IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Leslie A. Campbell, Petitioner	:	
v.	:	No. 369 C.D. 2014
	:	Submitted: August 15, 2014
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT[1] FILED: February 17, 2015

Leslie A. Campbell (Claimant) petitions for review of an adjudication of the Unemployment Compensation Board of Review (Board) denying her claim for benefits under the Unemployment Compensation Law (Law).[2] The Board held that Claimant was ineligible for unemployment benefits under Section 402(e) of the Law[3] because she violated a work rule of her employer. The Board found, as fact, that Employer had a work rule that prohibited abusive language. Concluding

[1] The case was reassigned to this author on October 14, 2014.

[2] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §§751-918.10.

[3] Section 402(e) of the Law provides that an employee is ineligible for unemployment benefits when her "unemployment is due to [her] discharge or temporary suspension from work for willful misconduct connected with [her] work[.]" 43 P.S. §802(e).

that a one-time use of the word "bitch" toward a co-worker, in response to that employee's threatening outburst, was *de minimis*, we reverse the Board's conclusion that Claimant committed disqualifying willful misconduct.

Claimant worked for City Center Lems Realty (Employer) as a Room Inspector and House Keeping Supervisor, from May 23, 2012, to September 9, 2013, when she was discharged by Employer. Claimant applied for unemployment benefits. The UC Service Center granted Claimant's application, finding that she was not ineligible under Section 402(e) of the Law, 43 P.S. §802(e). Employer appealed, and a hearing was held before a Referee on November 12, 2013. Claimant appeared *pro se*; Tara Sheik, a General Manager for Employer, testified on behalf of Employer.

Claimant testified that on September 8, 2013, she discovered a stash of food in a closet on the ninth floor of the hotel. Claimant removed the items from the closet and carried them to the laundry room. There, an employee supervised by Claimant demanded that she return the food to him. Doubting that the food belonged to this employee, Claimant asked for an explanation. According to Claimant, he became "upset and frustrated to the point that he was yelling and cursing at me, threatening me, and all this stuff." Notes of Testimony, November 12, 2013, at 10 (N.T. __). In response, Claimant called the employee a "bitch." *Id*. Though this confrontation occurred in the presence of other employees, no customers were present. Sheik sent Claimant home for the rest of the day and discharged her the next day.

At the hearing, the Referee questioned Sheik about Claimant's termination:

[Referee:] And what was the reason for her termination?

> [Sheik:] For using abusive and unprofessional language during the shift hours.
>
> [Referee:] And how did you become aware that the Claimant used abusive language during the shift hours?
>
> [Sheik:] It was brought to my attention by [Claimant] and a fellow employee who was involved in the situation…. And [Claimant] did acknowledge the fact that she did use the abusive unprofessional language and got into an argument with the fellow staff member and she was supervising during the shift at that time.
>
> [Referee:] And what is the Employer's policy regarding using abusive language during shift hours?
>
> [Sheik:] There is zero tolerance at the hotel. As per [Employer] standards, we are only allowed to use professional language. And as a supervisor she was supposed to notify her immediate manager of the department rather than taking this occasion in her hands. So she got into an argument with the employee she was supervising and used unprofessional language.

N.T. 6-7.

In support of Sheik's testimony that Employer had a policy of zero tolerance for abusive language in the workplace, Employer introduced the relevant excerpt from its handbook. The proffered employee handbook page states, in relevant part, as follows:

> Customer Relations … Here are several things you need to do to help give customers a good impression of the Company: … Communicate pleasantly and respectfully with other associates at all time[s].

Certified Record Item No. 3. This provision does not use the phrase "abusive language," and its goal is to foster good "customer relations."

The Referee asked Claimant, "[a]re you aware of the Employer's policy regarding using abusive language in the workplace?" to which Claimant

replied, "Yes I was, it was in their [sic] employee handbook, yes." N.T. 9. Claimant apparently believed Sheik's characterization of what was stated in the employee handbook without reading it.

Relying upon Claimant's response to his question about what Employer's handbook contained, *i.e.*, a proscription against any abusive language, the Referee concluded that Claimant violated Employer's policy by using the word "bitch."[4] Accordingly, the Referee held that Claimant was ineligible for benefits by reason of willful misconduct. On review, the Board adopted the Referee's findings of fact and conclusions of law and affirmed the denial of benefits. Claimant now petitions this Court for review.

On appeal,[5] Claimant raises two arguments. First, Claimant contends that her outburst was a *de minimis* violation of Employer's work rule. Claimant, acting *pro se*, does not use the term "*de minimis*" in her brief, but that is the substance of her appeal issue. Second, Claimant contends that she was justified in calling her co-worker a "bitch" because he provoked her. The Board counters that Claimant is ineligible for unemployment benefits because she admitted to violating a known policy of Employer.[6]

---

[4] The Referee was required to "aid [Claimant] in examining and cross-examining witnesses, and give [her] every assistance compatible with the impartial discharge of its official duties." 34 Pa. Code §101.21(a). The Referee did not help Claimant navigate the disconnect between the handbook and Sheik's testimony.

[5] This Court's review is limited to determining whether the Board violated the Claimant's constitutional rights, committed an error of law, or made findings of fact not supported by substantial evidence. 2 Pa. C.S. §704; *Kirkwood v. Unemployment Compensation Board of Review*, 525 A.2d 841, 843 (Pa. Cmwlth. 1987).

[6] Claimant did not appeal the Board's finding of fact that Employer's handbook proscribed the use of abusive language, such as the word "bitch." The Referee did not reconcile the discrepancy in the evidence. Employer's witness stated that the source of its prohibition against abusive language was the handbook, but the handbook offered to substantiate that claim did not

(Footnote continued on the next page . . .)

We begin with Claimant's argument that, even if she did violate a work rule of Employer, it was *de minimis.* In her own words, Claimant argues as follows:

> I believe it was a lapse in good judgment but never meant to be malicious. *This was a onetime isolated incident* of me using profanity in the work place since my employment, May 2012. I always had the company's best interest in mind in my decision making before this *one lapse in judgment*.

Claimant's Brief at 8 (emphasis added).[7] This Court's precedent supports Claimant's argument.

In *Arnold v. Unemployment Compensation Board of Review*, 703 A.2d 582 (Pa. Cmwlth. 1997), the claimant used the word "asshole" to refer to a customer. The incident occurred as the claimant was leaving the restaurant and was nearly struck by the customer's car as it exited the drive-through lane. The

---

(continued . . .)

use the term "abusive" language and narrowed the context of the instruction to customer relations.

[7] The dissent would find that Claimant waived the issue of whether her conduct was *de minimis* because she raised it in the "Conclusion" section of her brief rather than in the "Argument" section. In the case cited by the dissent, *In re Condemnation ex rel. Department of Transportation*, 76 A.3d 101, 106 n.8 (Pa. Cmwlth. 2013), this Court recited the general rule that where issues are raised in the statement of questions involved but not in the argument section of the brief, "courts find waiver." It did not state that courts *must* find waiver. Notably, in *Condemnation*, the petitioner's brief raised one question. Nevertheless, we did not refuse to consider any other issue; rather, we parsed out additional issues from several sections of the brief. Stated otherwise, this Court's general statement about waiver was *obiter dictum.*

Waiver is properly applied where the litigant raises an issue in the question presented section of her brief but does not address it anywhere else in the brief. That is not this case. Claimant's brief did address the issue of whether she committed willful misconduct by the one time use of the word "bitch." It would elevate form over substance to find Claimant, who is *pro se*, has waived the issue of whether her conduct was *de minimis* because she made this argument in the "conclusion" section of her brief, as opposed to the argument section.

claimant remarked to her co-worker, "[w]hat an asshole," which the customer heard and reported to the employer. *Id.* at 583. The claimant was fired. On appeal, this Court concluded that the claimant did not commit willful misconduct. We relied upon our precedent that had held that "offensive language directed by an employee to an employer, if sufficiently provoked or *de minimis*, will not constitute willful misconduct." *Id.* at 584. That precedent was *Horace W. Longacre, Inc. v. Unemployment Compensation Board of Review*, 316 A.2d 110 (Pa. Cmwlth. 1974), and *Kowal v. Unemployment Compensation Board of Review*, 512 A.2d 812 (Pa. Cmwlth. 1986). *A fortiori*, we concluded that a singular comment directed to another employee and overheard by a customer, as opposed to being made directly to the employer, was *de minimis*. Accordingly, we held that the claimant in *Arnold* did not commit willful misconduct.

This Court's decision in *Perez v. Unemployment Compensation Board of Review*, 736 A.2d 737 (Pa. Cmwlth. 1999), is also instructive. In that case, the claimant's supervisor conscripted a co-worker to harass the claimant in the hopes that the claimant would lash out, permitting the supervisor to fire the claimant. To accomplish the supervisor's objective, the co-worker hammered on the outside of a large metal bin while the claimant was inside the bin working, momentarily deafening the claimant. Angered by the co-worker's conduct, the claimant pushed the co-worker. The supervisor discharged the claimant for violating the employer's policy against workplace violence. We acknowledged that the push violated the employer's policy, but because the claimant was adequately provoked we held that he was not ineligible under Section 402(e) of the Law. In so holding, we again relied on *Horace W. Longacre, Inc.*, 316 A.2d 110, and *Kowal*, 512 A.2d 812.

In short, an employee's *de minimis* violation of an employer's policy, rule or behavioral expectation does not constitute willful misconduct under Section 402(e) of the Law. Here, Claimant called her co-worker a "bitch" one time in the midst of a heated argument in response to the co-worker's abusive outburst. As was the case in *Arnold*, Claimant's comment was not directed at a customer or spoken in a tone meant for a customer to overhear. Employer offered no evidence or even suggested that its business was negatively impacted in any way by Claimant's outburst. Claimant should not have been disqualified from receiving unemployment benefits because of this one-time, *de minimis* use of an expletive.[8]

Because we agree with Claimant that her outburst was *de minimis*, we need not consider her second argument. Accordingly, we reverse the Board's decision denying Claimant benefits under Section 402(e) of the Law.

_____

MARY HANNAH LEAVITT, Judge

[8] It bears noting that the word Claimant used, *i.e.*, "bitch," was less "abusive" than the word used by the claimant in *Arnold*, *i.e.*, "asshole."

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Leslie A. Campbell, Petitioner	:	
v.	:	No. 369 C.D. 2014
Unemployment Compensation Board of Review, Respondent	:	

O R D E R

AND NOW, this 17th day of February, 2015, the order of the Unemployment Compensation Board of Review in the above-captioned matter, dated February 11, 2014, is hereby REVERSED.

MARY HANNAH LEAVITT, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Leslie A. Campbell,	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	No. 369 C.D. 2014
Respondent	:	Submitted: August 15, 2014

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE McGINLEY FILED: February 17, 2015

I respectfully dissent to the majority's conclusion that Claimant was not ineligible for benefits under Section 402(e) of the Unemployment Compensation Law, 43 P.S. §802(e), by virtue of committing a *de minimis* violation of Employer's work rule that prohibited the use of abusive language.

Without addressing the merits of whether Claimant's violation was *de minimis*, I believe that Claimant failed to raise this issue before this Court. In her brief, Claimant's Statement of Questions Involved stated, "[t]he issue is whether the Claimant [sic] actions rise to the level of willful misconduct in connection with the work." Claimant's Brief at 4. In the argument section of her brief, Claimant recounted the incident with the other

employee, admitted that she should have handled it better, and asserted that she used the abusive language because her life was threatened.[1]

Claimant did not raise the issue of a *de minimis* violation of Employer's rule in the argument section of her brief. Under Pa.R.A.P. 2119, when a party fails to develop an issue in the argument section of its brief, the Court may consider the issue to have been waived. In re: Condemnation by the Commonwealth of Pennsylvania, Department of Transportation of Right-of-Way for State Route 0079, 76 A.3d 101, 106 (Pa. Cmwlth. 2013).

While the majority quotes Claimant's brief on page eight to support the conclusion that Claimant raised the issue of a *de minimis* violation, page eight of Claimant's brief is the *Conclusion* of the brief and not the argument. I note that Claimant appears before this Court *pro se*, but this Court may not ignore the rules of appellate procedure in order to make arguments for a party.

Because of its resolution of this issue, the majority did not need to reach the second issue of whether Claimant was justified in her language because she was provoked. The Board found that Claimant was not credible regarding the alleged threats made to her. Based on that credibility determination, I would find Claimant ineligible for benefits under Section

[1] Incidentally, the Board did not find Claimant credible regarding the alleged threats made to her.

402(e) because she violated a known policy of Employer's without good cause. I would affirm the Board.

_____

BERNARD L. McGINLEY, Judge