

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Deenaw Patterson, :
 :
 Petitioner :
 :
 v. : No. 227 C.D. 2008
 : Submitted: August 15, 2008
 Unemployment Compensation :
 Board of Review, :
 Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN

FILED: September 19, 2008

Deenaw Patterson (Claimant), proceeding *pro se*,¹ petitions for review of the December 28, 2007, order of the Unemployment Compensation Board of Review (UCBR), which affirmed the decision of a referee denying Claimant unemployment compensation benefits pursuant to section 402(e) of the Unemployment Compensation Law (Law).² We also affirm.

¹ Our supreme court has adopted the Commonwealth Court's position that "any layperson choosing to represent himself in a legal proceeding must, to some reasonable extent, assume the risk that his lack of expertise and legal training will prove his undoing." *Vann v. Unemployment Compensation Board of Review*, 508 Pa. 139, 148, 494 A.2d 1081, 1086 (1985) (quoting *Groch v. Unemployment Compensation Board of Review*, 472 A.2d 286, 288 (Pa. Cmwlth. 1984)).

² Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e). This section provides that an employee shall be ineligible for compensation for any week in which her unemployment is due to her discharge or temporary suspension from work for willful misconduct in connection with her work. 43 P.S. §802(e).

Claimant worked full-time as a nurse assistant at HCR Manor Care/Arden Courts (Employer), an assisted living center. On July 14, 2007, Claimant and a co-worker were in a common resident area during their work shifts when they became involved in an argument, which included profanity. Claimant and the other worker were suspended pending an investigation, and, after review, Employer decided to discharge both employees. Claimant's employment was terminated in mid-July 2007. (UCBR's Findings of Fact, Nos. 1-5.) Thereafter, the local job center granted Claimant's application for benefits. Employer appealed, and the matter was assigned to a referee for hearings.

Employer presented the testimony of Kimberly Goodall, Sharrise Williams and Judy McCafferty. Goodall, Employer's executive director, testified that Employer has rules against the use of profanity and fighting on the job, that a violation of these rules results in immediate discharge and that Claimant was aware of these rules. Goodall stated that she assisted in the investigation of the incident, which included interviewing witnesses, and that it was clear that Claimant violated the work rules. (N.T. at 4-8.)

Williams, Employer's administrative services coordinator, testified that she observed a portion of the argument and that both Claimant and the other employee were using profanity and were "in each other's faces." (N.T. at 10.) Williams stated that she initially attempted to diffuse the situation by telling Claimant and the other employee to calm down, but she eventually had to pull the other employee away from Claimant, and other employees had to pull Claimant back. Williams testified that the argument occurred in a common area where residents and

other employees were present. Williams explained that Claimant was suspended pending an investigation and that when Employer attempted to advise Claimant of the results of the investigation through telephone calls and a letter, Claimant did not respond. (N.T. at 9-13, 23.)

McCafferty, a resident service supervisor, stated that she was in the nursing office with two other employees when she heard yelling in the common area of one of the resident houses. She testified that, when she arrived on the scene, Claimant and the other employee were yelling at each other, using profanity and reaching for each other, trying to get close enough to make contact. McCafferty explained that she stepped between the two to keep them separated but that the two kept trying to move forward toward each other. McCafferty testified that the two eventually were separated and that both employees were suspended pending an investigation. McCafferty stated that she was not present at the beginning of the argument and did not observe the other employee come at Claimant. (N.T. at 13-16, 21.)

In response, Claimant described her version of the events of July 14, 2007, stating that the other employee had confronted her about a non-work-related conflict and that Claimant told the co-worker that she was not going to discuss the matter at work. According to Claimant, McCafferty came to her and asked what was going on with the other employee, and Claimant told McCafferty about the confrontation. Claimant testified that while she was discussing the matter with McCafferty, the other employee returned and started putting her hands in Claimant's face and touched Claimant's face. Claimant stated that she smacked the co-worker's

hands out of her face, and the two began to argue loudly. Claimant explained that McCafferty did nothing to prevent the argument from starting but, eventually: (1) told Claimant to calm down; (2) stepped between the women to try to break up the argument; and (3) grabbed Claimant to remove her from the situation. Claimant testified that she never moved from her position but that the co-worker attempted to break free from Williams. Claimant acknowledged that, during the argument, several employees grabbed her to try to calm her down and that she continued to argue with the co-worker as Williams took the co-worker away. Claimant was aware of Employer's policies against fighting and profanity but denied that she used profanity during the argument. Claimant testified that she received several telephone messages from Employer regarding the results of the investigation and that she returned Employer's calls but was out of town when Employer returned her calls. (N.T. at 16-20.)

Crediting Employer's witnesses' testimony, the referee held that Claimant disregarded the standards of behavior of which Employer should reasonably expect from its employees when she engaged in the argument and used profanity, and, therefore, her actions constituted willful misconduct under the Law. Moreover, the referee held that Claimant did not demonstrate good cause for participating in the argument or for escalating the argument. Accordingly, the referee reversed the job center's determination and denied Claimant benefits. Claimant appealed to the UCBR, which affirmed, adopting and incorporating the referee's findings and conclusions and resolving any conflicts in testimony in Employer's favor.

On appeal to this court,³ Claimant asserts that the UCBR erred in concluding that she had committed willful misconduct and was, therefore, ineligible for benefits because: (1) Employer’s witnesses’ testimony about the situation was untrue; and (2) she had good cause for engaging in the argument.⁴

Initially, we note that, because Claimant has not challenged any specific findings of fact, the UCBR’s findings are conclusive on appeal. *Steinberg Vision Associates v. Unemployment Compensation Board of Review*, 624 A.2d 237 (Pa. Cmwlth. 1993). In addition, Claimant’s assertion that the UCBR erred in relying on Employer’s witnesses’ testimony because it was untrue is an improper attack on the UCBR’s credibility determinations. Questions of credibility and the resolution of conflicting evidence are within the sound discretion of the UCBR and are not subject to re-evaluation on judicial review. *Peak v. Unemployment Compensation Board of Review*, 509 Pa. 267, 501 A.2d 1383 (1985).

Under section 402(e) of the Law, an employer bears the burden of proving that the claimant engaged in willful misconduct in order to disqualify a claimant from receiving benefits.⁵ *Docherty v. Unemployment Compensation Board*

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

⁴ Claimant also asserts that she is entitled to benefits because Employer failed to give notice that she was discharged from her employment. However, Claimant failed to raise this issue in her Petition for Review, and, therefore, this issue is waived. *McDonough v. Unemployment Compensation Board of Review*, 670 A.2d 749 (Pa. Cmwlth. 1996).

⁵ Our supreme court in *Frumento v. Unemployment Compensation Board of Review*, 466 Pa. 81, 83-4, 351 A.2d 631, 632 (1976) (emphasis added), defined “willful misconduct” to include “ a **(Footnote continued on next page...)**

of Review, 898 A.2d 1205 (Pa. Cmwlth. 2006). This court has held that verbal and physical fighting rises to the level of willful misconduct because it constitutes a disregard of standards of behavior which an employer has the right to expect from an employee. *Jones v. Unemployment Compensation Board of Review*, 460 A.2d 412 (Pa. Cmwlth. 1983). Once the employer shows that the claimant engaged in willful misconduct, the burden shifts to the claimant to prove that she had good cause for her actions. *Department of Corrections v. Unemployment Compensation Board of Review*, 943 A.2d 1011 (Pa. Cmwlth. 2008).⁶

Here, the credited testimony of Employer’s witnesses supports the finding that Claimant engaged in a verbal altercation, which included profanity, with a co-worker during work hours and in the presence of co-workers and Employer’s elderly residents. Thus, Employer has satisfied its burden of proof, and the burden now shifts to Claimant to establish that she had good cause for her conduct.

Claimant argues that she had good cause to engage in the argument because her supervisor, who was present at the beginning of the argument, did not

(continued...)

deliberate violation of the employer’s rules, [and] **a disregard of standards of behavior which the employer has a right to expect of an employee.**” Whether a claimant’s conduct constitutes willful misconduct rendering the claimant ineligible for benefits is a question of law that is subject to plenary review by the court. *Docherty v. Unemployment Compensation Board of Review*, 898 A.2d 1205 (Pa. Cmwlth. 2006).

⁶ Good cause is established where the action of the employee is justifiable or reasonable under the circumstances and should be evaluated in light of all the circumstances. *Department of Corrections*. The question of whether a claimant proved good cause is a question of law subject to our review. *Id.*

intervene to prevent the argument from occurring. Suffice it to say that Claimant, and no one else, is accountable for her conduct.

Claimant further asserts in her brief that she had to participate in the argument to defend herself, and she could not retreat from the situation because she did not know what would happen if she turned her back to her co-worker given her supervisor's inability to control the other employee. (Claimant's brief at 9.) However, before the referee, Claimant never testified that she was afraid of her co-worker or that she ever attempted to retreat; accordingly, Claimant has waived the issue of self-defense as good cause. Moreover, the testimony of Employer's witnesses, as well as Claimant's, clearly supports the conclusion that Claimant was actively involved in the argument from the beginning and continued to argue with the co-worker even as the co-worker was being removed from the area. (N.T. at 17-18.) Viewing all the circumstances surrounding Claimant's July 14, 2007, conduct, we agree with the UCBR that this conduct was not reasonable or justifiable, and, therefore, Claimant did not establish that she had good cause for her actions.⁷

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Judge

⁷ We note that the UCBR held that Claimant committed willful misconduct because her conduct fell below the standards of behavior that Employer had the right to expect, whereas Employer discharged Claimant for violating Employer's work rule. However, Claimant does not raise any issue challenging the UCBR's reasoning and, in any event, we would reach the same result under either analysis.

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Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 19th day of September, 2008, the order of the Unemployment Compensation Board of Review, dated December 28, 2007, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Judge