IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Eli G. Ball, Petitioner	:	
v.	:	No. 1911 C.D. 2009
	:	Submitted: February 12, 2010
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: April 21, 2010

Eli G. Ball (Claimant) petitions for review of the August 28, 2009, order of the Unemployment Compensation Board of Review (UCBR) reversing the decision of the referee to award Claimant unemployment compensation benefits. The UCBR concluded that Claimant was ineligible for benefits under section 402(e) of the Unemployment Compensation Law (Law)[1] because his discharge was the result of willful misconduct. We agree and, therefore, affirm.

Claimant worked as an injection mold machine operator for Erie Molded Plastics Company (Erie) from June 30, 2008, through March 13, 2009. He was

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e).

placed with Erie by a staffing agency, All Seasons Placement, Inc. (Employer). On March 12, 2009, Claimant reported to his foreman at Erie that a co-worker had been throwing machine parts at him. When the situation was not resolved, Claimant approached the co-worker and used the word "body bag" while holding a large plastic box liner in his hands. (UCBR's Findings of Fact, Nos. 1-5.)

The next day, which was a Friday, Erie investigated the matter and notified Employer that Claimant had placed a large plastic box liner over his co-worker's head and told the co-worker that he was "fitting him for a body bag." (UCBR's Findings of Fact, Nos. 6-7.) Erie also told Employer that Claimant was not to return to work at the facility. The following Monday, Employer notified Claimant that his job at Erie had been terminated. Claimant initially told Employer that he had intended the "body bag" remark as a joke. After his discharge, however, Claimant informed Employer that he made the remark because his co-worker was throwing parts at him. (UCBR's Findings of Fact, Nos. 8-11.)

Claimant filed a claim for unemployment benefits, citing "lack of work" as the reason for his separation from Employer. (UCBR's Findings of Fact, No. 13.) Claimant began collecting unemployment benefits; however, the local service center later determined that Claimant was ineligible for benefits under section 402(e) of the Law because his discharge was the result of willful misconduct. It also determined

that Claimant was liable for a fault overpayment in the amount of $1,274.00 under section 804(a) of the Law.[2]

Claimant appealed to the referee. The referee held an evidentiary hearing at which Claimant and his former supervisors, David A. Marshall and Donna L. Boyd,[3] testified. Claimant admitted that he approached his co-worker and used the word "body bag" while holding a plastic box liner, but he denied that he placed the box liner over the co-worker's head. (N.T., 6/16/09, at 17.) Claimant testified that he made the remark out of frustration because the co-worker had been throwing parts at him. Claimant further testified that he reported the parts-throwing incident to his foreman, but the foreman did nothing to resolve the situation. (*Id.* at 13, 17-18.) Claimant admitted, however, that he did not tell Marshall about the parts-throwing incident until after his discharge, and Boyd testified that the first time she heard about it was at the hearing. (*Id.* at 22.)

At the conclusion of the hearing, the referee reversed, finding that Claimant was not ineligible for benefits and not liable for a fault overpayment under the Law. Employer appealed to the UCBR, which reversed the referee's decision. The UCBR noted the conflicts in the testimony, but credited the testimony of Employer's witnesses that Claimant admitted to making the "body bag" remark to his

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[2] Section 804(a) of the Law provides that when a person, by reason of his own fault, has received compensation under the Law to which he was not entitled, he shall be liable to repay the amount received, plus interest, to the Unemployment Compensation Fund. 43 P.S. §874(a).

[3] Marshall and Boyd were staffing recruiters for Employer, which placed Claimant with Erie. (N.T., 6/16/09, at 1-2.)

co-worker while holding a plastic box liner. The UCBR found that even if Claimant did not actually place the box liner over the co-worker's head, Claimant's remark was a threat of physical harm. (UCBR Order at 3.) Thus, the UCBR concluded that Claimant was ineligible for benefits under section 402(e) of the Law and liable for a fault overpayment in the amount of $1,274.00 under section 804(a) of the Law. Claimant now petitions for review of that decision.

On appeal, Claimant asserts that the UCBR erred in finding that Claimant's telling a co-worker that he was "fitting him for a body bag" while holding a plastic box liner was willful misconduct.[4] We disagree.

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). "Willful misconduct" is defined as: (1) wanton and willful disregard of the employer's interests; (2) deliberate violation of the rules; (3) disregard of standards of behavior that an employer can expect from its employees; or (4) negligence that manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer's interests or the employee's duties and obligations.

[4] 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. Whether an employee's conduct constitutes willful misconduct is a question of law subject to our review. *Andrews v. Unemployment Compensation Board of Review*, 633 A.2d 1261, 1262 (Pa. Cmwlth. 1993). The burden of establishing willful misconduct is on the employer. *Rivera v. Unemployment Compensation Board of Review*, 526 A.2d 1253, 1255 (Pa. Cmwlth. 1987).

Andrews v. Unemployment Compensation Board of Review, 633 A.2d 1261, 1262 (Pa. Cmwlth. 1993).

This Court has held that "threats of harm toward a supervisor or a co-worker constitute conduct below the standards of behavior which an employer has a right to expect from an employee." *Sheets v. Unemployment Compensation Board of Review*, 708 A.2d 884, 885 (Pa. Cmwlth. 1998). Moreover, a willful misconduct determination may be based on an employee's verbal threat of harm even if no physical altercation ensues. *See, e.g., Rodites v. Unemployment Compensation Board of Review*, 382 A.2d 1287, 1287-88 (Pa. Cmwlth. 1978) (finding willful misconduct where employee, during heated exchange with councilman, "offered to take the councilman outside"); *Wilson v. Unemployment Compensation Board of Review*, 325 A.2d 500, 501 (Pa. Cmwlth. 1974) (finding willful misconduct where employee told co-worker that his manager "should get off [his] back or [he] would ship him out of there in a plastic bag" and weapons were later discovered in employee's car); *Zondler v. Unemployment Compensation Board of Review*, 175 A.2d 149, 149-50 (Pa. Super. 1961) (finding willful misconduct where employee held pencil close to co-worker's face and made stabbing motions, frightening co-worker).[5]

Although the evidence in this case was not overwhelming, we conclude that the testimony credited by the UCBR provides substantial evidence to support the determination that Claimant disregarded the standards of behavior that an employer

[5] *But see Blount v. Unemployment Compensation Board of Review*, 466 A.2d 771 (Pa. Cmwlth. 1983) (concluding employee's remark about bomb threat did not rise to level of willful misconduct where remark was made off-handedly and there was no indication he was capable of carrying out such threat).

has a right to expect of its employees by threatening his co-worker with physical harm.

Claimant also asserts that his conduct did not amount to willful misconduct because it was justified under the circumstances. Claimant asserts that he was not the aggressor and that he made the "body bag" remark to his co-worker only after the co-worker threw parts at him. An offensive remark does not amount to willful misconduct if it is justifiably provoked and *de minimis* in nature. *Rivera v. Unemployment Compensation Board of Review*, 526 A.2d 1253, 1256 (Pa. Cmwlth. 1987). Where an employee's action is justifiable under the circumstances, "it cannot be considered willful misconduct because it cannot properly be charged as a willful disregard of the employer's intent or rules or of the standard of conduct which the employer has a right to expect." *Eshbach v. Unemployment Compensation Board of Review*, 855 A.2d 943, 948 (Pa. Cmwlth. 2004).

The UCBR concluded that even if the co-worker threw parts at Claimant, Claimant's conduct was not justified. (UCBR Order at 3.) We agree. At the time Claimant made the "body bag" remark, the parts-throwing incident had ended, and Claimant had already spoken to his foreman about the co-worker's behavior. (N.T., 6/16/09, at 13, 17-18.) Thus, Claimant's conduct was not in reaction to an immediate provocation; rather, Claimant believed the foreman was not going to do anything to resolve the matter and was expressing his frustration about the situation. Moreover, Claimant admitted that he did not report the problem with his co-worker to Employer until after he was discharged. (*Id.* at 22.) Under these circumstances, Claimant failed to establish that his behavior was justified. *See*

Rivera, 526 A.2d at 1256 (finding no justifiable good cause where employee could have retreated and sought assistance but instead willingly escalated confrontation with fellow employee).

Finally, Claimant asserts that Employer failed to prove the existence of a written workplace rule that Claimant violated. However, that issue is irrelevant because the UCBR based its willful misconduct determination on the finding that Claimant disregarded standards of behavior that an employer has a right to expect of its employees. This finding is supported by substantial evidence.

Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Senior Judge

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O R D E R

AND NOW, this 21st day of April, 2010, we hereby affirm the August 28, 2009, order of the Unemployment Compensation Board of Review.

ROCHELLE S. FRIEDMAN, Senior Judge