

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

|                           |   |                              |
|---------------------------|---|------------------------------|
| Clark M. Tyler,           | : |                              |
|                           | : |                              |
| Petitioner                | : |                              |
|                           | : |                              |
| v.                        | : | No. 935 C.D. 2010            |
|                           | : | SUBMITTED: November 19, 2010 |
| Unemployment Compensation | : |                              |
| Board of Review,          | : |                              |
|                           | : |                              |
| Respondent                | : |                              |

**BEFORE:**   **HONORABLE BONNIE BRIGANCE LEADBETTER**, President Judge  
              **HONORABLE DAN PELLEGRINI**, Judge  
              **HONORABLE ROCHELLE S. FRIEDMAN**, Senior Judge

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
PRESIDENT JUDGE LEADBETTER**

**FILED: January 20, 2011**

Clark M. Tyler (Claimant), *pro se*, petitions this court for review of the order of the Unemployment Compensation Board of Review (Board) determining that Claimant was ineligible for unemployment compensation benefits under Section 402(e) of the Unemployment Compensation Law (Law) due to his discharge for willful misconduct.<sup>1</sup> After review, we affirm.

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(e). Section 402(e) provides that an employee shall be ineligible for unemployment compensation benefits where his “unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with” that work.

The Board made the following factual findings. Claimant was employed by the Department of Labor and Industry as a claims interviewer at the Scranton Unemployment Compensation Service Center for nine years with his last day of work being August 24, 2009. Claimant's position required him to take unemployment claims over the phone from claimants seeking to obtain unemployment compensation benefits. Employer provided training to its employees on the proper policies and procedures for dealing with the public, including how to transfer calls to the language line if the caller did not speak English and needed to speak with someone who spoke his own language. The employees were trained to transfer calls either to the language line or to other knowledgeable employees or supervisors in the office.

Employer alleged that Claimant did not follow the proper procedures during a call on July 13, 2009, by failing to maintain control of the call and failing to verify the caller's identity. According to Employer, Claimant's manner was inappropriate and his tone of voice was loud when responding to the caller's representative. Claimant told the representative that the UC Examiner did not want to speak to him. During another call the next day, Claimant failed to transfer a caller who was not speaking English to either the language line or to another employee or supervisor, as required by Employer's procedures. Claimant later stated to Employer that he could have transferred the call but that it was easier for him to take the call himself. The final incident occurred on July 16, 2009, when Claimant again failed to follow procedures and transfer a Spanish-speaking caller to the language line. By letter dated August 24, 2009, Employer notified Claimant that as a result of his continued failure to follow procedures and for inappropriate

behavior in conducting calls with claimants, he was being discharged from his employment.

Claimant applied for unemployment compensation benefits with the Lancaster Service Center, which determined that he was ineligible for benefits under Section 402(e) of the Law. The UC Center found that Claimant was discharged for continually failing to follow procedures and for inappropriate conduct, and that he had previously been disciplined for the same behavior, which resulted in several suspensions. The UC Center also found that Claimant had received training on transferring calls to the language line and that he did not have good cause for his conduct. Claimant appealed, and a hearing was held before the referee at which testimony was taken and documents were submitted into evidence. The Referee concluded that although the record showed that Claimant had a long history of poor work performance, there was insufficient evidence that the final incident constituted willful misconduct. The referee accordingly granted him benefits.

Employer appealed the Referee's decision to the Board. The Board reversed the referee's decision, concluding that Claimant's repeated violations of Employer's policies and procedures led to his discharge. The Board also concluded that Claimant provided no justification or good cause for his actions and thus his conduct constituted willful misconduct, rendering him ineligible for benefits under Section 402(e) of the Law. Claimant's appeal to this court followed.

On appeal, Claimant raises the following issues for our review: 1) whether his discharge was the result of willful misconduct; 2) whether he was denied due process of law when he was not given the chance to rebut Employer's

discharge letter submitted to the Lancaster UC Center; 3) whether he was sexually harassed at the workplace and disciplined by Employer for complaining; 4) whether his constitutional right to free speech was violated by Employer; 5) whether Employer met its burden of proving that the last incident which led to his discharge constituted willful misconduct; and, 6) whether he established good cause for his actions.

The Board argues that Claimant's brief should be quashed and his appeal dismissed for failure to comply with Rule 2119 (a) of the Pennsylvania Rules of Appellate Procedure, Pa. R.A.P. 2119 (a), which states that "[t]he argument shall be divided into as many parts as there are questions to be argued . . . followed by such discussion and citation of authorities as are deemed pertinent." The Board maintains that Claimant's brief contained six issues but only one argument section and that Claimant has failed to support several of his arguments with any supportive authority. In the alternative, the Board argues that this court should only consider those issues raised by the Claimant regarding the substantive issues of willful misconduct and whether he established good cause for his conduct.

It is well settled that when a party fails to properly raise or develop an issue in a brief or when the brief is wholly inadequate to present specific issues for review, a court will not consider the merits thereof. *Boniella v. Commonwealth*, 958 A.2d 1069 (Pa. Cmwlth. 2008), *app. den. Sub nom. In re Taurus Handgun*, 600 Pa. 376, 966 A.2d 551 (2009); *Rapid Pallet v. Unemployment Comp. Bd. of Review*, 707 A.2d 636 (Pa. Cmwlth. 1998); *Smithfield Café v. Unemployment Comp. Bd. of Review*, 660 A.2d 248 (Pa. Cmwlth. 1995). A brief that is not in conformance with the appellate rules is substantially defective and precludes the

court from conducting meaningful review. *Kochan v. Dep't. of Transp., Bureau of Driver Licensing*, 768 A.2d 1186 (Pa. Cmwlth. 2001). It is not the appellate court's function to act as counsel for a *pro se* party. *Id.* However, where the court can discern the argument raised by claimant, and thus review is possible, we will decline to deem the issue waived. *Russell v. Unemployment Comp. Bd. of Review*, 812 A.2d 780 (Pa. Cmwlth. 2002).

In the case *sub judice*, with respect to Claimant's second, third and fourth issues, Claimant presented no analysis of the issues nor provided any citation to any authority whatsoever in support of his arguments. Claimant argued on those issues:

The claimant was denied due process by the Lancaster UC Service Center because he was not give a chance to rebutt [sic] the employer's discharge letter of 8/24/09 . . . This decision is in violation of labor dept. regulation 65.61[,] Opportunity for refutations. "The bureau shall not issue a decision invalidating a claim until the claimant has been given an opportunity to refute any alleged facts or circumstances which are being considered for invalidating his claim[.]"

The claimant was sexually harassed via phone by a claimant on 10/01/08.

. . . .

The employee's right to free speech was violated by his employer . . . The employers [sic] action violate[s] Section 26 of the PA Constitution. ["Neither the Commonwealth nor any political sub-division shall deny to any person the enjoyment of any civil right, nor discriminate any person in the exercise of any civil right.["]

Claimant's Brief, at 8. His arguments amount to nothing more than bald assertions without pointing to any relevant facts or legal authority to support his claim. With

respect to his assertion that he was denied due process by not being able to refute the allegations made in Employer's discharge letter, the record shows that he was afforded the opportunity to refute Employer's discharge letter both when his initial claim was taken, and again in the Claimant Questionnaire submitted to the UC Center. In addition, at the hearing before the referee, Claimant was afforded the opportunity to examine Employer's witnesses with respect to the discharge letter and to give his own testimony in order to dispute or challenge any of the allegations made in the letter. Thus, even assuming that Claimant's brief complied with Rule 2119 (a), Claimant's due process argument is without merit.

With respect to the third and fourth issues raised by Claimant, specifically, that he was sexually harassed over the phone by a caller/claimant and that his first amendment right to free speech was violated, we similarly conclude that these arguments are without merit. As far as we can discern from Claimant's brief and the record before us, these arguments concern issues that arose during the fact-finding investigation conducted by Employer concerning previous incidents of Claimant's misconduct which occurred on October 3, 2007 and October 1, 2008, respectively, for which Claimant eventually received progressive discipline in the form of a three-day suspension and a five-day suspension with final warning.<sup>2</sup> At the hearing before the referee, Employer submitted the fact-finding reports along with the recording of the phone call which prompted the disciplinary action, as well as the accompanying suspension letter from Employer to Claimant.<sup>3</sup> Claimant

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<sup>2</sup> The letter from Employer to Claimant dated October 30, 2008, outlining his five-day suspension, also informed Claimant: "Be advised that this constitutes a final warning. Any future issues of a same or similar nature will result in your dismissal." Hearing of December 10, 2009, Employer's Exhibit 1.

<sup>3</sup> Employer submitted a total of five reports, including the compact disc recording of the phone call, the fact-finding investigation, and the disciplinary letters to Claimant. These reports  
**(Footnote continued on next page...)**

did not object to the admission of these documents. Claimant fails to explain how the disciplinary actions taken by Employer in the past or his allegation of sexual harassment is related to the issue of whether he committed willful misconduct or had good cause for his conduct.<sup>4</sup> Claimant's failure to develop these arguments prevents meaningful review by this court. Therefore, those issues are waived for purposes of this appeal.

Next, Claimant asserts that the Board erred in concluding that his conduct constituted willful misconduct. He argues that the following findings of fact made by the Board are not supported by evidence. The Board found:

8. When the [Claimant] answered a call on July 14, 2009, the [caller] was not speaking English. The [Claimant] failed to follow the appropriate procedure of transferring the [caller] to the language line and instead told the [caller] "no they are all busy or you would have got one." The [Claimant] inappropriately took the

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**(continued...)**

show that on August 24, 2006, and again on July 19, 2007, Claimant received a one-day suspension; a three-day suspension on November 5, 2007, and a five-day suspension with final warning on October 30, 2008. Finally, Claimant was discharged by Employer on August 24, 2009. *See* Hearing of December 10, 2009, Employer's Exhibits 1-5.

<sup>4</sup> Claimant testified at the hearing that during the October 1, 2008 phone call which resulted in his five-day suspension, both the caller and her boyfriend sexually harassed him when he tried to explain why the caller's check had not arrived, stating that after he told the caller she would get her check the next day, the caller and her boyfriend used expletives. Claimant testified that, "if they're using that kind of language and I'm offended by it, yes I do [consider that to be sexual harassment]." Hearing of December 10, 2009, Notes of Testimony (N.T.), at 12. With respect to the freedom of speech issue, the only thing Claimant points to comes from the fact-finding report regarding the October 3, 2007 phone call during which he discussed his personal political views with the caller and was otherwise inappropriate. In response to Employer's reprimand that it was inappropriate to discuss such matters with a caller, Claimant stated, "we do still have free speech in this country, don't we?" Hearing of December 10, 2009, Employer's Exhibit 5. Other than these bald assertions, Claimant offers no reasoned argument or legal authority to support the merits of these contentions.

[caller] in English instead of transferring the [caller]. During the fact-finding on this matter, when asked [Claimant] responded by stating that it was easier for him.

....

12. The [Claimant] alleges that he was verbally provoked which caused his actions and that he did not transfer because another individual was calling on behalf of the [caller], who was not clear with the English language and certainly not fluent.

13. The [Claimant] was perfectly able to make the transfer for the individual and failed to do so because it was easier to handle it himself.

14. The [Claimant] performed the policy violations for which he was discharged and has not justified his behavior.

Board's Findings of Fact Nos. 8 and 12-14.

Claimant argues that if the caller on July 14, 2009 was not speaking English and he could not speak Spanish, then it was unreasonable for Employer to expect him to take the caller's claim in English. Claimant also asserts that it is "common practice at the worksite to help a claimant if their English is not that good." Claimant's Brief, at 8. The Board counters that Claimant had been trained on the correct procedures to follow when a caller did not speak English and that Claimant deliberately failed to comply with those procedures.

Willful misconduct is defined as an act of wanton or willful disregard of an employer's interests; a deliberate violation of its rules; a disregard of the standards of behavior that an employer has the right to expect of an employee; or negligence that indicates an intentional disregard of an employer's interests or a disregard of the employee's duties and obligations to the employer. *Dep't. of*



*Transp. v. Unemployment Comp. Bd. of Review*, 755 A.2d 744 (Pa. Cmwlth. 2000). In order for an employer to prove willful misconduct based on a violation of a work rule or policy, the employer must show the existence of the work rule or policy, and that it was violated. *Walsh v. Unemployment Comp. Bd. of Review*, 943 A.2d 363 (Pa. Cmwlth. 2008). Finally, a determination of whether the employee's actions constitute willful misconduct requires a consideration of all the circumstances, "including the reasons for the employee's noncompliance with the employer's directives." *Rebel v. Unemployment Comp. Bd. of Review*, 555 Pa. 114, 117, 723 A.2d 156, 158 (1998) (citation omitted). Whether a claimant's conduct rises to the level of willful misconduct is a question of law subject to this court's plenary review. *Frazier v. Unemployment Comp. Bd. of Review*, 833 A.2d 1181 (Pa. Cmwlth. 2003).

Employer's witness, Judith Calogero, a Program Analyst II, testified that she trained Claimant on the new phone system and how to transfer non-English speaking callers to the language line. Ms. Calogero testified that the training included that calls could be transferred to other people in the office including supervisors, and that at no time was the Claimant told that he should not transfer any calls. Hearing of December 10, 2009, N.T. at 7-8. Finally, Ms. Calogero testified that while there were problems with the language line for the first two days it was operating, the problems were fixed and all employees were notified by e-mail. *Id.*

Claimant testified that he thought he did follow the proper procedure when handling the caller on July 14, 2009, and that he thought they were having problems with the language line at the time. Although the fact-finding report indicates that Claimant told Employer that the reason he did not transfer this caller

on July 14, 2009 to the language line was because it was easier for him not to do so, Claimant denied making such a statement at the hearing.

There is substantial evidence of record to support the Board's finding that Claimant "failed to follow the appropriate procedure of transferring the [caller] to the language line . . . ." Board's Decision and Order, Finding of Fact No. 8. Not only did Employer's witness testify that Claimant had been trained on how to transfer non-English speaking callers, Claimant did not deny that he failed to transfer the call on July 14, 2009 as Employer alleged. The record establishes that Claimant was aware of the procedure and admittedly failed to follow it. Such conduct constitutes willful misconduct.

Elaine Minier, Initial Claims Manager, testified as to the three specific incidents that led to Claimant's discharge and were set forth in Employer's discharge letter to Claimant. In these calls, which took place on July 13, 14 and 16, 2009, Ms. Minier testified that Claimant was rude, argumentative, and that he did not follow the proper procedure to first identify the caller and also for transferring the non-English speaking caller to the language line. Ms. Minier also testified that Employer followed a course of progressive discipline that included counseling in 2005, verbal and written warnings in 2006, and various suspensions. N.T. at 4. Claimant's last suspension was accompanied by a final written warning advising him that any further misconduct would result in his discharge.

The evidence presented by Employer amply supports a finding of willful misconduct by Claimant. This evidence includes the testimony of Employer's witnesses who detailed the phone calls in which Claimant was rude, did not follow procedures for taking claims and did not follow procedures for transferring non-English speaking callers. Employer established that Claimant had

been trained in the use of the language line and was aware of its policy to transfer non-English speaking callers to either the language line or to another knowledgeable person or supervisor in the office. Moreover, Employer submitted documentation of Claimant's previous misconduct and resulting disciplinary action, which documents were admitted without objection by Claimant. This evidence consisted of fact-finding meetings conducted by Employer with Claimant in order to review Claimant's behavior with him, give him the chance to explain his conduct and reiterate the proper rules and procedures for handling difficult or non-English speaking claimants and representatives. Finally, Claimant admitted that he failed to transfer the calls as required under the policy, with the only justification offered was that he thought there was a problem with the language line.

Accordingly, having concluded that the Board's decision is amply supported by substantial evidence of record, we affirm the order of the Board.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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| Clark M. Tyler,           | : |                   |
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| Petitioner                | : |                   |
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| v.                        | : | No. 935 C.D. 2010 |
|                           | : |                   |
| Unemployment Compensation | : |                   |
| Board of Review,          | : |                   |
|                           | : |                   |
| Respondent                | : |                   |

**ORDER**

AND NOW, this 20th day of January 2011, the order of the Unemployment Compensation Board of Review in the above captioned matter is hereby AFFIRMED.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge