IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Ruch Carbide Burs, Inc., Petitioner | : | |
| v. | : | No. 520 C.D. 2009 |
| | : | Submitted: October 2, 2009 |
| Unemployment Compensation Board of Review, Respondent | : | |

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge[1]

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: January 22, 2010

Ruch Carbide Burs, Inc. (Employer) petitions for review of an adjudication of the Unemployment Compensation Board of Review (Board) finding Keith J. Cox (Claimant) eligible for unemployment compensation benefits. Employer contends that Claimant was ineligible by reason of his willful misconduct, *i.e.*, starting a physical fight in the workplace. The Board held that Claimant was not ineligible for benefits because Employer waited from Thursday to Tuesday to discharge Claimant and did not offer sufficient evidence that it used that time to conduct an investigation. Because Employer was not obligated to explain such a short delay in terminating Claimant, we will reverse the Board's order granting benefits.

[1] This case was decided before Senior Judge McCloskey retired on December 31, 2009.

Employer is a tool and die company that employed Claimant as a full-time grinder from July 29, 2007, through September 26, 2008. On Thursday, September 25, 2008, Claimant got into an argument with another employee, Jason Carpenter, that became physical. Claimant knocked Carpenter to the ground, after punching him in the nose and kneeing him in the abdomen. Claimant initiated the altercation. Employer sent Claimant home for the day. Later that day, Employer called Claimant back to work to apologize to Carpenter. Employer made both employees shake hands and informed Claimant that any future incidents would result in his termination. Claimant then worked the remainder of the day without incident.

Claimant returned to work on Friday, September 26, 2008, assigned to a place where he could not interact with Carpenter. On Monday, September 29, 2008, Claimant called Employer to report that he could not work because of illness. Employer instructed Claimant to obtain a doctor's note. When Claimant responded that he could not afford to see a doctor, Employer told Claimant to "stay home and forget it all." Referee Decision, Finding of Fact No. 11. Claimant returned to work on September 30, 2008, but was told that he was no longer needed.

Claimant filed for unemployment compensation benefits, and they were granted by the Unemployment Compensation Service Center (UC Service Center) for the reason that Employer had not promptly discharged Claimant after he instigated the workplace fight. Employer appealed, and a hearing was conducted by a Referee. At the hearing, the Referee first identified the documents from the UC Service Center's file, documents identified as SC-1 through SC-16, which were entered into the record without objection. The Referee then heard the testimony of Claimant and Employer's witness. Employer was represented by counsel, and Claimant was not.

Before closing the record, the Referee asked the parties if they were "satisfied they had an opportunity to present all their evidence to the Referee," and both parties answered in the affirmative. Notes of Testimony at 37 (N.T. ___). In the course of his closing argument, Employer's counsel attempted to read a statement from the Record of Oral Interview with Employer, marked as Exhibit SC-10, which reported that Employer did not discharge Claimant on the day of the fight because it was investigating Claimant's background. The Referee did not allow Employer's counsel to read from Exhibit SC-10. The Referee stated that the document, made part of the record by the Referee, had not been moved into evidence.[2]

The Referee held that Employer did not sustain its burden of proving that Claimant's actions rose to the level of willful misconduct. The Referee found:

> Here, the employer was fully aware of the circumstances surrounding the claimant's attack upon the other employee. The employer chose not to discharge the claimant for that incident, but to resolve it by way of a forced settlement between the claimant and the other employee. As the other employee testified before the Referee, the employer insisted that he not press criminal charges against the claimant, but resolve the matter by shaking hands, accepting the claimant's apology, and returning to work. Having done so, even if the employer later regretted its decision to allow the claimant to continue working, absent any additional incident of the same type, the employer cannot again use the incident of September 25, 2008 to contend that the claimant was discharged for reasons of willful misconduct when the employer failed to do so when it had the opportunity. No further investigation was required and no intermediate action was taken to suspend the claimant subsequent to the handshake resolution imposed by the employer.

[2] The Referee's observation in this is baffling. The Referee made Exhibit SC-10 part of the evidentiary record.

Referee Decision at 2. Accordingly, the Referee found that Claimant was not disqualified from receiving unemployment compensation benefits.

Employer appealed to the Board. Attached to its appeal was a copy of Claimant's criminal record. Employer argued that the record established that it conducted an investigation in the period between the fight and Claimant's discharge and, therefore, Employer proved Claimant ineligible for benefits by reason of his willful misconduct. The Board affirmed the Referee, adopting the Referee's decision as its own and noting that it could not and did not "consider extra record evidence submitted after the Referee's hearing," *i.e.*, Claimant's criminal record. Board Opinion at 1. The Board also noted that Employer "failed to offer sufficient, credible, firsthand testimony establishing that it terminated the claimant after a thorough investigation." *Id*.

Employer petitioned for this Court's review.[3] It seeks a remand so that it can offer evidence that it terminated Claimant after a thorough investigation. It contends, first, that it was denied due process and, second, that its evidence established that Claimant committed willful misconduct.

In its first issue, Employer argues that the Referee violated its due process rights by precluding Employer's attorney from reading into the record the statement contained in the Record of Oral Interview with Employer, marked as Exhibit SC-10 at the hearing. The Board contends that Employer has waived this issue because it was not raised in Employer's appeal to the Board.

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[3] This Court's review of the Board's order is limited to determining whether constitutional rights were violated, whether an error of law was committed and whether the findings of fact are supported by substantial evidence of record. 2 Pa. C.S. §704; *Pettyjohn v. Unemployment Compensation Board of Review*, 863 A.2d 162, 164 (Pa. Cmwlth. 2004).

When a party fails to raise an issue, even one of a constitutional dimension, in an agency proceeding, the issue is waived and cannot be considered for the first time in a judicial appeal. PA. R.A.P. 1551(a);[4] *Hudock v. Pennsylvania Department of Public Welfare*, 808 A.2d 310, 313 n.4 (Pa. Cmwlth. 2002). Further, the Pennsylvania Rules of Appellate Procedure require a petitioner to set forth the location in the record where the issue was raised and preserved below. *See* PA. R.A.P. 2117(c) (requiring the statement of the case in an appellate brief to identify the place and manner in which the issues were raised and preserved below); and PA. R.A.P. 2119(e) (requiring argument in an appellate brief to identify where the issues were raised below). Finally, Rule 1513(d) requires a petition for review to include "a general statement of the objections to the order or other determination." PA. R.A.P. 1513(d).

Employer did not argue in its appeal to the Board that it was denied a full and fair evidentiary hearing. Employer's petition for review does not raise a due process claim. Where an issue could have been, but was not, presented to the government unit from which the appeal is taken, it will not be considered by the Court and the issue will be considered waived. *Pennsylvania Power Co. v. Pennsylvania Public Utility Commission*, 561 A.2d 43, 52 (Pa. Cmwlth. 1989).

In its second issue, Employer challenges the Board's holding that Employer "failed to offer sufficient, credible, firsthand testimony establishing that it terminated the claimant after a thorough investigation." Board Opinion at 1. Employer asserts that it was not required under Pennsylvania law to offer "firsthand testimony" on its investigative efforts. Employer also notes that its immediate and

[4] It provides in relevant part that "[n]o question shall be heard or considered by the court which was not raised before the government unit…." PA. R.A.P. 1551(a).

thorough investigation was "reflected by documents in the record," *i.e.*, the Record of Oral Interview with Employer, which the Referee made part of the record but then stated was not in evidence.[5] Petitioner's Brief at 10.

We agree with Employer that it was not required to offer firsthand testimony on its investigation into Claimant's background and his coworkers' fear of working with him. The hearing notice provided to Employer stated only that Employer *may* present live testimony and that it was preferable to "bring witnesses who directly observed, heard, or participated in the matters about which they are to

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[5] The Record of Oral Interview with Employer stated as follows:

> Why was Keith allowed to work on Friday, Sept 26th if he was discharged for hitting another employee on 9/25? Was the discharge because he didn't come to work on Monday 9/29? If he was discharged for absenteeism, did he follow the company's proper call off procedure? What was Keith told was the reason for his discharge? Keith was discharged for the physical altercation with the other employee. He wasn't left go for absenteeism. Mr. Ruch was thinking of giving Keith another chance, but the employees complained about Keith working there on Friday 9/26. The employee who Keith assaulted was afraid to work with him and other employees felt the same way and left Mr. Ruch know that. Keith has a very hot temper and he is also a boxer. We then found out that he had been incarcerated for assault and battery previously. Mr. Ruch felt that it was not worth the risk to continue to keep Keith working. He was told that his services were no longer needed when he came to work on Tuesday 9/30.

R.R. 12a.

The Board argues in its brief to this Court that statements contained in the Record of Oral Interview with Employer are hearsay and, therefore, not competent evidence. Claimant counters that Exhibit SC-10 was admissible under the business record exception to the hearsay rule. The statement Employer made to the UC Service Center, which the Referee would not allow to be read, was that Employer waited to discharge Claimant until it did an investigation. The truth of Employer's statement is beside the point. The statement was made and recorded by the UC Service Center. It held that Employer's investigation did not justify Employer's waiting until Tuesday, following the fight on Thursday, to dismiss Claimant. Accordingly, the dispositive issue is whether Employer promptly dismissed Claimant, not whether it actually did an investigation. The contents of the Record of Oral Interview are not relevant to the outcome.

testify." Certified Record, Item No. 10, at 2.[6] In this case, there was no dispute that Claimant initiated a physical altercation with a coworker during working hours, which was the basis of Employer's charge of willful misconduct.

Viewing this case like any other willful misconduct case, the applicable legal standards are well settled. Participation in a fight during working hours is willful misconduct, whether it is in violation of a stated company policy or not, since at minimum it rises to the level of a disregard of justifiably expected standards of behavior and of the employer's interests. *Kilpatrick v. Unemployment Compensation Board of Review*, 429 A.2d 133, 134 (Pa. Cmwlth. 1981).[7]

Whether the conduct for which an employee has been discharged constitutes willful misconduct is a question of law subject to appellate review. *Kelly v. Unemployment Compensation Board of Review*, 747 A.2d 436, 438 (Pa. Cmwlth. 2000). The employer bears the burden of proving willful misconduct in order to disqualify a claimant from receiving benefits. *Id.* Once the employer establishes a prima facie case of willful misconduct, the burden shifts to the claimant to prove that

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[6] The hearing notice provided the following standard instructions to Employer:

> You may have witnesses testify in your behalf. Be sure to bring witnesses who directly observed, heard, or participated in the matters about which they are to testify. What a witness learned second-hand may not, depending on the circumstances, be considered at the hearing. You must notify such witnesses about the date, time and place of the hearing. Also, you must arrange for them to be present and to provide any relevant documents. If a witness refuses to appear or provide documentary evidence, you may submit a written request in advance of the hearing to the Referee for a subpoena, as outlined below.

Certified Record, Item No. 10, at 2.

[7] Willful misconduct has been repeatedly defined as a wanton or willful disregard of the employer's interest; a deliberate violation of the employer's rules; disregard of standards of behavior which an employer can rightfully expect from an employee; or negligence indicating an intentional disregard of the employer's interest or the employee's duties or obligations. *Pettyjohn v. Unemployment Compensation Board of Review*, 863 A.2d 162, 164 (Pa. Cmwlth. 2004).

his actions did not constitute willful misconduct under the circumstances or that he had good cause for the behavior. *Id*. at 438-439. A claimant has good cause if his or her actions are justified and reasonable under the circumstances. *Id.* at 439.

Here, Claimant participated in a fight during working hours. As a matter of law, his conduct constituted willful misconduct. Claimant offered no evidence that he had good cause for initiating an altercation with his coworker. The Board's conclusion that "[E]mployer chose not to discharge the claimant for [the altercation], but to resolve it by way of a forced settlement between the claimant and the other employee" is irrelevant to the outcome and, in any event, is not supported by the record. Referee Decision at 2. There is simply no evidence that Employer condoned Claimant's conduct. By making Claimant and Carpenter shake hands and continue working in separate rooms, Employer maintained an orderly work environment while it considered whether or not to terminate Claimant. Employer made its decision to discharge Claimant a mere three business days after the incident, well within the acceptable timeframe for such a decision.[8]

Accordingly, the order of the Board is reversed.

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MARY HANNAH LEAVITT, Judge

[8] Although not directly applicable to the instant matter, numerous decisions of this Court have emphasized that "where there is an *unexplained* substantial delay between the claimant's misconduct and the employer's act to terminate the claimant, the remoteness doctrine will preclude an employer from seeking a denial of benefits based on allegations of willful misconduct." *Raimondi v. Unemployment Compensation Board of Review*, 863 A.2d 1242, 1247 (Pa. Cmwlth. 2004) (emphasis in original). In the case at bar, the three-day delay between the altercation and Claimant's discharge was, by any measure, insubstantial.

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**ORDER**

AND NOW, this 22nd day of January, 2010, the order of the Unemployment Compensation Board of Review, dated February 23, 2009, in the above-captioned matter is hereby REVERSED.

MARY HANNAH LEAVITT, Judge