IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Alfonso Miller,	:	
Petitioner	:	
	:	
v.	:	No. 412 C.D. 2013
	:	SUBMITTED: August 16, 2013
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE LEADBETTER **FILED: October 17, 2013**

Alfonso Miller (Claimant) petitions this court for review of the order of the Unemployment Compensation Board of Review (Board) which affirmed a decision of the Referee denying benefits to Claimant under Section 402(e) of the Unemployment Compensation Law (Law).[1] After review, we affirm.

Claimant worked as a rehabilitation counselor for Horizon House (Employer) from December 10, 2007 through September 10, 2012. At his

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended,* 43 P.S. § 802(e). Section 402(e) provides that a claimant shall be ineligible for compensation for any week in which his employment is due to a discharge from work due to willful misconduct connected with his work.

scheduled performance evaluation, Claimant called his supervisor a f***ing clown and called the evaluation a joke. Employer discharged Claimant following this incident.[2] After Claimant's application for unemployment compensation benefits was denied by the Unemployment Compensation Service Center, Claimant appealed and a hearing was held before the referee at which both Claimant and Employer appeared and testified. The referee credited Employer's testimony that Claimant called his supervisor a f***ing clown during an evaluation and concluded that, "[u]sing profanity and insulting a supervisor falls below the standards the employer can reasonably expect of an employee; therefore, the Referee finds the claimant ineligible for benefits." Referee's Decision/Order, Original Record (O.R.) Item 13 at 2. Claimant appealed, and the Board affirmed, adopting and incorporating the Referee's findings and conclusions. This appeal followed.

The sole issue Claimant presents for our review is whether an alleged verbal exchange between himself and his supervisor can be considered willful misconduct barring him from receiving unemployment compensation benefits. Claimant argues that even applying the "virtually ambiguous" definition of willful misconduct to the facts of this case, it still boils down to nothing more than a "non threatening comment made in private from one party to another," and does not amount to willful misconduct. Claimant's Brief at 9, 10. Claimant avers that in order for Employer to show that his actions rose to the level of willful misconduct, it had to establish that his behavior fell below a certain acceptable standard of

[2] The evaluation in question took place on August 24, 2012, although Claimant was not actually discharged from his employment until September 7, 2012, after a requested meeting between Claimant, his supervisor and Employer's Human Resource Manager did not occur. The delay was due to several factors, including Employer's need to compile a report on the incident, the Labor Day holiday, and Claimant's unavailability.

behavior that it had a right to expect from him or that his conduct went against its interests. Claimant submits that an employer can "rightfully expect" that its employees are not always going to get along, that an employee and his supervisor will sometimes disagree, and that an employee may occasionally use "questionable language" when disagreeing with his supervisor. *Id.* at 9. According to Claimant, having a disagreement with one's supervisor during which the employee says something with which the supervisor takes umbrage is exactly the type of behavior that an employer can expect to occur from time to time, and thus, it cannot be characterized as disqualifying willful misconduct. Moreover, Claimant argues that Employer's interest in providing community-based rehabilitation services is not affected by whether or not he "truly believes his supervisor is a clown." *Id.* at 10. Finally, Claimant argues that "just as he has the right to express himself, Horizon has the right to fire him[,]" but the Board does not have the right to deny him benefits. *Id.* Claimant asserts that his comments were protected speech under the First Amendment and that the Board's action denying him benefits amounts to censorship and is, therefore, unconstitutional.

Willful misconduct, though not defined in the Law, has been defined by the courts of this Commonwealth as: (1) a wanton and willful disregard of the employer's interests; (2) a deliberate violation of the employer's rules; (3) a disregard of the standards of behavior that an employer rightfully can expect from its employees; or (4) negligence that manifests culpability, wrongful intent, or evil design, or an intentional and substantial disregard of the employer's interests or the employee's duties and obligations. *Oliver v. Unemployment Comp. Bd. of Review*, 5 A.3d 432, 438 (Pa. Cmwlth. 2010). The employer has the burden of proving that it discharged an employee for willful misconduct. *Id.* An employee's use of

abusive, vulgar or offensive language toward a superior is a form of insubordination that can constitute willful misconduct, even if the employer has not adopted a specific work rule prohibiting such language. *Brown v. Unemployment Comp. Bd. of Review*, 49 A.3d 933, 937 (Pa. Cmwlth. 2012). We must consider not only the context in which the profanity or other proscribed language is used, but also the language itself to determine whether it is abusive, vulgar or offensive. *Id.* Finally, even a single instance of profanity or offensive language directed by an employee toward a supervisor without provocation constitutes willful misconduct. *Williams v. Unemployment Comp. Bd. of Review*, 531 A.2d 88, 89 (Pa. Cmwlth. 1987); *Losch v. Unemployment Comp. Bd. of Review*, 461 A.2d 344, 346 (Pa. Cmwlth. 1983); *Dodson v. Unemployment Comp. Bd. of Review*, 437 A.2d 1080, 1082 (Pa. Cmwlth. 1981).

Here, Claimant's supervisor testified that while he was conducting Claimant's performance evaluation with him, Claimant disagreed with the training report which showed that he had not received the required amount of training. In attempting to address Claimant's concerns, the supervisor testified that he went out of the room to print a copy of Claimant's training sessions in order to verify or refute Claimant's allegations and that he told Claimant that if it was incorrect, it would be corrected. The supervisor testified that while he was walking out of the room, Claimant called him a "f***ing clown," and said that the evaluation "was a joke." Notes of Testimony (N.T.) at 6, 40. The supervisor testified that these comments were overheard by another employee. *Id.* at 41. Although Claimant denied making these comments, the Board credited the supervisor's testimony. It is well settled that credibility determinations are the province of the Board as the ultimate fact-finder and will not be disturbed on appeal. *Elser v. Unemployment*

Comp. Bd. of Review, 967 A.2d 1064, 1069-70 n.8 (Pa. Cmwlth. 2009). In examining the context in which Claimant uttered the profanity towards his supervisor, that is, during a meeting to discuss a performance evaluation with which he disagreed, we must also conclude, as did the Board, that Claimant's language was insulting and fell below the standards of behavior Employer reasonably expected of him.[3] Directed, as it was, toward his supervisor without provocation, Claimant's actions constituted willful misconduct under Section 402(e) of the Law.

Lastly, we address Claimant's contention that the Board's denial of benefits infringes upon his First Amendment right of free speech. It has been established that the denial of unemployment compensation benefits cannot be based on an individual's exercise of First Amendment rights absent a compelling state interest. *Frigm v. Unemployment Comp. Bd. of Review*, 642 A.2d 629, 633 (Pa. Cmwlth. 1994). Ordinarily, where the claimant has been discharged by a private employer, as is the case in the matter herein, we would have to balance the claimant's interest in commenting upon a matter of public concern and the Commonwealth's interest in protecting the unemployment compensation fund by disqualifying those individuals whose unemployment is due to willful misconduct. *Bala v. Unemployment Comp. Bd. of Review*, 400 A.2d 1359, 1368-69 (Pa. Cmwlth. 1979). However, we need not undertake this analysis herein, as Claimant's "speech" was not on a matter of public concern, but a personal attack on his supervisor during a performance evaluation. Accordingly, Claimant's

[3] *See, e.g., McCall v. Unemployment Comp. Bd. of Review*, 717 A.2d 623, 625 (Pa. Cmwlth. 1998) (making a statement that is so offensive that it should be obvious to the utterer that it is inimical to an employer's best interests and a disregard of the standards of behavior that employer has a right to expect of employee constitutes willful misconduct).

statements were not entitled to First Amendment protection. *See McCall* (holding that claimant's statements were not entitled to constitutional protection because they were merely attacks on the moral character of the students with no basis in fact).

For the reasons set forth above, we affirm the order of the Board.

BONNIE BRIGANCE LEADBETTER,
Judge

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O R D E R

AND NOW, this 17th day of October 2013, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby AFFIRMED.

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BONNIE BRIGANCE LEADBETTER,
Judge