

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

August Tittel, Jr., :
Petitioner :
v. : No. 1173 C.D. 2011
Unemployment Compensation : Submitted: November 4, 2011
Board of Review, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: December 21, 2011

August Tittel, Jr. (Claimant) petitions *pro se* for review of an order of the Unemployment Compensation Board of Review (Board) affirming an order of a Referee denying benefits to Claimant pursuant to Section 402(e) of the Unemployment Compensation Law (Law).¹ We affirm.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(e). Section 402(e) reads:

Ineligibility for compensation

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 willful misconduct connected

(Continued....)

The following are the facts as adopted by the Board in this matter, which facts have not been challenged by Claimant.² Claimant worked for Giant Food Stores (Employer) as a full time lead receiver. On December 13, 2010, Claimant was preparing to unload two delivery trucks when he discovered that the power jacks available to him to unload the deliveries had not been charged from the previous night. Claimant's Night Manager, who was responsible to insure that the jacks had been previously charged, volunteered to help Claimant manually unload the trucks, with the further assistance of a meat room employee.

Claimant felt it inappropriate that his Night Manager would unload trucks when other employees were available to assist. Accordingly, Claimant walked away from the delivery receiving area and into the meat department, where he approached three other employees. Claimant was agitated, and used profanity on two separate occasions while speaking to the three meat room employees. Approximately eight to ten months prior to the incident in question, Claimant had

with his work, irrespective of whether or not such work is "employment" as defined in this act[.]
43 P.S. §802(e).

² The Board's findings of fact are conclusive on appeal, where a claimant has failed to make any challenge to any specific findings of fact. Campbell v. Unemployment Compensation Board of Review, 694 A.2d 1167 (Pa. Cmwlt. 1997).

been warned about his use of profanity, and had been advised that his job would be in jeopardy if it happened again.

A customer service representative overheard Claimant's use of profanity, and reported the incident to the Store Manager. On the same day as the incident and concomitant reporting to the Store Manager, that Manager suspended Claimant and informed him that he may be discharged as a result of his use of profanity.

At the beginning of January 2011, Claimant met with his District Manager, Store Manager, and a Human Resources representative to be afforded an opportunity to present his case. Claimant stated that he used profanity because he was provoked beyond a reasonable point and he suffered from post-traumatic stress disorder. At the January, 2011 meeting, Claimant was discharged due to his use of profanity in the workplace.

Claimant thereafter applied for benefits under the Law at the Lancaster Unemployment Compensation Service Center. By Determination dated January 4, 2011, the UC Center ruled Claimant ineligible for benefits pursuant to Section 402(e) of the Law. Claimant appealed, and a hearing before the Referee ensued.

At the hearing, Claimant appeared *pro se*, and Employer failed to appear. The Referee reviewed the documents before him in the matter with

Claimant, and entered them into evidence without objection by Claimant. Claimant then testified, *inter alia*, as to the facts as surmised above, and the hearing ended.

By Decision and Order dated March 4, 2011, the Referee denied Claimant's benefits pursuant to Section 402(e) of the Law. The Referee concluded:

Since the [C]laimant was discharged, the [E]mployer has the burden of establishing that the discharge was for willful misconduct in connection with the [C]laimant's work in accordance with Section 402(e) of the Law.

The Courts have consistently held that profanity, even in a single incident, is willful misconduct if unjustified, unprovoked, and unnecessary or uncalled for, under the circumstances.

In this case, the [C]laimant had been previously warned about the use of profanity in the workplace. The [C]laimant testified that the profane language used was provoked; however, the intentional act of leaving the receiving area to approach three individuals in a separate department displays unnecessary intent. The individuals, in whom the [C]laimant directed his profanity toward, were not directly involved in the issues that prompted the [C]laimant to use the profane language. Therefore, the [C]laimant's behavior disregarded the reasonable expected standards of behavior, which the [E]mployer has the right to expect, and benefits were properly denied.

Referee Opinion at 2. Accordingly, the Referee denied benefits.

Claimant appealed to the Board, which adopted and incorporated the Referee's findings and conclusions, and affirmed by order dated April 27, 2011. Claimant now petitions for review of the Board's order.³

Claimant has failed to present this Court with any Statement of Questions Involved, in violation of Pennsylvania Rule of Appellate Procedure 2116(a).⁴ Such a failure constitutes a waiver of all issues.⁵ Glatfelter Barber Shop

³ This Court's scope of review of the Board's order is set forth in Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704, which provides that the Court shall affirm unless it determines that the adjudication is in violation of the claimant's constitutional rights, that it is not in accordance with law, that provisions relating to practice and procedure of the Board have been violated, or that any necessary findings of fact are not supported by substantial evidence. See Porco v. Unemployment Compensation Board of Review, 828 A.2d 426 (Pa. Cmwlth. 2003).

⁴ Rule 2116(a) reads, in relevant part:

Statement of Questions Involved

(a) General rule. The statement of the questions involved must state concisely the issues to be resolved, expressed in the terms and circumstances of the case but without unnecessary detail. The statement shall be no more than two pages and will be deemed to include every subsidiary question fairly comprised therein. **No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby.** Each question shall be followed by an answer stating simply whether the court or government unit agreed, disagreed, did not answer, or did not address the question...

Pa.R.A.P. 2116(a) (emphasis added.)

⁵ Notwithstanding Claimant's waiver, we note that the issues that can be gleaned from the remainder of his brief are without merit. Claimant's argument that Employer's failure to appear before the Referee resulted in Employer's failure to satisfy its burden to show willful misconduct ignores Claimant's own testimony, which establishes that Claimant's use of profanity disregarded the standards of behavior which an employer can expect from his employee. See

(Continued....)

v. Unemployment Compensation Board of Review 957 A.2d 786 (Pa. Cmwlth.), petition for allowance of appeal denied, 599 Pa. 712, 962 A.2d 1198 (2008) (issues argued but not raised in the Statement of Questions Involved are waived for purposes of appellate review).

Accordingly, we affirm.⁶

JAMES R. KELLEY, Senior Judge

Moore v. Unemployment Compensation Board of Review, 578 A.2d 606 (Pa. Cmwlth. 1990) (Even where an employer fails to appear at hearing on denial of unemployment compensation benefits on ground of willful misconduct, and thus does not meet its burden of establishing willful misconduct, benefits may be denied if the claimant seeking benefits proves employer's case via his or her own testimony). Despite his brief assertion to the contrary, there is no evidence of record whatsoever that Claimant was provoked to such a level as to justify his use of profanity, especially in light of Claimant's testimony that he had been previously warned about such use in the workplace. "An employee's use of abusive, vulgar or offensive language evidences a disregard of standards that an employer can rightfully expect of its employees." Leone v. Unemployment Compensation Board of Review, 885 A.2d 76, 81 (Pa. Cmwlth. 2005).

Even in the absence of Claimant's dispositive waiver of his issues in this appeal, the Board did not err in affirming the Referee, given Claimant's own testimony, and history, in this matter.

⁶ While this Court is cognizant of, and sympathetic to, the frequent necessity and incumbent difficulty of *pro se* representation by unemployed claimants in matters such as this, it is axiomatic that a layperson who chooses to represent himself in a legal proceeding must assume the risk that his lack of expertise and legal training may prove to be his undoing. Finfinger v. Unemployment Compensation Board of Review, 854 A.2d 636 (Pa. Cmwlth. 2004).

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Board of Review,	:	
	:	
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ORDER

AND NOW, this 21st day of December, 2011, the order of the Unemployment Compensation Board of Review, dated April 17, 2011, at B-516673, is affirmed.

JAMES R. KELLEY, Senior Judge