

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lauren G. Smith, :
 :
 : Petitioner :
 :
 : v. : No. 869 C.D. 2010
 : Submitted: September 3, 2010
 :
 : Unemployment Compensation :
 : Board of Review, :
 : Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN

FILED: October 12, 2010

Lauren G. Smith (Claimant) petitions for review, *pro se*, of the April 19, 2010, order of the Unemployment Compensation Board of Review (UCBR) affirming the decision of the referee to deny her request for unemployment compensation benefits. The UCBR determined that Claimant was not entitled to benefits because her discharge was the result of willful misconduct under section 402(e) of the Unemployment Compensation Law (Law).¹ We affirm.²

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).

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

Claimant worked for Luther Woods Convalescent Center (Employer) as a full-time support aide from March 21, 1990, until her termination on July 24, 2009. (Findings of Fact, No. 1.)³ Employer's personnel policy provided that employee meals and breaks were to be taken in the employee break room. (Findings of Fact, No. 2.) Employer also had a code of ethics, which required all employees to exhibit honesty toward their fellow employees. (Findings of Fact, No. 3.) Although Claimant has a mental disability,⁴ she was aware, or should have been aware, of Employer's policies and procedures. (Findings of Fact, Nos. 5, 7.)

Prior to Claimant's termination, Suzanne Arrighy, Director of Nursing, became aware that Claimant had lied on several occasions about the completion of her job duties. (Findings of Fact, No. 6.) Employer recommended to Claimant's father that he hire a job coach to assist Claimant with her work. Claimant worked with a job coach from some time in 2008 until the date of her termination. (Findings of Fact, Nos. 7-8.)

Despite these efforts to coach Claimant, Employer continued to have problems with Claimant's job performance. On February 13, 2009, Employer issued Claimant a written warning for failing to wash her hands and change her gloves after

³ The UCBR adopted the referee's findings of fact in their entirety. Thus, any citations to findings of fact in this opinion may be found in the referee's December 11, 2009, decision.

⁴ While the parties do not dispute this fact, there is no evidence in the record describing the nature or extent of Claimant's mental incapacity. At the hearing before the referee, Claimant's counsel attempted to introduce a 1992 psychological report as evidence of Claimant's mental incapacity. However, the referee sustained Employer's objection to the report on the grounds of relevance, hearsay, and lack of authentication. (N.T., 11/13/09, at 6, 8-9.)

dispensing cups of water to the residents. (Findings of Fact, No. 9.) On July 6, 2009, Employer suspended Claimant for three days because she failed to collect cups from the residents and then lied to her supervisor about the incident. (Findings of Fact, No. 11.)

On July 24, 2009, Claimant was scheduled to work from 8:00 a.m. to 4:15 p.m. (Findings of Fact, No. 12.) At approximately 3:45 p.m., Kathy Gray, Director of Social Services and Admissions, found Claimant sitting inside a resident's room, watching television alone and holding a bag of chips and a soda. (Findings of Fact, Nos. 13-16.) After being notified of this incident, Arrighy met with Claimant at the end of Claimant's shift. (Findings of Fact, No. 20.) Claimant admitted to Arrighy that she was in the resident's room watching television and not completing her job duties. (Findings of Fact, No. 21.) Employer discharged Claimant for dishonesty, gross insubordination, failure to complete her duties, and violation of Employer's meal and break policy. (Findings of Fact, No. 22.)

Claimant filed an application for unemployment benefits, which was granted by the local service center. Employer appealed that decision to the referee, who held an evidentiary hearing at which Arrighy, Gray, and Claimant testified. At the beginning of the hearing, Claimant's counsel stated that Claimant's father was present to testify regarding the issue of Claimant's mental capacity. However, there was no dispute that Claimant had mental limitations. (*See* N.T., 11/13/09, at 1-2, 21, 40; UCBR's Order at 1.) Because Claimant's father's testimony was not relevant to the issues before the referee, he was not called to testify. (N.T., 11/13/09, at 39.) When Claimant took the stand, she testified that she admitted to Arrighy that it was

wrong for her to be in a resident's room watching television during her shift and that she should have been dispensing water to the residents at that time. (*Id.* at 35.)

On December 11, 2009, the referee issued an order reversing the local service center's decision and denying Claimant's request for benefits. The referee concluded that Claimant's refusal to comply with Employer's break policy and code of ethics constituted willful misconduct. (Referee's Decision/Order at 2.)

Claimant timely appealed to the UCBR. The UCBR agreed with the referee's analysis and adopted the referee's findings of fact and conclusions of law. The UCBR also noted that, although Claimant has mental challenges, she admitted that she knew it was wrong to be in a resident's room watching television during her work shift. (UCBR's Order at 1.) Claimant also demonstrated at the hearing that she was capable of understanding Employer's rules. (*Id.*) Therefore, the UCBR affirmed the referee's ruling. Claimant filed a timely request for reconsideration of the UCBR's order, which was denied.

In her petition for review, Claimant raises a single claim.⁵ Claimant asserts that she was denied due process of law at the hearing because her father was not permitted inside the hearing room.⁶ Specifically, she argues that: (1) her father is

⁵ Although the argument section of Claimant's thirty-six-page brief is divided into nine subsections, each subsection addresses some aspect of Claimant's primary argument that her due process rights were violated at the hearing.

⁶ It appears that Claimant's father and one of Employer's witnesses, neither of whom testified, had to remain in the waiting room during the hearing due to insufficient seating inside the hearing room. (*See* N.T., 11/13/09, at 3; UCBR's Brief at 6 n.2.)

her “communication facilitator”; (2) she needed him to assist her with her testimony; and (3) because the referee precluded her father’s presence at the hearing, Claimant’s due process rights were violated. We conclude that this claim is waived.

Neither Claimant nor her counsel objected to continuation of the hearing without Claimant’s father present, nor did they assert that Claimant needed her father’s assistance to proceed with the hearing. Furthermore, Claimant failed to raise this claim in her appeal to the UCBR, and the UCBR did not address it.⁷ Therefore, it is waived. *See Reading Nursing Center v. Unemployment Compensation Board of Review*, 663 A.2d 270, 275 (Pa. Cmwlth. 1995) (finding due process claim waived on appeal where employer failed to develop claim in its brief to UCBR); *Tri-State Scientific v. Unemployment Compensation Board of Review*, 589 A.2d 305, 307 (Pa. Cmwlth. 1991) (stating that issues not specifically raised before UCBR will not be considered by this court).

Accordingly, we affirm the UCBR’s order.

ROCHELLE S. FRIEDMAN, Senior Judge

⁷ On appeal to the UCBR, Claimant challenged the referee’s refusal to admit certain evidence, including her father’s testimony and the 1992 psychological report, regarding her limited mental capacity. The first time Claimant asserted a violation of her due process rights was in her April 24, 2010, petition for reconsideration, which the UCBR denied without opinion.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | | |
|---------------------------|---|-------------------|
| Lauren G. Smith, | : | |
| | : | |
| Petitioner | : | |
| | : | |
| v. | : | No. 869 C.D. 2010 |
| | : | |
| Unemployment Compensation | : | |
| Board of Review, | : | |
| | : | |
| Respondent | : | |

ORDER

AND NOW, this 12th day of October, 2010, we hereby affirm the April 19, 2010, order of the Unemployment Compensation Board of Review.

ROCHELLE S. FRIEDMAN, Senior Judge