

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brian S. Boyer, :
 :
 Petitioner :
 :
 v. : No. 638 C.D. 2011
 : Submitted: October 7, 2011
 Unemployment Compensation :
 Board of Review, :
 Respondent :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
 HONORABLE ROBERT SIMPSON, Judge
 HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY SENIOR JUDGE FRIEDMAN

FILED: November 2, 2011

Brian S. Boyer (Claimant) petitions for review of the February 11, 2011, order of the Unemployment Compensation Board of Review (UCBR), which affirmed the decision of a referee to deny Claimant unemployment compensation (UC) benefits pursuant to section 402(e) of the Unemployment Compensation Law (Law).¹ We affirm.

Claimant worked for High Steel Structures, Inc. (Employer) as a lead supervisor. Employer has an “Electronic Communications Policy,” which governs

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e). Under section 402(e) of the Law, a claimant shall be ineligible for benefits for any week in which his or her unemployment is due to discharge from work for willful misconduct.

the use of any electronic communications device owned or maintained by Employer, including cell phones. The policy prohibits written or spoken comments or images that may be reasonably considered offensive, disruptive, defamatory or derogatory with respect to race, religion, sex, national origin, sexual orientation, political beliefs or disability. Claimant was aware of the policy. (Findings of Fact, Nos. 1-4.)

Employer received a complaint that Claimant was using a cell phone provided by Employer to send inappropriate text messages and jokes. During an investigation by Employer, Claimant admitted that he used the cell phone to send jokes and photos. Employer suspended Claimant and took possession of the cell phone. Employer found photos and text messages on the cell phone that were sexual in nature and that were in violation of Employer's policy. Employer reviewed cell phones that it had provided to other employees, but Employer found nothing that violated the policy. Employer then discharged Claimant for violating the "Electronic Communications Policy." (Findings of Fact, Nos. 5-11.)

Claimant filed an application for UC benefits, which was granted based on a finding that Claimant was not aware that Employer's policy applied to cell phones and that Claimant was not warned prior to dismissal. (O.R., Item No. 6.) Employer filed an appeal, and the matter was assigned to a referee. At the hearing, Employer's witness testified that: (1) the policy states that it applies to cell phones and that a violation may result in termination of employment without warning, (N.T., 11/4/10, at 5, 7, Ex. E-2); (2) Claimant signed an acknowledgement in 2003 indicating that he understood the policy, (*Id.* at 6, Ex. E-2); and (3) the content of the policy has not changed since 2003, (*Id.* at 14). The referee found this testimony

credible and determined that Claimant was ineligible for UC benefits due to willful misconduct. Claimant appealed to the UCBR, which affirmed. Claimant now petitions this court for review.²

Claimant argues that the UCBR improperly ignored evidence that Employer failed to discipline other employees who violated the policy.³ However, Employer's witness testified that Employer examined the cell phones of other employees and found no violation of the policy. The UCBR found this testimony to be credible, and, as the fact-finder, the UCBR may accept or reject the testimony of any witness, in whole or in part. *Greif v. Unemployment Compensation Board of Review*, 450 A.2d 229, 230 (Pa. Cmwlth. 1982).

Claimant also argues that the UCBR improperly ignored evidence that Employer's 2007 "Corporate E-Mail and Digital Technology Policy" applies only to "data enabled cell phones," not to regular cell phones like his. (*See* Ex. E-4, Policy No. 2-755, effective 11/1/07.) However, the UCBR found that Claimant violated

² Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law and whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

³ The UCBR notes that Claimant's *pro se* brief violates Rule 2111 of the Pennsylvania Rules of Appellate Procedure because it lacks a statement of the standard of review, a statement of the case, a short conclusion stating the relief sought, a statement of questions involved that corresponds with the argument, distinguishable arguments, a summary of the argument and a copy of the UCBR's decision and order. (UCBR's Brief at 4 n.3.) We recognize these defects and also point out that: (1) Claimant has not complied with Rule 2119 because the "argument" portion of his brief does not cite to authorities or make reference to the relevant portions of the record; and (2) Claimant has attached documents to the brief that are not found in the record.

Employer's "Electronic Communications Policy," which does apply to regular cell phones. (*See* Ex. E-2, relating to Policy Nos. 2-755 and 2-757, dated April 2008.)

Claimant next argues that the UCBR improperly ignored evidence that no one who received photos or text messages from Claimant ever complained to him of harassment. However, Employer's "Electronic Communications Policy" prohibits content that may reasonably be considered offensive, so the policy may be violated even if no one is actually offended. Moreover, although no one complained to Claimant, someone complained to Employer about Claimant's cell phone usage.

Finally, Claimant argues that he was not aware that his cell phone usage was a violation of Employer's policy. However, as indicated, Claimant signed an acknowledgment in 2003 that he understood Employer's policy, and the UCBR found that the policy had not changed since 2003.

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brian S. Boyer,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 638 C.D. 2011
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 2nd day of November, 2011, the order of the Unemployment Compensation Board of Review, dated February 11, 2011, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Senior Judge