

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brenda L. Jones, :
Petitioner :
 :
v. : No. 946 C.D. 2008
 : Submitted: October 31, 2008
Unemployment Compensation :
Board of Review, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN

FILED: December 19, 2008

Brenda L. Jones (Claimant) petitions *pro se* for review of the April 17, 2008, order of the Unemployment Compensation Board of Review (UCBR) denying Claimant's request for benefits on grounds of willful misconduct pursuant to section 402(e) of the Unemployment Compensation Law (Law).¹ We affirm.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e). Section 402(e) of the Law 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 connected with her work. Although the Law does not define "willful misconduct," our case law has consistently held that "willful misconduct" in the unemployment compensation context is: an act of wanton or willful disregard of the employer's interests; a deliberate violation of the employer's rules; a disregard of the behavioral standards which the employer has a right to expect of an employee; or negligence indicating an intentional disregard of the employer's interest or of the employee's duties and obligations to the employer. *See e.g., Kilpatrick v. Unemployment Compensation Board of Review*, 429 A.2d 133 (Footnote continued on next page...)

Claimant worked for Cosi (Employer) as a part-time prep person until November 11, 2007, when she was involved in a dispute with a co-worker. Following an investigation into the incident, Employer discharged Claimant for creating a hostile working environment by threatening the co-worker with a knife during the argument. The local job center denied Claimant's application for benefits pursuant to section 402(e) of the Law. (O.R. at Item 4.) Claimant appealed, and a hearing was held before the referee. Claimant testified on her own behalf, describing what happened during the incident. On behalf of Employer, Carolyn French, Employer's General Manager, testified regarding her investigation of the incident. The referee affirmed the denial of benefits, concluding that Claimant's actions constituted willful misconduct and that she failed to establish good cause for her conduct. (O.R. at Items 9-10.)

On further appeal, the UCBR reviewed the record and made the following pertinent findings of fact:

2. The claimant noticed that a male employee showed interest in a female employee.
3. The claimant believed the male employee was not a good person and so informed the female employee, [of] which the male employee became aware.

(continued...)

(Pa. Cmwlth. 1981). The burden of proving willful misconduct is on the employer. *Id.* Where an employee attempts to justify actions rising to the level of willful misconduct by a showing of good cause, the employee bears the burden of proving such good cause. *Biggs v. Unemployment Compensation Board of Review*, 443 A.2d 1204 (Pa. Cmwlth. 1982).

4. The male employee approached the claimant and yelled at her.
5. The claimant told the male employee to get the “F*** out of my face”, three times.
6. The claimant admitted that she stepped back and took a knife and waved it at the male employee against [sic] stating he was to get the “F***” out of her face.
7. The claimant has a back injury which limits her ability to move.
8. The claimant alleged that she was in fear of being pushed by the male employee and falling and hurting herself so she pulled the knife.
9. The employer investigated the incident and discharged the claimant for the incident.

(UCBR Findings of Fact, Nos. 2-9.)

Relying on Claimant’s admission that she pulled a knife on a co-worker during a verbal dispute, the UCBR concluded that Employer met its burden of proving that Claimant engaged in willful misconduct. The UCBR rejected as not credible Claimant’s contention that she pulled the knife on her co-worker because she was afraid of falling, noting that the record contained no indication that the co-worker made any move reflecting that he was changing the dispute from a verbal confrontation to a physical one. Further, although acknowledging that Claimant’s movements were limited by her back condition, the UCBR found no evidence in the record indicating that Claimant was precluded from retreating

from the situation.² Thus, the UCBR concluded that Claimant failed to credibly establish good cause for her action and agreed that Claimant was ineligible for benefits under section 402(e) of the Law. Claimant now petitions this court for review of that order.³

Claimant argues that the UCBR erred in determining that Claimant's conduct constitutes willful misconduct under section 402(e) of the Law. According to Claimant, the UCBR incorrectly concluded that her "brandishing of a knife was excessive" where she was merely acting in self-defense.⁴ (Claimant's

² At the hearing, the referee learned that a manager was not far from where the altercation was occurring and asked Claimant why she did not call out to him for help. Claimant responded by saying, "In the heat of the moment I didn't think just to run up to one of the – although I can't run real quickly. I didn't think to call anybody." (N.T. at 6.)

³ Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with law or whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704. Whether or not an employee's actions amount to willful misconduct is a question of law subject to this court's review. *Sheets v. Unemployment Compensation Board of Review*, 708 A.2d 884 (Pa. Cmwlth. 1998).

⁴ Claimant also argues that Employer's method of investigating the incident was totally biased against Claimant, and, therefore, Employer's evidence was unreliable, particularly where Ms. French deliberately eliminated testimony from the one unbiased witness that "would have rationalized [Claimant's] action." (Claimant's brief at 4.) However, Claimant omitted the issue of bias from the Petition for Appeal she filed with the UCBR, (O.R.), thereby depriving the UCBR of the opportunity to address these allegations. As a result, the issue is waived on appeal to this court. Pa. R.A.P. 1551(a).

We also note that Claimant failed to expressly raise the issue of bias before the referee, and she offered no evidence at the hearing to support her contentions. Although Claimant maintained that there was an unbiased witness who would support her version of the incident, she failed to present his testimony. (N.T. at 5.) Moreover, when afforded the opportunity to question Ms. French, Claimant never challenged her investigative methods. (N.T. at 5-6.) Thus, **(Footnote continued on next page...)**

brief at 4.) However, we have previously held that participation in a fight during working hours and threats of harm toward a supervisor or co-worker constitute willful misconduct in that such conduct exhibits a disregard of the standards of behavior which an employer has a right to expect from an employee and of the employer's interests. *Kilpatrick v. Unemployment Compensation Board of Review*, 429 A.2d 133 (Pa. Cmwlth. 1981); *Sheets v. Unemployment Compensation Board of Review*, 708 A.2d 884 (Pa. Cmwlth. 1998). Because Claimant admitted that she pulled a knife on a co-worker during a fight at work, we agree that Employer met its burden of proof in this proceeding.

Claimant nevertheless contends that she remains eligible for benefits because her actions were warranted under the circumstances. Claimant asserts that her testimony proves that her conduct merely was a natural reaction to her co-worker's aggression and an effort to protect herself from harm.⁵ We have recognized that a reasonable belief of imminent bodily harm and feared danger of an assault justifies reasonable retaliatory force, *Sun Oil Company v. Unemployment Compensation Board of Review*, 408 A.2d 1169 (Pa. Cmwlth. 1979); however, in this case, the UCBR was not persuaded by Claimant's testimony that her action

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even if this issue were properly preserved, the record would offer no support for Claimant's argument.

⁵ Claimant testified that her co-worker came to her yelling and waving his hands crazily, asking Claimant why she was talking about him. (N.T. at 4.) Claimant stated that she told her co-worker to "[g]et the F out of my face," once, twice, three times. The third time I ... reached back, grabbed the knife and came back to his face," repeating the profanity. Claimant explained that she did so because she falls easily, and she "felt like he would push me or hit me," and she could fall and suffer a significant injury. (N.T. at 4.)

was justified.⁶ The UCBR rejected Claimant's assertion that she pulled the knife because she was afraid of falling and found no indication that the co-worker was going to escalate the confrontation beyond yelling. In addition, the UCBR found that, in spite of her limitations, Claimant had other alternatives, and she could have retreated or called for assistance instead of resorting to a weapon during the verbal dispute.

In an unemployment compensation case, the UCBR is the ultimate fact finder, and, as such, questions of conflicts in evidence, witness credibility and evidentiary weight are within the discretion of the UCBR. *Wolfe v. Unemployment Compensation Board of Review*, 425 A.2d 1218 (Pa. Cmwlth. 1981). In making those determinations, the UCBR may accept or reject the testimony of any witness in whole or in part. *Collier Stone Company v. Unemployment Compensation Board of Review*, 876 A.2d 481 (Pa. Cmwlth. 2005). Because Claimant here failed to present credible evidence establishing good cause for her conduct, Claimant's arguments on appeal necessarily fail.⁷

⁶ By comparison, in *Sun Oil*, the UCBR accorded weight and credibility to the claimant's testimony that a co-worker directed racial epithets at him along with threatening gestures toward an unseen device and prior threats. Based on this credible testimony, the UCBR concluded that the claimant feared an imminent attack on his person and, thus, acted in self-defense when he hit the co-worker.

⁷ In addition to the issues discussed, Claimant appears to raise a question of disparate treatment when she alleges that another knife incident in 2006 ended without repercussions for either employee involved. (Claimant's brief at 9.) Claimant also raises issues regarding a brain injury which allegedly left her with delayed comprehension and mental disability. (Claimant's brief at 5.) However, because Claimant raises these issues for the first time in her brief to this court, they are waived. Pa. R.A.P. 1551(a).

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Judge

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	:	
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ORDER

AND NOW, this 19th day of December, 2008, the order of the Unemployment Compensation Board of Review, dated April 17, 2008, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Judge