the hearing and move to have them entered as evidence into the record. Section 101.31 of the Board's regulations provides that "[t]he issuance of subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda and other records and documents, *may be obtained on application to the Board, referee, or at any local employment office.*" 34 Pa. Code § 101.31 (emphasis added). It was Claimant's burden to subpoena Employer to acquire these documents and enter them into evidence at the hearing. It was not the responsibility of Employer to bring the documents to the hearing, and the absence of these documents does not deprive Claimant of his right to due process in this matter.

Claimant also contends that he was not afforded due process because there was no testimony from other co-workers regarding whether Claimant harassed the co-worker who accused him of sexual harassment. Claimant was informed by the Referee that he had a right to present witnesses and testimony on his behalf. (Hr'g Tr. at 2.) Claimant stated that he understood his rights and did not call additional witnesses to testify on his behalf. (Hr'g Tr. at 2.) If Claimant wanted specific co-workers to testify in his favor, he had an opportunity to subpoena witnesses under

Section 101.31, which Claimant did not pursue. It is not necessary that Claimant's co-workers testify in order for Claimant to be afforded due process.

Finally, Claimant argues that Employer failed to provide him due process of law because Employer improperly terminated him. Specifically, Claimant contends that Employer ignored Claimant's complaints about the co-worker; Employer accused Claimant of sexually harassing the co-worker; and Employer fired Claimant, but not the co-worker whom he accused of harassing him. At the hearing, Claimant testified that he made complaints about the co-worker and that nothing was done about it. (Hr'g Tr. at 8.) The Referee partly credited Claimant's testimony and made a finding that "[t]he [C]laimant complained to the supervisor, to the foreman and to human resources about the co-worker's behavior." (FOF ¶ 5.) In addition, Employer testified that Claimant never filed a formal written complaint against the co-worker with human resources, (Hr'g Tr. at 10), but Claimant's Supervisor admitted that when Claimant orally reported the co-worker, the Supervisor discussed the complaint with the co-worker that same day. (Hr'g Tr. at 8.) The Supervisor also testified that, after the co-worker made complaints about Claimant, Supervisor approached Claimant to discuss the alleged complaint and Claimant said "[f***] her okay that he don't want to do nothing with her because she is a lesbian." (Hr'g Tr. at 7.) Employer further testified that, after Claimant made the inappropriate comments about the co-worker, an investigation was conducted and, subsequently, a decision was made to terminate Claimant. (Hr'g Tr. at 10.) Claimant did not challenge the findings of fact or the implicit credibility determinations that were made by the Referee and adopted by the Board. Thus, the factual findings are binding on appeal. Campbell v.

Unemployment Compensation Board of Review, 694 A.2d 1167, 1169 (Pa. Cmwlth. 1997). A “layperson choosing to represent himself in a legal proceeding must, to some reasonable extent, assume the risk that his lack of expertise and legal training will prove his undoing.” Groch, 472 A.2d at 288.

Claimant’s argument could perhaps encompass a challenge to his due process rights afforded to him before the Referee. If that is the case, we note that due process in an administrative proceeding, here, a hearing before the Referee, provides a litigant with the protection of notice and the opportunity to be heard. Id. at 287-88. In this case, Claimant was sent notice of the hearing and had the opportunity to be heard because he testified before the Referee. The Referee informed the pro se Claimant of his right to counsel, to present witnesses and testimony on his behalf, and to cross-examine Employer’s witnesses. Claimant indicated on the record that he understood his rights during the hearing. (Hr’g Tr. at 2.) In fact, Referee questioned Claimant on the facts of the case and Claimant fully participated in the proceeding. Therefore, Claimant has not shown a violation of due process before the Referee.

For these reasons, we are constrained to affirm the Order of the Board.

RENÉE COHN JUBELIRER, Judge

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ORDER

NOW, August 23, 2011, the Order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge