IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 19, 2014 Session

LENA BARNER v. BURNS PHILLIPS, ACTING COMMISSIONER OF THE TENNESSEE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, ET AL.

Direct Appeal from the Chancery Court for Maury County
No. 10-659 Robert L. Holloway, Jr., Judge

No. M2013-01180-COA-R3-CV - Filed May 5, 2014

This case involves Employee's right to unemployment compensation benefits. The Tennessee Department of Labor and Workforce Development denied Employee's claim for unemployment compensation benefits after finding that she voluntarily quit her job based on her belief that she would soon be terminated. Employee appealed that finding in the trial court, where she also contended that she was denied her due process rights of notice and representation during the agency proceedings. The trial court upheld the denial of benefits, finding substantial and material evidence that Employee voluntarily quit her job, and finding that Employee was not denied due process during the agency proceedings. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed and Remanded

DAVID R. FARMER, J., delivered the opinion of the Court, in which HOLLY M. KIRBY, J., and J. STEVEN STAFFORD, J., joined.

David A. Kozolowski, Columbia, Tennessee, for the appellant, Lena Barner.

Robert E. Cooper, Jr., Attorney General and Reporter, Dereck C. Jumper, Assistant Attorney General, for the appellee, Burns Phillips, Action Commissioner of the Tennessee Department of Labor and Workforce Development.

Charles J. Mataya, Kristi M. Wilcox and John Patrick Rogers, Nashville, Tennessee, for the appellee, Seton Corporation, d/b/a Baptist Hospital, Inc.

OPINION

I. BACKGROUND

Lena Barner ("Ms. Barner") was employed by Seton Corporation d/b/a Baptist Hospital (the "Hospital") as a patient care technician from November 2003 until August 13, 2009. On December 8, 2009, Ms. Barner applied for unemployment compensation benefits with the Tennessee Department of Labor and Workforce Development (the "Department").[1] The following day, the Department mailed a form to the Hospital requesting information about the circumstances under which the Hospital's employment relationship with Ms. Barner ended. The form provided that "the claimant states he/she was forced to leave work due to a non work related illness or injury." On December 17, 2009, the Department received the completed form back from the Hospital, on which the Hospital indicated that Ms. Barner had not been forced to leave work due to an injury or medical condition, but had been terminated for sleeping on the job.

On December 30, 2009, the Department mailed Ms. Barner its initial Agency Decision denying her claim for benefits. The Agency Decision stated that Ms. Barner had been discharged from her most recent work, and that because she had violated the Hospital's standards by sleeping on the job, she was guilty of "work-related misconduct." The Agency Decision included a paragraph informing Ms. Barner of her right to appeal the decision to the Appeal's Tribunal. The paragraph included the following statement:

> You may be represented by an attorney or assisted by any other representative you choose. If you cannot afford an attorney, free or low cost legal assistance may be available through your local legal services organization or bar association. We cannot provide an attorney for you.

On January 11, 2010, Ms. Barner appealed the Agency Decision to the Appeals Tribunal. On February 19, 2010, the Department mailed Ms. Barner a Notice of Telephone Hearing, which stated in pertinent part:

> ISSUE(S):
> TCA §50-7-303(a)(1) & (2) Whether claimant left work voluntarily without good cause or was discharged for misconduct.
>
> IMPORTANT INSTRUCTIONS:

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[1]Ms. Barner's application for unemployment compensation benefits was not made a part of the administrative record.

> PLEASE READ CAREFULLY THE ENCLOSED INSTRUCTIONS CONCERNING YOUR APPEALS HEARING.
> If you are represented by an attorney, please have the attorney submit a signed Notice of Appearance with the attorney's complete name, address, phone number and your signature.

The telephonic hearing took place on March 2, 2010. During the hearing, the Hospital was represented by its Human Resources Consultant, Camille Calloway, and presented the witness testimony of Ms. Barner's former supervisor, Dana Pansa. Ms. Barner participated in hearing, but was not represented by counsel. During the hearing, Ms. Pansa and Ms. Barner were each allowed to present their account of how Ms. Barner's employment relationship with the Hospital ended. Ms. Pansa testified as follows:

> I was doing an investigation from receiving some complaints from supervisory personnel that report to me, regarding the behavior of Lena Barner. I called Lena Barner on eight – I'm sorry, 08/13, 08/13, and asked her if she could come to my office. And she said, "Am I being fired?" And I said, "Lena, I would like for you to come into my office so we can discuss it." She goes, "I quit. She was, "I don't want to be fired. I won't be able to get another job. I quit." And that was the end of the proceedings. I chose – I took a personal action form, which is her file form. I sent it to Camille in Human Resources, and in the part that I wrote in here, in the process of termination for sleeping on the job, she resigned[.]

Ms. Pansa acknowledged that she intended to terminate Ms. Barner for sleeping on the job, but stated that as a matter of personal preference, she would not terminate employees over the phone. Ms. Barner admitted to sleeping on the job, but contended that she was overworked and that she only slept when all of her work was done and she was waiting for her shift to end. Ms. Barner recalled the phone call with Ms. Pansa as follows:

> She called me at home. She asked me could I come up there a little early and I said, "Dana," I said, "I'm already in trouble for falling asleep." I said, "I need to, you know, stay at home and go on and get my rest," I said, "before I come up the highway." And I said, "And I'll tell you, Dana," I said, "I worked hard that night," and I told her, I said, "We already done had a tech that was killed going home from working the morning and left four little children that are – are left alone by their father." I said, "She got killed." I said, "And I'll tell you this," I said, "I'd rather nod in front of that computer than to nod on that interstate in front of a tractor-trailer and kill myself and can't make it home." And she said, "Well, I don't know what to tell you." I said, "If they

> feel that way," I said, "I quit." She said, "Well, that's what I was going to have to tell you." She said, you – "You're fired." She said – and I said, well, (Inaudible). She said, I've got to put somebody on the phone and let them tell you – let them tell them. She put somebody on the phone and I told them, I said, "I just told Dana that I quit." Now, that's the honest to God truth.

The Appeals Tribunal released its decision on March 3, 2010. The decision included the following findings of fact and conclusions of law:

> FINDINGS OF FACT: The claimant's most recent employment prior to filing this claim was with Saint Thomas Health Network as a patient care tech from November 10, 2003 until August 13, 2009. The claimant's supervisor informed the claimant that she had been reported by other staff members for being asleep while on the job. The claimant did state that she dozed off but that it occurred at the end of her shift after her work was finished and it was due in part to exhaustion and in part to some medication that she had been prescribed by her physician. The Clinical Manager contacted the claimant prior to her shift and requested that the claimant meet in the Clinical Manager's office prior to her shift. The claimant asked the Clinical Manager if she intended to terminate the claimant due to the sleeping incident. The Clinical Manager stated that she would not discuss the situation on the telephone and that she wanted the claimant to come to her office prior to starting her shift. The claimant then informed the Clinical Manager that she was quitting her job. The claimant testified that she quit her job because she anticipated that she was to be terminated due to the sleeping incident and she did not want a termination on her work record.
>
> CONCLUSIONS OF LAW: The Appeals Tribunal holds that the claimant is disqualified from receiving unemployment compensation benefits. The issue in this case is whether the claimant left her most recent work without good cause connected with the work, as provided in T.C.A. § 50-7-303(a)(1). The Agency Decision is modified to hold that the claimant voluntarily quit her job. The courts have held that "good cause" requires necessitous and compelling circumstances. The standard is one of reasonableness as applied to the average person in the claimant's situation. In order to establish a work-connected reason for resigning, the claimant was required to show that the employer either did something or failed to do anything and the employer's actions are what actually caused her to resign. Furthermore, the claimant was required to prove that she exhausted all reasonable alternatives prior to resigning. The burden of proving that the claimant had a good, work-related reason for

> resigning rests on the claimant and in this case, the claimant has not met her burden of proof.
>
> The evidence establishes that the claimant voluntarily quit her job because she anticipated that she was about to be terminated by the employer for being found asleep on the job and she did not want a termination on her work record. The claimant quit for personal reasons.
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> DECISION: The Agency Decision is modified. The claimant is not eligible for unemployment benefits under T.C.A. § 50-7-303(a)(1). The claim is denied as of December 8, 2009, and until the claimant qualifies for benefits in accordance with the Tennessee Employment Security Law.

Following the decision of the Appeals Tribunal, Ms. Barner retained counsel for the first time in the proceedings, and appealed to the Department's Board of Review. On June 5, 2010, Ms. Barner submitted to the Board of Review a written argument prepared by her newly-appointed counsel. Ms. Barner contended that the decision of the Appeals Tribunal must be reversed because she was not advised of her right to counsel prior to its March 2, 2010 telephonic hearing. Ms. Barner also contended that she did not receive adequate notice of the issues because the Appeals Tribunal switched the issue from whether she was terminated for sleeping to whether she voluntarily quit. Finally, Ms. Barner contended that the decision of the Appeals Tribunal was erroneous on the merits because her decision to resign in the face of certain termination should not have been considered a "voluntary quit" disqualifying her from receiving benefits.

Despite Ms. Barner's contentions, the Board of Review affirmed the decision of the Appeals Tribunal on August 23, 2010. In pertinent part, its decision stated:

> FINDINGS OF FACT AND CONCLUSIONS OF LAW: Based upon the entire record in this cause, the Board of Review finds the Appeals Tribunal correctly found the facts and applied the law under TCA § 50-7-303(a)(2). We hereby adopt the findings of fact, conclusions of law, and decision of the Appeals Tribunal but the same need not be copied herein for the purposes of our decision.
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> The claimant admitted at the hearing to "nodding" on the job at the end of her shift due to exhaustion. Her supervisor decided to discharge her and asked her by phone to come into work to discuss the matter. The claimant replied, "I won't be fired. I quit." The employer did not give her an ultimatum. The Hearing Officer gave her ample opportunity to present her testimony and

> questions for the employer's witness. The claimant claimed overwork and resultant anxiety attacks.

The Board of Review did not address Ms. Barner's procedural arguments in its decision.

On August 31, 2010, Ms. Barner petitioned the Board of Review through her counsel for a rehearing to consider her arguments that she had not voluntarily and knowingly waived her right to counsel and that she did not receive proper notice because the Appeals Tribunal switched the issue from whether Ms. Barner had been terminated to whether Ms. Barner had voluntarily quit. Additionally, Ms. Barner pointed out that the Board of Review decision stated that "the Appeals Tribunal correctly found the facts and applied the law under TCA § 50-7-303(a)(2)," which provides for disqualification of a claimant who has been discharged, but that the Appeals Tribunal decision concluded that "the claimant is not eligible for unemployment benefits" under T.C.A. § 50-7-303(a)(1), which provides for disqualification of a claimant who has voluntarily quit his or her most recent job. Based on the discrepancy, Ms. Barner remarked that the Board of Review had apparently switched the issue once again.

On September 30, 2010, the Board of Review released another decision in which it denied Ms. Barner's request to rehear the matter. The Board of Review pointed out that in the December 30, 2009 initial Agency Decision, Ms. Barner was notified of her right to legal counsel and informed about the possibility that free or low cost legal assistance might be available to her. Additionally, the Board of Review acknowledged that it mistakenly cited to Tennessee Code Annotated section 50-7-303(a)(2) in its prior decision, and modified the decision to indicate that Ms. Barner voluntarily quit her job and was therefore disqualified from benefits by Tennessee Code Annotated section 50-7-303(a)(1).

On November 9, 2010, Ms. Barner filed a complaint in the Chancery Court for Maury County naming the Department and the Hospital as defendants and seeking judicial review of the Department's denial of unemployment compensation. Ms. Barner contended that the Department's decision should be reversed for procedural errors because she did not receive adequate notice of the issues to be considered in the March 2, 2010 telephonic hearing, and because she did not knowingly and voluntarily waive her right to counsel at that hearing. Additionally, Ms. Barner contended that the Department's decision should be reversed on the merits because the administrative record lacked substantial and material evidence to support the decision of the Department. The Chancery Court upheld the Department's decision, finding that it was supported by substantial and material evidence, and that Ms. Barner's procedural contentions were not well founded. Ms. Barner timely filed a Notice of Appeal to this Court.

II. ISSUES PRESENTED

Ms. Barner presents the following issues on appeal, restated:

1. Whether the trial court erred by finding that there is substantial and material evidence in the record to support the Department's decision.

2. Whether the Department denied Ms. Barner a fair hearing by failing to provide her adequate notice of the issue to be considered by the Appeals Tribunal.

3. Whether the Department denied Ms. Barner a fair hearing by failing to provide her adequate notice of her right to be represented.

III. DISCUSSION

In an appeal from an agency decision regarding unemployment compensation benefits, the appropriate standard of review applying to both the trial court and this Court is set forth by statute. *Hale v. Neeley*, 335 S.W.3d 599, 601 (Tenn. Ct. App. 2010). Tennessee Code Annotated section 50-7-304(i)(2) and (3) states:

> (2) The chancellor may affirm the decision of the commissioner or the chancellor may reverse, remand or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
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> (A) In violation of constitutional or statutory provisions;
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> (B) In excess of the statutory authority of the agency;
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> (C) Made upon unlawful procedure;
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> (D) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
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> (E) Unsupported by evidence that is both substantial and material in the light of the entire record.
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> (3) In determining the substantiality of the evidence, the chancellor shall take into account whatever in the record fairly detracts from its weight, but the chancellor shall not substitute the chancellor's judgment for that of the commissioner's designee as to the weight of the evidence on questions of fact. No decision of the commissioner's designee shall be reversed, remanded or

> modified by the chancellor, unless for errors that affect the merits of the final decision on the commissioner's designee. . . .

Tenn. Code Ann. § 50-7-304(i)(2)-(3) (2008).

"[T]he burden of producing substantial and material evidence is not an onerous one." *Roberts v. Traughber*, 844 S.W.2d 192, 196 (Tenn. Ct. App. 1991). Indeed, we have stated in the past that "it requires something less than a preponderance of the evidence, but more than a scintilla or glimmer." *Wayne Cnty v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 280 (Tenn. Ct. App. 1988) (citations omitted). Where there is substantial evidence in the administrative record to support the decision of the Board of Review, the Board's decision is conclusive and judicial review shall be limited to questions of law. *Millen v. Tenn. Dep't of Labor and Workforce Dev.*, 205 S.W.3d 929, 932 (Tenn. Ct. App. 2006) (citing *Perryman v. Bible*, 653 S.W.2d 424, 429 (Tenn. Ct. App. 1983)). We review questions of law de novo with no presumption of correctness. *See* Tenn. R. App. P. 13(d); *Wallace v. Sullivan*, 561 S.W.2d 452, 453 (Tenn. 1978).

Substantial and Material Evidence

Ms. Barner's first contention on appeal is that the trial court erred by upholding the Board of Review's decision because the record does not contain substantial and material evidence that Ms. Barner voluntarily quit her job. Tennessee Code Annotated section 50-7-303(a)(1) provides that an unemployment compensation claimant is disqualified from receiving benefits "[i]f the administrator finds that the claimant has left the claimant's most recent work voluntarily without good cause connected with the claimant's work." Tenn. Code Ann. § 50-7-303(a)(1)(A). Ms. Barner contends that because she anticipated that Ms. Pansa was about to fire her, her decision to quit was not voluntary.

The trial court relied on our prior case, *Frogge v. Davenport*, 906 S.W.2d 920 (Tenn. Ct. App. 1995), to uphold the Board of Review's finding that Ms. Barner voluntarily quit her job. The facts of *Frogge* are fairly similar to those in this case. In *Frogge*, the claimant heard rumors and statements from co-workers and the news media that he was being recommended for discharge. *Frogge*, 906 S.W.2d at 921. Though the claimant was never given official notice that he would be discharged or that his name was on the list of employees being considered for discharge, the claimant decided to resign. *Id.* It was only after he resigned that the claimant's suspicions were confirmed to have been correct. *Id.* at 922-23. The *Frogge* Court held that because the claimant's voluntary decision to quit was motivated only by speculation that he would lose his job, he lacked good cause upon which to leave the ranks of the employed for the ranks of the compensated unemployed. *Id.* at 924.

After reviewing *Frogge*, we think the question here is not whether Ms. Barner left her work voluntarily, but whether she had good cause for doing so. The word "voluntarily," as it is used in Tennessee Code Annotated section 50-7-303(a)(1)(A), "connotes the employees volition or will in contrast to conduct compelled by the employer." *McPherson v. Stokes*, 954 S.W.2d 749, 751 (Tenn. Ct. App. 1997). "Court's will find that an employee has voluntarily terminated employment if the employee fails to take all necessary and reasonable steps to protect his or her employment." *Id.* Here, it is undisputed that Ms. Pansa never gave Ms. Barner an ultimatum to quit her job or be fired. Ms. Pansa simply requested that Ms. Barner come to the Hospital prior to her shift to discuss the sleeping incident. When Ms. Barner asked whether she was being terminated, Ms. Pansa refused to answer, later explaining that as a personal preference, she does not talk about termination over the phone. According to her own testimony, Ms. Barner then quit her job because she anticipated that she would be fired. There is no contention that Ms. Barner was not acting of her own free will when she told Ms. Pansa over the phone that she quit. Thus, the question is not whether Ms. Barner's action was voluntary, it is whether Ms. Barner had good cause connected to her work for quitting. Likewise, the issue in *Frogge* was not the voluntariness of the claimant's resignation, it was whether he had good cause connected to his work to resign. *Frogge*, 906 S.W.2d at 924.

Whether Ms. Barner had good cause connected to her work to voluntarily quit her employment is a question of law. *Id.* at 922. Though the statute itself does not define good cause, this Court has stated in the past that "[o]nly a disability or illness that is directly attributable to the job is sufficient good cause." *Ford v. Traughber*, 813 S.W.2d 141, 144 (Tenn. Ct. App. 1991) (citation omitted). In *Frogge*, this Court stated that mere speculation that the claimant would be terminated did not constitute good cause. *Frogge*, 906 S.W.2d at 924. Ms. Barner contends that her case is distinguishable from *Frogge* because her decision to quit was not based on speculation, it was instead based on the correct and reasonable belief that her supervisor had already made the decision to terminate her. Despite that contention, Ms. Barner concedes in her brief that if Ms. Pansa had confirmed her intention to terminate Ms. Barner over the telephone, "Ms. Barner would have known her fate." Thus, Ms. Barner implicitly concedes that prior to quitting her job, she was only speculating that she would be terminated. *Frogge* makes it clear that later confirmation that the claimant's speculation was correct does not have any effect on whether the claimant had good cause to quit his or her job. *Id.* Based on the foregoing, we find that there is substantial and material evidence to support the trial court's conclusion that Ms. Barner voluntarily quit her job without good cause connected to her work, thereby disqualifying herself from receiving unemployment compensation benefits.

Due Process: Notice of Issues

Next, Ms. Barner makes two procedural due process arguments. First, Ms. Barner contends that she was denied due process by the Department because she was not given reasonable notice of the issues to be addressed at the Appeals Tribunal on March 2, 2010.

The Administrative Procedures Act sets forth the procedures for hearing and determining contested cases both at the agency level and on appeal. In each case, the parties are entitled to reasonable notice, which must include:

> (1) A statement of the time, place, nature of the hearing, and the right to be represented by counsel;
>
> (2) A statement of the legal authority and jurisdiction under which the hearing is to be held, including a reference to the particular sections of the statutes and rules involved; and
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> (3) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon timely, written application a more definite and detailed statement shall be furnished ten (10) days prior to the time set for the hearing.

Tenn. Code Ann. § 4-5-307(b) (2011). Notice provided to the offending party must be "'reasonably calculated under all the circumstances, to apprise interested parties'" of the opposing party's claims. *McClellan v. Bd. Of Regents of State Univ.*, 921 S.W.2d 684, 688 (Tenn. 1996) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). "The purpose of due process requirements is to notify the individual in advance in order to allow adequate preparation and reduce surprise." *Id.* (citing *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 14 (1978)). Here the Notice of Telephone Hearing, mailed to Ms. Barner on February 19, 2010, stated the issues to be at the hearing considered as follows:

> TCA §50-7-303(a)(1) & (2) Whether claimant left work voluntarily without good cause or was discharged for misconduct.

Initially, we note that Ms. Barner repeatedly insists in her brief that she was not provided notice prior to the telephonic hearing that whether she voluntarily quit would be at issue before the Appeals Tribunal. We are unable to reconcile her argument with the plain language of the notice, which states that "whether claimant voluntarily left work without good cause" would be an issue at the hearing. Additionally, the notice cites to Tennessee Code Annotated section 50-7-303(a)(1), which provides that claimants who voluntarily leave

work without good cause shall be disqualified from benefits. We are therefore unpersuaded that Ms. Barner was somehow not put on notice that whether she voluntarily quit would be an issue at the hearing.

Moving on, we note that this Court previously upheld a similar due process notice challenge in *Yates v. Traughber*, 747 S.W.2d 338 (Tenn. Ct. App. 1987). In *Yates*, the agency issued a notice of hearing to all interested parties stating the issues to be considered at the Appeals Tribunal hearing as "separation from work–T.C.A. § 50-7-303(a)(1) & (a)(2)." *Yates*, 747 S.W.2d at 339. The *Yates* court concluded that such notice satisfied the minimal requirements of due process. *Id.* at 340. Ms. Barner acknowledges the similarities between the notice provided in *Yates* and the notice she received in this case. We are unaware of any reasoning to suggest that *Yates* should not guide our decision in this case, nor does Ms. Barner provide any. Ms. Barner never indicated at the hearing that she was surprised or unprepared to discuss the issues. No issues beyond those stated in the notice were discussed at the hearing. Additionally, the decision of the Appeals Tribunal was not based on facts outside of those issues. After considering all of the surrounding circumstances, we find that because the notice was reasonably calculated to apprise Ms. Barner of the issues, it satisfied the minimal requirements of due process.

Due Process: Right to Counsel

Finally, Ms. Barner contends that she was denied due process because the hearing officer during her March 2, 2010 telephone hearing failed to ensure that she knowingly and voluntarily waived her right to representation. It is well-established in Tennessee that the right to a fair hearing includes the right to be represented by counsel. *Simmons v. Traughber*, 791 S.W.2d 21, 24 (Tenn. 1990) (citing *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970)). In fact, the right to be advised and represented by counsel is codified in Tennessee in the Administrative Procedures Act. Tenn. Code Ann. § 4-5-305(b). In order for the right to be effective, the Tennessee Supreme Court has held that a claimant must have "full and meaningful" notice of the right to be represented by counsel before the Appeals Tribunal. *Simmons*, 791 S.W.2d at 24. To constitute full and meaningful notice, claimants must be notified of the possible availability of free or low-cost legal counsel. *Id.* at 25. Ms. Barner was advised of her right to be represented by counsel in the initial Agency Decision, which was mailed to her on December 30, 2009. The paragraph entitled "Appeal Rights" stated as follows:

> You may be represented by an attorney or assisted by any other representative you choose. If you cannot afford an attorney, free or low cost legal assistance may be available through your local legal services organization or bar

association. We cannot provide an attorney for you.[2]

There is no indication that Ms. Barner did not receive this notice. We find that this advisement complied with the Supreme Court's holding in *Simmons*, and was therefore sufficient to notify Ms. Barner of her right to be represented. *See id.* at 25. Additionally, we note that the Notice of Telephone Hearing mailed to Ms. Barner on February 19, 2010, though it did not fully comply with the requirements of *Simmons*, referenced Ms. Barner's right to counsel by requesting that her attorney enter a Notice of Appearance. Ms. Barner's contention that the hearing officer should have orally notified her of her right to representation, and ensured that she waived that right voluntarily and knowingly is not supported by Tennessee law. The Department was only obligated to adequately advise Ms. Barner of her right to representation, which it did.

IV. HOLDING

Based on the foregoing, the judgment of the trial court is affirmed. The costs of this appeal are taxed to the appellant, Lena Barner, and her surety, for which execution may issue if necessary.

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DAVID R. FARMER, JUDGE

[2]Ms. Barner contends that the quoted language did not provide reasonable notification because it was "buried in the agency decision." We find this argument particularly unconvincing in light of the fact that the referenced Agency Decision was less than one page long.