

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Caroline Kendrick, :  
Petitioner :  
v. :  
Unemployment Compensation :  
Board of Review, : No. 1687 C.D. 2010  
Respondent : Submitted: March 25, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McGINLEY

FILED: May 3, 2011

Caroline Kendrick (Claimant) challenges the orders<sup>1</sup> of the Unemployment Compensation Board of Review (Board) which affirmed the referee's denial of benefits under Section 402(e) of the Unemployment Compensation Law (Law)<sup>2</sup> and Section 4001(d)(2) of the Emergency Unemployment Compensation Act of 2008, 26 U.S.C. §3304 note.

The facts, as initially found by the referee and adopted by the Board, are as follows:

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<sup>1</sup> The Office of Employment Security appears to have issued two separate determinations and assigned two separate appeal numbers because the first claim week at issue (the claim week ending November 14, 2009) concerned Claimant's suspension from work. This claim was assigned Appeal Number B-EUC-10-009-D-1874. The next week at issue was the claim week ending December 19, 2009, which occurred after Claimant was discharged. This claim was assigned Appeal No. B-EUC-10-09-D-1875.

<sup>2</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e).

1. The claimant filed an application for unemployment compensation benefits effective March 1, 2009, and exhausted her entitlement to regular UC benefits.
2. A EUC claim was created for the claimant on or about September 14, 2009.
3. For purposes of this appeal, the claimant was employed as a part time Associate with Sav A Lot working on average between 15-20 hours per week, earning \$13 per hour. The claimant began employment on August 22, 2000 and was last employed on November 13, 2009.
4. During the course of the claimant's employment, the claimant received at least five warnings pertaining to poor customer service.
5. On November 13, 2009, the claimant was observed by the Assistant Manager informing a customer interested in purchasing milk under the WIC<sup>3</sup> Program that 'I can't get that for you right now' after which the Assistant Manager asked the claimant what the problem was.
6. After observing the claimant and the WIC customer, the claimant had a man and a woman in her checkout line at which time the claimant started ringing up items that did not belong to the man.
7. When it was pointed out to the claimant she was ringing out items that did not belong to the customer, the claimant stated 'How was she supposed to know which items belonged to which customer, if you (the man) were paying attention and not on your phone it wouldn't have happened.'
8. The Assistant Manager informed the claimant her behavior was inappropriate in the way she was speaking to the customer to which the claimant replied that the Assistant Manager was not going to talk to her that way.

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<sup>3</sup> WIC refers to a program for women, infants, and children.

9. The employer pulled the claimant's till and sent the claimant home.

10. The employer spoke to the claimant on November 16, 2009, at which time the claimant admitted she had stated to the male customer how was she supposed to know which items belonged to who [sic], and that the customer should have been paying more attention to the order, and the claimant also admitted to asking the WIC customer if she spoke English. The claimant further admitted she was wrong in the way she spoke to the customer.

11. The claimant was discharged from her employment for providing poor customer service.

Referee's Decision, March 29, 2010, (Decision), Findings of Fact Nos. 1-11 at 1-2.

The referee determined:

In the present case, the competent evidence contained in the hearing record establishes the claimant was discharged from her employment for engaging in unprofessional conduct with a customer and further engaging in a verbal confrontation with the Assistant Manager. The Referee recognizes there is a dispute in the testimony presented by the parties, related to the precise nature of the comments made by the claimant, but also in the manner in which the claimant made said statements and the Referee resolves all conflicts in the testimony in favor of the employer.

Specifically, the Referee finds the employer credible the claimant questioned a customer about whether the customer spoke English, and informed the same customer that she was unable to assist the customer at that time. And further finds the employer credible that the claimant commented to a male customer that if he wasn't on his phone and paying attention to his order, that a mix-up in the claimant [ 's ] processing of the order would not have occurred.

Decision at 2.

The Board affirmed as modified:

The Board, finds however, that the sum of the claimant's weekly benefit rate and partial benefit credit is \$314.00 and her average weekly part-time wages, based upon an average of 15 hours per week (not 15-20) amount to \$195.00. Because the claimant's average part-time weekly wage was less than \$314.00, under the doctrine from Richards [v. Unemployment Compensation Board of Review, 480 A.2d 1338 (Pa. Cmwlth. 1984)]<sup>[4]</sup> the claimant is still eligible for reduced EUC benefits.

Therefore, the Board adopts and incorporates the Referee's findings and conclusions, and enters the following order:

The decision of the Referee is affirmed as modified and the claimant is ineligible [sic] for EUC benefits to the extent of Richards.

Board Opinion, June 15, 2010, at 1.

Claimant contends the following:

Whether the Respondent [Board] erred in finding that there was insufficient evidence that the claimant worked 15-20 hours weekly earning \$195.00 weekly, or was it less or more weekly. And could the respondent [Board] verify the amount in wages earned or hours worked weekly to make the decision under the doctrine from Richards.

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<sup>4</sup> In Richards, this Court held that when a claimant leaves a part-time job that does not increase weekly unemployment compensation benefits to which an employee was eligible and thus does not impose an added burden on the fund, the loss of the part-time job becomes irrelevant to the payment of regular benefits.

Whether the Respondent [Board] erred in concluding that the claimant is ineligible for benefits under the provision of section 402(b) of the Pennsylvania Unemployment Compensation Law?

Claimant's Brief at 8.<sup>5</sup>

Initially, the Board asserts that Claimant has failed to properly preserve any issue for this Court's review because the issues she raises in the Statement of Questions Involved in her brief were not included in her petition for review with this Court. Pa.R.A.P. 1513(d)(5) provides that an appellate jurisdiction petition for review shall contain "a general statement of the objections to the order or other determination . . . . The statement of objections will be deemed to include every subsidiary question fairly comprised therein."

"[W]here a Claimant fails to include an issue in his petition for review, but addresses the issue in his brief, this court has declined to consider the issue, since it was not raised in the stated objections in the petition for review, 'nor fairly comprised therein' in accordance with the Pa.R.A.P. 1513. . . ." Tyler v. Unemployment Compensation Board of Review, 591 A.2d 1164, 1168 (Pa. Cmwlth. 1991).

Here, in her petition for review, Claimant asserted that the referee was not impartial and permitted Sav A Lot's (Employer) representative to question her

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<sup>5</sup> This Court's review in an unemployment compensation case is limited to a determination of whether constitutional rights were violated, errors of law were committed, or findings of fact were not supported by substantial evidence. Lee Hospital v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994).

on issues that were not pertinent to the issues before the referee. She also asserts that her constitutional rights were violated when Employer was allowed to raise issues in the hearing that were not the issues before the referee, and that Employer did not present a witness to confirm a statement made at the hearing.

This Court agrees with the Board that Claimant failed to raise the issues contained in the Statement of Questions Involved in her brief in her petition for review. Consequently, those issues are waived. Claimant also did not raise the issues contained in her petition for review in her brief so those issues are waived. Tyler, 591 A.2d at 1167.<sup>6</sup>

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

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<sup>6</sup> Assuming arguendo, that Claimant preserved the issues contained in her Statement of Questions Involved, she still would not prevail. Her first issue regarding whether there was substantial evidence that she worked fifteen to twenty hours per week is not raised in the argument section of her brief, so that is waived. See Pa.R.A.P. 2116(a); Van Duser v. Unemployment Compensation Board of Review, 642 A.2d 544 (Pa. Cmwlth. 1994). (Issues not briefed are waived).

Her second issue concerning her ineligibility for benefits under Section 402(b) of the Law, 43 P.S. §802(b), also fails. Claimant was ineligible for benefits on the basis of willful misconduct under Section 402(e) of the Law, 43 P.S. §802(e). Section 402(b) refers to ineligibility for quitting employment without a necessitous and compelling reason. Claimant argues that she did not leave her job but was discharged by Employer. That is what the Board found. Claimant does not address the issue of willful misconduct.

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**ORDER**

AND NOW, this 3<sup>rd</sup> day of May, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

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BERNARD L. MCGINLEY, Judge