



Claimant worked as a full-time restaurant server for Great Lakes Services (Employer) from March 6, 2008, through December 18, 2011. (Findings of Fact, No. 1.)<sup>2</sup> Employer has a written policy requiring that any items left behind by guests, such as money, valuables, or clothing, must be immediately turned in to a director. (Findings of Fact, No. 2.) Employer also has an unwritten policy prohibiting employees from soliciting tips or gratuities from customers. (Findings of Fact, No. 3.)

On December 18, 2011, a customer complained to Employer about Claimant delivering a jacket to his hotel room that the customer had left in Employer's restaurant. (Findings of Fact, No. 4.) Claimant had provided service earlier that night to the customer and his minor children. (Findings of Fact, No. 5.) After the customer left the restaurant, Claimant realized that the customer had left his jacket behind. Claimant called the customer's hotel room to inform him that he had left the jacket. (Findings of Fact, No. 6.) The customer told Claimant that he would come back to pick up his jacket later that evening. (Findings of Fact, No. 7.)

Around 10:00 p.m., the customer sent his two children to the restaurant to pick up the jacket. Claimant refused to give the children the jacket because he was concerned that he would be held responsible if something happened to the jacket or its contents. (Findings of Fact, No. 8.) Claimant then accompanied the two children to the customer's hotel room to deliver the jacket. (Findings of Fact, No. 9.) On the way, Claimant asked the children if there was anything wrong with the service he

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<sup>2</sup> The UCBR adopted and incorporated the referee's findings of fact and conclusions of law, but the UCBR modified findings of fact numbers 2, 8, and 9. (UCBR's Order, 5/16/12, at 1.) Those modified findings appear in the text above.

provided. When asked why, Claimant told the children that the customer did not leave him a tip. (Findings of Fact, No. 10.)

Upon receiving the customer's complaint, Employer suspended Claimant pending further investigation. (Findings of Fact, No. 11; Certified Record (C.R.), Item No. 5.) Before this incident, Employer had issued two warnings to Claimant, in July 2009 and August 2011, regarding tip solicitations. (Findings of Fact, No. 12.) On December 21, 2011, Employer discharged Claimant for deliberately violating its lost-and-found policy and its no-tip-solicitation policy. (Findings of Fact, No. 13.)

Claimant filed a claim for unemployment benefits, which was denied by the local service center. Claimant timely appealed to the referee, who held an evidentiary hearing on March 8, 2012. Claimant testified on his own behalf. Employer presented the testimony of Bill Patsis, Director of Food and Beverage, and Brynn Lee, Employee Relations Manager. The referee concluded that Claimant committed willful misconduct by deliberately violating Employer's lost-and-found and no-tip-solicitation policies and intentionally disregarding Employer's interests. Claimant timely appealed to the UCBR, which affirmed. Claimant now petitions for review of that decision.<sup>3</sup>

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<sup>3</sup> Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law, and whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

In his petition for review, Claimant asserts that Employer failed to establish that Claimant solicited a tip in violation of Employer's policy.<sup>4</sup> We disagree.

“Willful misconduct” is 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, evil design, or an intentional and substantial disregard of the employer's interests or the employee's duties and obligations. *Oliver v. Unemployment Compensation Board of Review*, 5 A.3d 432, 438 (Pa. Cmwlth. 2010) (*en banc*). When an employee is discharged for violating a work rule, the employer must prove the existence of the rule, the reasonableness of the rule, and the fact of its violation. *Chapman v. Unemployment Compensation Board of Review*, 20 A.3d 603, 607 (Pa. Cmwlth. 2011). The burden then shifts to the employee to prove that he or she had good cause for violating the rule. *Id.*

Claimant does not dispute that Employer has an unwritten rule prohibiting tip solicitation. Rather, he claims that he did not receive prior warnings regarding tip solicitation and that his conduct in this case did not amount to tip solicitation. In an unemployment case, the UCBR is the ultimate factfinder. *Bell v. Unemployment Compensation Board of Review*, 921 A.2d 23, 26 n.4 (Pa. Cmwlth.

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<sup>4</sup> We note that Claimant's statement of questions involved on appeal lists additional issues that were neither included in his petition for review nor fairly comprised therein. Therefore, they are waived. *See Jimoh v. Unemployment Compensation Board of Review*, 902 A.2d 608, 611 (Pa. Cmwlth. 2006); Pa. R.A.P. 1513(d).

2007). Questions of credibility and the resolution of evidentiary conflicts are within the UCBR's discretion and are not subject to re-evaluation on judicial review. *Id.* Here, the UCBR resolved the evidentiary conflicts in favor of Employer and against Claimant. Each of Employer's witnesses testified about Employer's progressive disciplinary policy and Claimant's prior warnings regarding tip solicitation. (N.T., 3/8/12, at 11-14, 17-18.)

Claimant asserts that on the night in question, he merely asked the customer's children whether he had provided good service. However, Claimant's own testimony established that he inquired about a tip:

C: I was asking [the children] did [your father] say anything about my service? . . . And they said no, why? And I said well he didn't leave me anything so I did say that to the girls.

R: And what's he didn't leave me anything?

C: He didn't leave me anything on the table.

R: What's that supposed – what am I supposed to interpret that as?

C: He didn't leave me anything – a gratuity.

(*Id.* at 25.)<sup>5</sup> The UCBR found that although Claimant did not directly ask for a tip, Claimant's remarks to the customer's children about not receiving a tip amounted to solicitation. We agree that Claimant's intent to solicit was apparent in his statements

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<sup>5</sup> In a December 19, 2011, email to Patsis describing the incident, Claimant stated, "I wanted to return [the jacket] myself to ensure nothing fell out of the pocket and, depending on [the customer's] demeanor when he opened the door, I thought I might ask him if I did anything to disappoint him." (C.R., Item No. 7, at 1.)

and his overall conduct. Furthermore, Claimant had been warned about attempts to solicit in the past and knew that Employer prohibited such conduct.

We conclude that the record contains substantial evidence to support the UCBR's determination that Claimant was discharged for willful misconduct under the Law.<sup>6</sup> Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Senior Judge

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<sup>6</sup> Even if Claimant had not violated Employer's no-tip-solicitation policy, we agree with the UCBR that the evidence also established that Claimant deliberately violated Employer's lost-and-found policy and intentionally disregarded Employer's interests.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Byron D. Melvin,	:
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Petitioner	: No. 1114 C.D. 2012
	:
v.	:
	:
Unemployment Compensation	:
Board of Review,	:
	:
Respondent	:

ORDER

AND NOW, this 22nd day of January, 2013, we hereby affirm the May 16, 2012, order of the Unemployment Compensation Board of Review.

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ROCHELLE S. FRIEDMAN, Senior Judge