IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Robert E. Kress, Petitioner | : | |
| v. | : | No. 634 C.D. 2008 |
| | : | Submitted: October 3, 2008 |
| Unemployment Compensation Board of Review, Respondent | : | |

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: December 23, 2008

Robert E. Kress (Claimant) petitions for review of an adjudication of the Unemployment Compensation Board of Review (Board) holding him ineligible for unemployment compensation benefits under Section 402(e) of the Unemployment Compensation Law[1] (Law). In this appeal, we consider whether

[1] Section 402(e) of the Law, Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e), provides in relevant part:

> An employe shall be ineligible for compensation for any week –
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> ***
>
> (e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work…

43 P.S. §802(e).

the Board erred in concluding that Claimant's behavior qualified as willful misconduct. For the reasons that follow, we affirm.

Claimant began his employment with Baierl Chevrolet, Inc. (Employer) in 1996. Employer dismissed Claimant on October 26, 2007, and he then applied for unemployment compensation benefits. On November 8, 2007, the Duquesne UC Service Center approved Claimant's benefits for the stated reason that Claimant had been discharged for non work-related conduct, and, further, Employer had not proven that this conduct was inconsistent with Employer's standards of expected behavior. Employer appealed, and a hearing was held before the Referee at which numerous witnesses testified. The Referee then reversed the decision of the UC Service Center and denied benefits.

Claimant appealed to the Board, which rendered its own findings of fact.[2] Those findings can be summarized as follows. Claimant was employed as director of internet sales for Employer and worked, principally, from home. On or about September 27, 2007, Claimant and the company controller discussed, at work, the need to have Claimant work at the automobile dealership because Claimant was going to be working as an automobile salesperson. Because Claimant's dog was extremely ill, Claimant told the controller that he was going to "come after" Employer's president, Lee Baierl, if the dog died while Claimant was at the dealership. Board decision, March 10, 2008, at 1, Finding of Fact 5; Reproduced Record at 251a (R.R. ___). The controller reported the comment to management and prepared a memorandum regarding the incident, as instructed, on October 5, 2007. Employer has a policy, of which Claimant was aware, that

[2] The Board is the ultimate fact finding body and arbiter of credibility. *Peak v. Unemployment Compensation Board of Review*, 509 Pa. 267, 276-277, 501 A.2d 1383, 1388 (1985).

provides that an employee who threatens another employee may be subject to immediate discharge from employment.

On October 5, 2007, Claimant was off-duty and off Employer's premises at a bar when he saw Employer's service administrator. Claimant approached his co-worker and twice choked him to the point where he could not breathe. The co-worker responded by pushing Claimant against a wall. The bar owner intervened and asked Claimant what he was doing. Although the incident occurred while Claimant was off-duty, it involved workplace issues.[3] The next day, Claimant called the co-worker to apologize, but the co-worker said he would "deck" Claimant if he came near him again. The co-worker did not immediately report the incident, but he later did so.

On October 21, 2007, Employer's vice-president of operations, Robert Baierl, met with Claimant. Employer's in-house counsel was also present at the meeting. The vice-president suspended Claimant at that time and set up another meeting.[4] Upset that Employer had brought its counsel to the meeting, Claimant decided to bring his own attorney to the next meeting. Claimant contacted his attorney, who informed Claimant that he was not available on the date of the next meeting and advised Claimant not to appear at the meeting without counsel. Claimant informed Employer that he could not attend the meeting because his

[3] Claimant told the bar owner that he was upset because this co-worker had caused another employee, who was Claimant's friend, to be transferred. R.R. 157a.

[4] The purpose of the future meeting was for company president Lee Baierl, vice-president Robert Baierl, and Claimant to discuss the incidents and for the Baierls to decide what would happen with Claimant's employment. The Baierls wanted to find out why the incidents were occurring with a long-time, good employee like Claimant. Employer's in-house counsel was also going to attend the meeting.

attorney was not available. The vice-president of operations then discharged Claimant from employment.

> Based on its findings, the Board concluded that:
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> > The employer discharged the claimant based upon a pattern of behavior that was detrimental to its operations. The Board notes the conflicts in the testimony and finds the employer witnesses credible that the claimant made a threat against the employer's president and that he put a choke hold on a fellow employee in a bar while off-duty. The Board finds persuasive the testimony of the owner of the establishment that the claimant had the fellow employee's feet off the ground.
> >
> > The final act that resulted in the claimant's discharge was his refusal to attend a meeting with the employer's management without an attorney present. There is no right to have an attorney present at a disciplinary meeting unless representation is part of a collective bargaining agreement, which is not the case here. The claimant did not have good cause for his refusal to attend that meeting.
> >
> > The behavior for which the claimant was discharged was insubordinate, below the standards that the employer has a right to expect, and inimical to the employer's interests. The claimant's discharge was the natural result. Benefits are denied under Section 402(e) of the Law.

Board decision, March 10, 2008, at 3; R.R. 253a. Claimant now petitions this Court for review.[5]

On appeal, Claimant raises one issue for our consideration. Claimant argues that the Board erred in concluding that the oral threat, the assault on a co-

[5] Our scope of review is limited to determining whether constitutional rights have been violated, errors of law were committed, or whether findings of fact are supported by substantial evidence. *Sheets v. Unemployment Compensation Board of Review*, 708 A.2d 884, 885 n.3 (Pa. Cmwlth. 1998).

worker and the refusal to attend a disciplinary meeting without an attorney constitute work-related willful misconduct.[6] Employer counters that each separate act amounts to willful misconduct and that, taken together, Claimant's conduct overwhelmingly justifies the Board's determination.[7]

Although not statutorily defined, the Court has defined willful misconduct as (1) the wanton and willful disregard for an employer's interests; (2) a deliberate violation of an employer's rules; (3) a disregard for standards of behavior which an employer has a right to expect of an employee; or (4) negligence indicating an intentional and substantial disregard of the employer's interest or an employee's duties or obligations. *Glenn v. Unemployment Compensation Board of Review*, 928 A.2d 1169, 1172 (Pa. Cmwlth. 2007). Whether a claimant's actions constitute willful misconduct, so as to disqualify him from receiving unemployment benefits, is a question of law that is fully reviewable by this Court. *Lindsay v. Unemployment Compensation Board of Review*, 789 A.2d 385, 389-390 (Pa. Cmwlth. 2001).

The employer has the burden of proving willful misconduct on the part of a discharged employee. *Pettyjohn v. Unemployment Compensation Board of Review*, 863 A.2d 162, 164 (Pa. Cmwlth. 2004). Once the employer establishes a *prima facie* case of willful misconduct, the burden shifts to the claimant to prove that his actions were justified or reasonable under the circumstances. *Downey v.*

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[6] Claimant states that the Board's findings of fact are not supported by substantial evidence; however, his brief makes clear that he is not challenging the findings of fact because he acknowledges that he must accept the Board's findings. Claimant is actually challenging the conclusion that he engaged in willful misconduct.

[7] Employer, as intervenor, filed a brief in this case. The Board did not file a brief.

*Unemployment Compensation Board of Review*, 913 A.2d 351, 353 (Pa. Cmwlth. 2006).

Claimant argues that none of the three incidents leading to his discharge amounted to disqualifying willful misconduct. Claimant acknowledges that Employer's Handbook prohibits making a "threat of violence" against others in the workplace.[8] However, Claimant argues that under *Blount v. Unemployment Compensation Board of Review*, 466 A.2d 771 (Pa. Cmwlth. 1983), his threat that he would "come after" Lee Baierl did not constitute willful misconduct. Claimant made the statement because of concern for his dog; the statement was not an actual "threat of violence;" Claimant did not carry out the threat after his dog died; and considering the context within which the threat was made, it is questionable

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[8] Employer's Handbook provides in relevant part:

> Violence and Weapons
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> Any act or threat of violence against an employee, customer, supplier or visitor will be taken very seriously. This applies to all company employees, *whether on or off site*….
>
> Any employee who uses or possesses weapons, or makes or carries out a threat of violence will be subject to appropriate disciplinary action, including termination.

R.R. 238a (emphasis added).

The Handbook also provides:

> Dismissal for Cause
>
> Depending upon the severity of the offense, any employee may be dismissed from Baierl Automotive at any time. The decision to dismiss an employee will be made by his or her supervisor and may be reached through consultation with management.
>
> ***Some infractions are serious enough to result in immediate dismissal, including:***
>
> ***
>
> Threatening or causing physical injury to anyone on company premises.

R.R. 240a (emphasis in original).

whether Claimant even possessed the capability of executing the threat. Claimant also argues that the threat was a *de minimis* infraction of Employer's policy and that Claimant might have been provoked by the situation into expressing the threat. Claimant notes that good cause for his behavior would foreclose a denial of benefits, but the Board made no findings as to whether Claimant had good cause to make the threat to "come after" Lee Baierl on the basis of provocation.

We begin with *Blount*, the case cited by Claimant. There, the claimant was talking with a co-worker whose car had been towed from the employer's parking lot for not having a parking sticker. The claimant stated that if something like that happened to her, she would put a bomb in the back seat of a manager's car. This Court explained that the "making of threats concerning a superior is generally 'willful misconduct' since such conduct evinces a disregard of behavioral standards which an employer has a right to expect." *Blount*, 466 A.2d at 773. However, we also specified that if the threat "was justifiably provoked and is of a *de minimis* nature, it does not amount to willful misconduct," and the Court can consider, *inter alia*, whether the threat was conditional and whether the employee indicated any intent to follow through on the threat. *Id*. (quoting *First Family Federal Savings and Loan Association v. Unemployment Compensation Board of Review*, 449 A.2d 870, 872 (Pa. Cmwlth. 1982)). We held that the comment did not rise to the level of willful misconduct because the remark was made as a joke during a work break and there was no evidence the claimant was actually capable of carrying out a bomb threat.

This case does not involve a joking comment and is more akin to *Sheets v. Unemployment Compensation Board of Review*, 708 A.2d 884 (Pa. Cmwlth. 1998). There, the claimant remarked to a co-worker after a union

meeting that he "may as well shoot [co-workers] Carl and Steve and get it over with," leading to his discharge for violating the employer's rule against threatening others. *Id.* at 884. This Court affirmed the Board's determination that the claimant engaged in willful misconduct. In doing so, we rejected the claimant's argument that the Board should have considered whether the statement was *de minimis* in nature, explaining that "the *de minimis* argument has no place in cases involving deliberate violations of employer's rules." *Id*. at 885. We also stated that the claimant failed to show that he had good cause for his behavior as he did not show that he was provoked into making the threat. *Id.* at 886.

Claimant's threat against the company president constituted willful misconduct. We are not persuaded by Claimant's suggestion that stating he would "come after" Lee Baierl if his dog died was not a type of "threat of violence" prohibited by Employer's Handbook. As explained in *Sheets*, the *de minimis* argument does not apply because Claimant violated Employer's rules. Further, findings about whether Claimant had good cause for making the threat are not necessary in this case because there is no evidence that Claimant was provoked. Claimant was undoubtedly upset about the situation with his dog, but that cannot serve as good cause for making a threat against Employer's president.

Claimant next alleges that the choking incident does not amount to willful misconduct because he did not actually violate a work rule. Claimant argues that Employer's Handbook only provides for immediate dismissal when an employee causes someone physical injury on the company premises. Claimant further argues that off-duty misconduct is not disqualifying under Section 402(e) of the Law unless it adversely reflects upon his fitness for or ability to perform his job, and that the record does not contain the substantial evidence necessary to

prove that the choking incident would adversely affect his fitness for or ability to perform his job.

We reject this argument. In *Frazier v. Unemployment Compensation Board of Review*, 833 A.2d 1181 (Pa. Cmwlth. 2003), this Court explained that off-duty behavior that violates a work rule can constitute work-related misconduct. In suggesting that he did not violate a work rule, Claimant points to language in the Handbook about on-premises behavior that is listed as one example of behavior that could result in immediate termination. Claimant ignores the prohibition in the Handbook against an act of violence against an employee, which "applies to all company employees, *whether on or off site*." R.R. 238a (emphasis added). Clearly, Claimant violated this rule when he choked his co-worker at the bar, and there is absolutely no good cause for this behavior. This amounts to willful misconduct under Section 402(e).

The law Claimant cites regarding off-duty conduct does not apply here. Claimant relies on *Burger v. Unemployment Compensation Board of Review*, 569 Pa. 139, 801 A.2d 487 (2002), wherein our Supreme Court explained the difference between Section 3 of the Law[9] and Section 402(e) of the Law as follows:

> Section 402(e) is used to disqualify claimant[s] for work-related misconduct. Section 3 is used to disqualify claimants for non-work-related misconduct which is inconsistent with acceptable

[9] Section 3 of the Law, 43 P.S. §752, is a basis for denying unemployment compensation benefits "when an individual is unemployed through his or her own fault due to conduct not connected with work." *Gillins v. Unemployment Compensation Board of Review*, 534 Pa. 590, 602, 633 A.2d 1150, 1156 (Pa. Cmwlth. 1993). In this case, the Board declined to apply Section 3, and instead applied Section 402(e) because the incident at the bar was work-related.

> standards of behavior and which directly affects the claimant's ability to perform his assigned duties.

*Id*. at 144, 801 A.2d at 491 (quotation omitted). The Supreme Court then stated that "[o]ff-duty misconduct will not support a finding of willful misconduct under §402(e) unless it extends to performance of the job; in such case, the misconduct becomes work-related." *Id*. At issue was an employee's use of marijuana off-duty. Because the drug use did not affect the claimant's work performance, the Court held that the marijuana use did not become work-related. The Court also held that benefits could not be denied pursuant to Section 3 because that issue was waived.

This case is distinguishable from *Burger*. Although Claimant's conduct took place off-premises and off-duty, it involved a co-worker and circumstances involving the workplace. It was work-related.[10] Claimant's physical attack of a co-worker adversely affected Claimant's fitness for his job. Further, as testified to by Employer's vice-president, the community is a small one and having people know that one of Employer's employees attacked another employee is damaging to Employer's good will in the community and could hurt business.

Finally, Claimant argues that the Board erred in concluding that he failed to show good cause for refusing to attend the disciplinary meeting with Lee and Robert Baierl.[11] Claimant asserts that his refusal to attend the meeting without

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[10] It would be absurd to suggest that attacking a co-worker over work-related issues during business hours would be work-related conduct, but waiting until both employees were off-duty and off-premises would render the identical conduct not work-related.

[11] Claimant does not contend that his insubordination in refusing to attend the meeting was not willful misconduct. He argues only that he had good cause for his refusal.

having his attorney present was justified because the purpose of the meeting was disciplinary; Employer's counsel was going to be present; Claimant disputed the allegations that were being made against him; and Employer's Handbook does not preclude an employee from having counsel at this type of meeting. Claimant suggests that because his conduct was of the type that could give rise to the filing of criminal charges, his desire to have counsel present at the meeting was not unreasonable.[12]

We do not agree. There is no evidence, and Claimant does not argue, that he was working under an employment contract or a collective bargaining agreement that gave him the right to have legal representation at the meeting. There is no evidence that any criminal charges were going to be pressed by anyone against Claimant. This was a personnel matter, not a criminal proceeding. Under the circumstances, Claimant's refusal to meet with management was unreasonable and without good cause.

We have discussed each incident separately, and determined that each incident constitutes willful misconduct, because that is the way Claimant presented his arguments to this Court. However, by looking at each incident separately as though each occurred in a vacuum, Claimant ignores the real reason for his discharge. Although Claimant threatened the company president, he was not immediately discharged for that incident; likewise, Claimant was not immediately discharged for choking his co-worker. Claimant was discharged only after he refused to meet with management to discuss these incidents. Claimant was not

[12] It is curious that Claimant argues that the threat and assault did not amount to willful misconduct, yet he argues here that he had a right to legal representation because those actions were serious enough to have possibly resulted in criminal charges.

terminated for any one incident but, rather, as explained by the Board, for a pattern of behavior that was detrimental to Employer's interests. Claimant's behavior during the three incidents, which occurred within the span of approximately one month, shows not only a violation of Employer's rules, but also a disregard for standards of behavior which Employer had a right to expect of Claimant as its employee. It was willful misconduct. Therefore, the Board did not err in determining that Claimant is ineligible for unemployment compensation benefits.[13]

Accordingly, we affirm the decision of the Board.

MARY HANNAH LEAVITT, Judge

[13] Claimant argues in the alternative that he was subjected to disparate treatment because he was discharged while the co-worker Claimant choked was not discharged or otherwise disciplined for threatening to "deck" Claimant. "[W]hen employees are subjected to differing standards of conduct, disqualification from the receipt of benefits under Section 402(e) of the Law is improper." *Daniels v. Unemployment Compensation Board of Review*, 755 A.2d 729, 732 (Pa. Cmwlth. 2000). The essence of disparate treatment is not only whether unlawful discrimination has occurred, but also whether similarly situated people are treated differently based upon improper criteria. *Electric Material Company v. Unemployment Compensation Board of Review*, 664 A.2d 1112, 1115 (Pa. Cmwlth. 1995). There is no disparate treatment here. Claimant's co-worker only threatened to deck him after Claimant had twice choked him. What is more, Claimant was suspended after two incidents and terminated after three. There is no evidence that the co-worker engaged in the same behavior as Claimant and escaped suspension or termination.

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| Unemployment Compensation Board of Review, Respondent | : | |

**ORDER**

AND NOW, this 23rd day of December, 2008, the order of the Unemployment Compensation Board of Review in the above-captioned matter, dated March 10, 2008, is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge