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NO. COA08-608

NORTH CAROLINA COURT OF APPEALS

Filed: 17 March 2009

IN THE MATTER OF:

WARREN R. FOLLUM

Petitioner,

v.

Wake County

No. 07 CVS 016476

N.C. STATE UNIVERSITY AND
RALEIGH

Court of Appeals

and

EMPLOYMENT SECURITY COMMISSION
OF NORTH CAROLINA,

Respondents.

Slip Opinion

Appeal by Petitioner from judgment entered 1 February 2008 by Judge A. Leon Stanback, Jr. in Wake County Superior Court. Heard in the Court of Appeals 17 November 2008.

Warren R. Follum, Pro Se, Petitioner-Appellant.

Thomas S. Whitaker, Chief Counsel, by Regina S. Adams, for Respondent-Appellee Employment Security Commission of North Carolina.

STEPHENS, Judge.

I. Facts and Procedure

On or about 14 March 2007, Petitioner Warren R. Follum was discharged from his employment as a project manager at North Carolina State University ("NCSU"). On 29 April 2007, Petitioner

filed an initial claim for unemployment insurance benefits with the Employment Security Commission of North Carolina ("Commission"). A Commission adjudicator determined that, pursuant to N.C. Gen. Stat. § 96-14(2), Petitioner was disqualified from receiving unemployment benefits for the duration of his unemployment as he had been "discharged [from employment] for misconduct connected with [his] work."

Petitioner appealed this determination to the Commission on 6 June 2007. A hearing before an Appeals Referee was held during which testimony and other evidence was received from Petitioner and three witnesses for NCSU. On 20 July 2007, the Appeals Referee issued a decision modifying the adjudicator's decision and determining that, pursuant to N.C. Gen. Stat. § 96-14(2a), Petitioner was disqualified from receiving unemployment benefits for a period of nine weeks beginning 29 April 2007 as he was "discharged [from employment] for substantial fault on his part connected with work."

Petitioner appealed the decision of the Appeals Referee to the Commission. After reviewing the record evidence and briefs submitted by the parties, the Commission, by and through its Chairman Harry E. Payne, Jr., affirmed the decision of the Appeals Referee on 13 September 2007.

Petitioner filed a Petition for Judicial Review in the Superior Court of Wake County on 12 October 2007. The matter was heard by the Honorable A. Leon Stanback, Jr. on 28 January 2008.

By judgment entered 1 February 2008, the trial court affirmed the Commission's decision.

From the trial court's judgment affirming the Commission's decision, Petitioner appeals to this Court.

II. Motion to Dismiss

We first address Respondent's motion to dismiss Petitioner's appeal for violations of North Carolina Rules of Appellate Procedure 28(b)(5) and (6). Respondent argues that Petitioner failed to include a full and complete statement of the facts in his brief, failed to refer in his arguments to the particular assignments of error corresponding to each argument, and asserted arguments in his brief which were not the subject of assignments of error.

Petitioner filed a Motion to Amend the Record on Appeal and Petitioner's Brief which set out the assignments of error corresponding to the questions presented. Such motion was granted by this Court on 4 September 2008, thus curing one of Petitioner's rule violations.

A review of Petitioner's brief reveals that his statement of facts contains legal arguments in addition to facts, in violation of N.C. R. App. P. 28(b)(5). Additionally, in his brief Petitioner argues outside the record on appeal, in violation of N.C. R. App. P. 28(b)(6). However, these violations do not "impede comprehension of the issues on appeal or frustrate the appellate process[.]" *State v. Hart*, 361 N.C. 309, 312, 644 S.E.2d 201, 203 (2007) (quotation marks and citation omitted), and thus do not rise

to the level of a "substantial failure" to comply with the rules. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 366 (2008). Accordingly, these violations do not warrant dismissal of Petitioner's appeal. Respondent's motion to dismiss is denied.

III. Administrative Remedies

By Petitioner's first two arguments, he asserts that his employer did not meet its burden of proving "just cause" for the adverse actions taken against him pursuant to N.C. Gen. Stat. § 126-35, and that Respondent's dismissal notice did not meet the specificity requirements of N.C. Gen. Stat. § 126-35.

Petitioner is a career State employee as defined in N.C. Gen. Stat. § 126-39. The State Personnel Act, enacted in Chapter 126 of the North Carolina General Statutes, provides that a career State employee shall not be discharged "except for just cause[,]" and that in the event of discharge, the employee must be furnished with a written statement of the acts or omissions which led to such action. N.C. Gen. Stat. § 126-35 (2007). Thereafter, the discharged employee may appeal to the head of the department from which the employee was discharged. *Id.* Furthermore, Section 126-34 requires any career State employee having a grievance arising out of his employment to discuss the grievance with his supervisor and then to "follow the grievance procedure established by [his] department or agency." N.C. Gen. Stat. § 126-34 (2007). An employee who has met the prerequisites of Section 126-34 and who remains dissatisfied with the final decision of his department may

appeal to the State Personnel Commission. N.C. Gen. Stat. § 126-37(a) (2007). To do so, the employee must "file in the Office of Administrative Hearings a contested case under Article 3 of Chapter 150B of the General Statutes." N.C. Gen. Stat. § 126-34.1 (2007). A contested case hearing, presided over by an Administrative Law Judge ("ALJ"), is held in which the parties are afforded the opportunity to present physical evidence and to examine and cross-examine witnesses. *N.C. Dept. Of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 657, 599 S.E.2d 888, 893 (2004). After the ALJ issues a decision, either party is entitled to pursue an administrative appeal by filing exceptions and written arguments with the State Personnel Commission. *Id.* Upon review of the parties' arguments and the material in the official record, the State Personnel Commission may make a final agency decision. N.C. Gen. Stat. §§ 126-4.1, 150B-36, 150B-37 (2007). Thereafter, either party aggrieved by the final decision of the State Personnel Commission is entitled to judicial review of the decision in superior court. N.C. Gen. Stat. §§ 126-37(b2), 150B-43 (2007). Either party may then seek further review of the trial court's decision in the appellate division. N.C. Gen. Stat. § 150B-52 (2007).

In *Stevenson v. Dept. of Ins.*, 31 N.C. App. 299, 229 S.E.2d 209, *cert. denied*, 291 N.C. 450, 230 S.E.2d 767 (1976), *overruled in nonpertinent part by Occaneechi Band of the Saponi Nation v. N.C. Comm'n of Indian Affairs*, 145 N.C. App. 649, 551 S.E.2d 535 (2001), this Court held that a party must exhaust his

administrative remedies before he seeks judicial review under Chapter 150A¹ of the General Statutes. However, a state employee who asserts a civil rights violation under 42 U.S.C. § 1983 for his wrongful dismissal need not exhaust administrative remedies before applying to the Superior Court for preliminary injunctive relief. *Williams v. Greene*, 36 N.C. App. 80, 243 S.E.2d 156, *appeal dismissed and disc. review denied*, 295 N.C. 471, 246 S.E.2d 12 (1978).

In this case, Petitioner has not alleged that his civil rights were violated. Furthermore, there is no evidence in the record that Petitioner followed NCSU's internal grievance procedures, appealed his dismissal to the head of the department, or subsequently appealed to the State Personnel Commission. This case concerns only Petitioner's application for unemployment benefits and his dissatisfaction with the Commission's determination of that application. Additionally, although Petitioner argues that the trial court erred in concluding that Respondent met its burden of proving "just cause" as required by N.C. Gen. Stat. § 126-35 or that Respondent's dismissal met the specificity requirements of N.C. Gen. Stat. § 126-35, neither the Commission nor the trial court addressed these issues. On the contrary, the Commission and, in turn, the trial court, solely considered Petitioner's entitlement to benefits under Chapter 96. As Petitioner was required to exhaust his administrative remedies with respect to his

¹ Chapter 150A was recodified as Chapter 150B, effective 1 January 1986.

arguments concerning Chapter 126, but failed to do so, this Court may not pass on Petitioner's assignments of error pertaining to these issues. These assignments of error are thus dismissed.

IV. Unemployment Benefits

By Petitioner's final argument, he asserts that the trial court erred in denying his claim for full unemployment insurance benefits.

The standard of review for this Court in reviewing an action of the Employment Security Commission is governed by N.C. Gen. Stat. § 96-15 which provides:

In any judicial proceeding under [the unemployment insurance statutes], the findings of fact by the Commission, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law.

N.C. Gen. Stat. § 96-15(i) (2007). "Accordingly, this Court, like the superior court, will only review a decision by the Employment Security Commission to determine whether the facts found by the Commission are supported by competent evidence and, if so, whether the findings support the conclusions of law." *Davis v. Britax Child Safety, Inc.*, 163 N.C. App. 277, 281, 593 S.E.2d 97, 101 (2004) (quotation marks and citation omitted).

In determining issues of fact in cases involving contested claims for unemployment insurance benefits, the Commission is the ultimate judge of the credibility of the witnesses, and of the weight to be given their testimony. *Williams v. Burlington Indust., Inc.*, 318 N.C. 441, 447, 349 S.E.2d 842, 846 (1986).

Where, as here, no exception has been made to the Commission's findings of fact, those findings are presumed to be supported by competent evidence and are binding on appeal. *Hagan v. Peden Steel Co.*, 57 N.C. App. 363, 364, 291 S.E.2d 308, 309 (1982). Thus, our review in this case is limited to whether the Commission's findings of fact support the Commission's conclusion that Petitioner was disqualified from receiving unemployment compensation for a period of nine weeks. *Id.*

N.C. Gen. Stat. § 96-14 provides that an individual shall be disqualified for benefits

[f]or a period of not less than four nor more than 13 weeks . . . if it is determined by the Commission that such individual is, at the time the claim is filed, unemployed because he was discharged for substantial fault on his part connected with his work not rising to the level of misconduct. Substantial fault is defined to include those acts or omissions of employees over which they exercised reasonable control and which violate reasonable requirements of the job but shall not include (1) minor infractions of rules unless such infractions are repeated after a warning was received by the employee, (2) inadvertent mistakes made by the employee, nor (3) failures to perform work because of insufficient skill, ability, or equipment.

N.C. Gen. Stat. § 96-14(2a) (2007). "An employee has 'reasonable control' when she has the physical and mental ability to conform her conduct to her employer's job requirements." *Lindsey v. Qualex, Inc.*, 103 N.C. App. 585, 590, 406 S.E.2d 609, 612, *disc. review denied*, 330 N.C. 196, 412 S.E.2d 57 (1991).

The Appeals Referee made the following relevant findings of fact, which the Commission concluded were supported by competent and credible evidence and adopted as its own:²

3. [Petitioner] was discharged from [his] job due to unacceptable personal conduct.

4. During a series of three meetings Terry Lomax, Dean, found [Petitioner] exhibited escalating levels of rudeness. The subject of these meetings was a building project for Winslow Hall. [Petitioner] and Dean Lomax were involved in the project.

5. Dean Lomax and others asked questions about a staircase, ventilation systems, and walkways. When Dean Lomax began to ask questions or address any of these issues, [Petitioner] would interrupt her, raise his voice, state the issue was not on the agenda and could not be discussed. Dean Lomax was never provided an agenda prior to the meetings to know what the topics of discussion for the meeting would be. [Petitioner] was not responsible for providing the agendas but he never informed Dean Lomax of that fact or who was responsible.

6. Dean Lomax found [Petitioner's] tone of voice and loudness to be embarrassing and unprofessional as there were attendees to the meeting who were outside personnel such as contractors and architects.

7. After the third meeting in which [Petitioner] continued to interrupt and rudely address Dean Lomax, Dean Lomax reported [Petitioner's] behavior. Carol Acquesta, Director of Capital Project Design, was informed that Dean Lomax and others were upset with [Petitioner's] behavior in the third meeting. Ms. Acquesta spoke to [Petitioner] to get his account of the meeting. Ms.

² The Commission made the following clerical modifications to the Appeals Referee's findings of fact: "In FINDING OF FACT 8, line 2 - Delete 'in appropriate' and substitute 'inappropriate', [sic] and in line 3 Delete 'feels he.'"

Acquesta then spoke to Dean Lomax and others present at the meeting.

8. After speaking to Dean Lomax[,] Ms. Acquesta spoke to [Petitioner] and again relayed what she had learned and asked [Petitioner] for his perspective. [Petitioner] did not feel his behavior was inappropriate. [Petitioner] speaks loudly naturally and has a rough voice.

9. [Petitioner] had received two prior warnings from his former supervisor. Both warnings were for unacceptable personal conduct. The first warnings occurred on August 2, 2006 and August 25, 2006. [Petitioner] denied the allegations in both warnings and presented his version of what occurred to his supervisor but the warnings remained part of [Petitioner's] record.

10. Employer has a disciplinary policy which provides for the immediate dismissal of an employee who engages in unacceptable personal conduct. No prior warnings have to be issued before dismissal for this violation. This policy is provided to employees in an employee handbook and on employer's intranet.

11. [Petitioner was] then discharged due to his behavior in the meeting with Ms. Lomax.

Based on these findings of fact, the Appeals Referee concluded, and the Commission affirmed such conclusion, "that [Petitioner] was discharged for engaging in rude behavior directed to colleagues during a meeting. As such, the [Petitioner] was discharged for substantial fault on his part connected with the work." The Commission thus determined that Petitioner was disqualified for unemployment benefits for a period of nine weeks.

The Commission's unchallenged findings support its conclusion of law that Petitioner was discharged for substantial fault connected with his employment, and the conclusion of law sustains

the Commission's decision. Accordingly, Petitioner's disqualification for unemployment benefits for a period of nine weeks pursuant to N.C. Gen. Stat. § 96-14(2a) was appropriate and the trial court did not err in affirming the Commission's decision.

AFFIRMED.

Chief Judge MARTIN and Judge WYNN concur.

Report per Rule 30(e).