

Claimant worked for East Penn Manufacturing (Employer) as a full time production worker from July 28, 2008, until August 12, 2010, earning \$15.75 per hour. Claimant filed for unemployment compensation benefits, and the Allentown UC Service Center denied benefits on the basis of Section 402(e) of the Law. Claimant appealed, and a hearing was held before the Referee on October 22, 2010, at which Claimant and the personnel director and personnel coordinator for Employer testified.

Employer's witnesses testified that Employer has a written policy stating that an employee who is absent from work on three consecutive days without notifying Employer in advance will be immediately terminated. Claimant was aware of this policy. Claimant was terminated after she missed three consecutive scheduled days of work, August 17-19, 2010, without calling in to report her absence. Certified Record (C.R.) Item No. 8.

Claimant testified that she did not call Employer on the days in question because she was in pre-trial incarceration at Berks County Prison from August 14, 2010, through August 28, 2010, and was unable to make phone calls. Claimant further testified that no one else knew to call Employer on her behalf. Claimant acknowledged that she was aware of Employer's absenteeism policy.

The Referee found that Claimant was aware of Employer's written policy on absences and violated that policy when she failed to report to work on three consecutive days without notifying Employer in advance. The Referee found that this constituted willful misconduct under case law precedent holding that pre-trial incarceration does not relieve a claimant from informing his employer of pending absences from work. Thus, the Referee denied Claimant unemployment compensation benefits. Claimant appealed to the Board.

The Board initially remanded the matter to the Referee on December 1, 2010, to “ascertain the disposition of criminal charges pending against the claimant.” C.R. Item No. 12. The remand hearing was held before the Referee on February 4, 2011, at which Claimant attended and testified. Claimant’s sister, Lucy Pastore, also attended the remand hearing with the intent of testifying to matters which were not then presently before the Referee.³ Claimant testified that she was sentenced to four years of probation stemming from a fight unrelated to her employment. Employer did not participate in the remand hearing. Following the completion of the record at the remand hearing, the Board affirmed the Referee’s denial of benefits. C.R. Item No. 17. Claimant now petitions for this Court’s review.

On appeal,⁴ Claimant essentially argues that she was deprived of due process because Employer did not attend the remand hearing before the Referee; she was never presented with an opportunity to “confront her accuser” or present evidence to rebut the accusations against her; and the Board impermissibly denied benefits based upon her guilty plea to criminal charges. Claimant’s Brief at 3-4. The law and the facts of record do not support these contentions.

It is well-settled that due process in an administrative proceeding requires notice and an opportunity to be heard. *Groch v. Unemployment*

³ The Referee explained to Claimant that the Referee was no longer part of the adjudication process of the claim, but was simply serving at the request of the Board for the sole purpose of ascertaining the disposition of the criminal charges against Claimant. Thus, Pastore was not permitted to testify.

⁴ Our review is limited to determining whether constitutional rights were violated, whether an error of law has been committed, or whether necessary findings of fact are supported by substantial evidence. *Roberts v. Unemployment Compensation Board of Review*, 977 A.2d 12, 16 n.2 (Pa. Cmwlth. 2009).

Compensation Board of Review, 472 A.2d 286, 287-88 (Pa. Cmwlth. 1984) (citing *Wojciechowski v. Unemployment Compensation Board of Review*, 407 A.2d 142 (Pa. Cmwlth. 1979)). A *pro se* claimant has a due process right to assistance by the referee at the hearing to develop the case and provide advice as to the claimant's basic rights. *Id.* at 288 (citing *Bennett v. Unemployment Compensation Board of Review*, 445 A.2d 258 (Pa. Cmwlth. 1982)). However, the referee is not required to become, and should not assume the role of, claimant's advocate. *McFadden v. Unemployment Compensation Board of Review*, 806 A.2d 955, 958 (Pa. Cmwlth. 2002) (citing *Brennan v. Unemployment Compensation Board of Review*, 487 A.2d 73 (Pa. Cmwlth. 1985)).

The record reveals that Claimant's hearing was procedurally proper. The hearing notices mailed to Claimant informed her of her rights, including the right to subpoena witnesses, examine the witnesses, and cross-examine Employer's witnesses. Claimant was further advised of her rights by the Referee. There is no evidence to support Claimant's contention that she was prevented from "confronting her accuser," *i.e.*, Employer. Claimant was in no way constrained from making her case at the first hearing before the Referee on October 22, 2010.

Claimant seems to misunderstand her due process rights because she argues that she should have been given the opportunity to discuss with Employer its decision to discharge her before effecting it. Due process requires notice and an opportunity to be heard in a hearing before the Referee. Due process did not require Employer, a private actor, to hear from Claimant before discharging her.

Claimant's argument that she was somehow prejudiced by Employer's failure to appear at the remand hearing on February 4, 2011, is unavailing. The sole purpose of that hearing was to determine the disposition of the criminal case

against Claimant. Employer was not subpoenaed or otherwise obligated to attend that hearing. Employer's non-appearance at the remand hearing was irrelevant to Claimant's right to a fair hearing.

Claimant's other due process claim appears to stem from her misunderstanding of the factual basis for the denial of benefits. Claimant believes that she was denied unemployment compensation benefits because of her guilty plea to the criminal charges against her. This was not the case. Rather, Claimant was denied benefits because she violated Employer's rule against unexcused absences, caused by her pre-trial incarceration and failure to call in.

The burden of proving willful misconduct is on the employer. *Reed v. Unemployment Compensation Board of Review*, 522 A.2d 121, 123 (Pa. Cmwlth. 1987) (citing *BMY, a Division of Harsco Corp. v. Unemployment Compensation Board of Review*, 504 A.2d 946 (Pa. Cmwlth. 1986)). The Courts have consistently held that a deliberate violation of an employer's rules constitutes willful misconduct. *Wertman v. Unemployment Compensation Board of Review*, 520 A.2d 900, 901 (Pa. Cmwlth. 1987) (citing *Kentucky Fried Chicken of Altoona, Inc. v. Unemployment Compensation Board of Review*, 309 A.2d 165 (Pa. Cmwlth. 1973)). It is true that incarceration unrelated to Claimant's employment, standing alone, cannot form the basis for denial of unemployment compensation benefits if it does not reflect on her fitness to perform her work. *See Wertman*, 520 A.2d at 902 (citing *Dunbar v. Unemployment Compensation Board of Review*, 475 A.2d 1355 (Pa. Cmwlth. 1984)). Further, "[a]bsence from work due to pre-trial incarceration is not, itself, willful misconduct." *Bruce v. Unemployment Compensation Board of Review*, 2 A.3d 667, 671 (Pa. Cmwlth.), *petition for allowance of appeal denied*, __ Pa. __, 12 A.3d 753 (2010) (citing *Hawkins v.*

Unemployment Compensation Board of Review, 472 A.2d 1191, 1192 (Pa. Cmwlth. 1984)). However, incarceration does not relieve an employee of her obligation to be available to work, or to comply with work rules, such as the duty to notify her employer of an absence. *Id.* In *Medina v. Unemployment Compensation Board of Review*, 423 A.2d 469, 471 (Pa. Cmwlth. 1980), this Court held that excessive absences caused by incarceration could support a finding of willful misconduct.

The Board's uncontroverted findings of fact, by which we are bound, established that Employer's policy requires immediate termination of an employee who is absent for three consecutive days without notifying Employer; Claimant was aware of the policy; and Claimant failed to notify Employer of her absences due to her incarceration. Thus, Employer sustained its burden of proving Claimant committed disqualifying willful misconduct by violating Employer's rule. The Board's adjudication is in accord with the above applicable law, and thus, we will not disturb it.

Thus, for the foregoing reasons, we affirm the decision of the Board.

MARY HANNAH LEAVITT, Judge

