

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sylina McNair,	:
	: No. 132 C.D. 2013
Petitioner	: Submitted: June 21, 2013
	:
v.	:
	:
Unemployment Compensation	:
Board of Review,	:
	:
Respondent	:

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN

FILED: July 12, 2013

Sylina McNair (Claimant) petitions for review, *pro se*, of the December 14, 2012, order of the Unemployment Compensation Board of Review (UCBR) affirming a referee’s decision to deny Claimant unemployment compensation (UC) benefits. The UCBR determined that Claimant was ineligible for benefits under section 402(e) of the Unemployment Compensation Law (Law)¹ because she committed willful misconduct. 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) of the Law provides that an employee shall be ineligible for compensation for any week “[i]n which his unemployment is due to his discharge . . . from work for willful misconduct connected with his work.” 43 P.S. §802(e).

Claimant worked for Keystone Mercy & Amerihealth (Employer) as a provider claims representative from March 15, 2010, until July 27, 2012. (Findings of Fact, No. 1.)² Claimant's job involved receiving calls from member providers. (*Id.*, No. 4.) The average talk time for a call was ten minutes. (*Id.*, No. 6.)

Employer has a progressive disciplinary policy, but the policy can be skipped if there is inappropriate or unprofessional conduct toward members, guests, or co-workers. (*Id.*, No. 2.) Claimant knew or should have been aware of Employer's policies. (*Id.*, No. 3.)

On July 25, 2012, the Quality Assurance Department asked Claimant's manager why Claimant had so many short calls that day. (*Id.*, No. 7.) The manager conducted an investigation, listened to the calls picked up by Claimant, and traced the activities on Claimant's calls. (*Id.*, No. 8.) On July 25, 2012, Claimant had, in one hour, put 15 calls back into the queue, and from 8:00 a.m. to 2:30 p.m., she put 25 calls back into the queue. (*Id.*, No. 9.)

Employer does not allow employees to put calls back in the queue because the caller has to push many buttons and wait for another live representative. (*Id.*, No. 11.) Employees can request to be relieved of answering calls if they have other work to do, but Claimant did not request such relief. (*Id.*, No. 12.)

² The UCBR adopted and incorporated the referee's findings of fact and conclusions of law in their entirety.

On July 27, 2012, Employer discharged Claimant for putting calls back into the queue, which Employer considered unacceptable conduct. Claimant applied for UC benefits with the local service center, which were granted. Employer appealed this determination to a referee. The referee held a hearing on September 20, 2012, and reversed the local service center, denying Claimant benefits.

Claimant appealed to the UCBR. On December 14, 2012, the UCBR affirmed the referee's decision. Claimant petitioned this court for review.³

Claimant argues that the UCBR erred in finding that she committed willful misconduct. We disagree.

“Willful misconduct has been defined as: (1) a wanton and willful disregard of the employer's interests; (2) a deliberate violation of the employer's rules; (3) a disregard of the standards of behavior that an employer rightfully can expect from its employees; or (4) negligence that manifests culpability, wrongful intent, or evil design, or an intentional and substantial disregard of the employer's interests or the employee's duties and obligations.” *Adams v. Unemployment Compensation Board of Review*, 56 A.3d 76, 78 (Pa. Cmwlth. 2012). This court has upheld a denial of benefits where “the behavioral standard is obvious and the employee's conduct is so inimical to the employer's best interests that discharge is a natural result.” *Biggs v. Unemployment Compensation Board of Review*, 443 A.2d

³ Our scope of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether the findings of fact were unsupported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

1204, 1206 n.3 (Pa. Cmwlth. 1982). The employer bears the burden of proving that the discharged employee committed willful misconduct. *Oliver v. Unemployment Compensation Board of Review*, 5 A.3d 432, 438 (Pa. Cmwlth. 2010) (*en banc*).

Here, the UCBR determined that Claimant disregarded the standards of behavior that Employer could expect of its employees. Specifically, the UCBR found that Claimant immediately placed calls back in the queue. This conduct was inimical to Employer's best interests because it resulted in poor customer service by requiring callers to start the call process over. Moreover, Claimant's central job duty was to assist callers and repeatedly placing the callers immediately back in the queue hindered this objective. Thus, the UCBR properly concluded that Claimant committed willful misconduct under the Law.

Claimant further argues that she had good cause for placing the calls back in the queue because she had permission from her direct supervisor to do so and her phone malfunctioned. It is true that "if there was 'good cause' for the employee's action, it cannot be charged as wil[l]ful misconduct." *McLean v. Unemployment Compensation Board of Review*, 476 Pa. 617, 620, 383 A.2d 533, 535 (1978).

However, the UCBR adopted the referee's conclusions, which unequivocally noted that Claimant's testimony in this regard "was neither credible nor convincing." (Referee's Op. at 2.) "[T]he UCBR is the ultimate fact finder and is empowered to make credibility determinations." *Bell v. Unemployment Compensation Board of Review*, 921 A.2d 23, 26 n.4 (Pa. Cmwlth. 2007). Questions of credibility are not subject to reevaluation on judicial review. *Id.* No other

evidence indicates that Claimant had good cause. If Claimant had to complete other work, she could have avoided deviating from behavioral standards by requesting “project time.” (Findings of Fact, No. 12.) Therefore, the UCBR did not err in finding that Claimant committed willful misconduct.⁴

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

⁴ Claimant also argues that she has a speech disability that prevented her from effectively testifying at the referee’s hearing. However, Claimant did not raise this issue before the UCBR and, therefore, it is waived. *See Merida v. Unemployment Compensation Board of Review*, 543 A.2d 593, 596 (Pa. Cmwlth. 1988).

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ORDER

AND NOW, this 12th day of July, 2013, we hereby affirm the December 14, 2012, order of the Unemployment Compensation Board of Review.

ROCHELLE S. FRIEDMAN, Senior Judge