

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tyrone William Gallo,	:
	: No. 655 C.D. 2014
Petitioner	: Submitted: October 24, 2014
	:
v.	:
	:
Unemployment Compensation	:
Board of Review,	:
	:
Respondent	:

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN

FILED: February 17, 2015

Tyrone William Gallo (Claimant) petitions for review, *pro se*, of the April 15, 2014, order of the Unemployment Compensation Board of Review (UCBR) affirming a referee's decision to deny Claimant unemployment compensation (UC) benefits under section 402(e) of the Unemployment Compensation Law (Law)¹ due to his discharge from work for willful misconduct. We reverse.

Claimant worked for Ten Mile Paving, LLC (Employer) as a full-time equipment operator/laborer. Most recently, Claimant was employed there for

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 "[i]n which his unemployment is due to his discharge . . . from work for willful misconduct connected with his work." 43 P.S. §802(e).

approximately 30 days before his last day of work on November 2, 2013.² (UCBR's Findings of Fact, No. 1.)

On November 2, 2013, when Claimant reported for work, he asked the foreman for job-site instructions for the day, which he then communicated to his co-workers. Greg, a co-worker, said that he would be driving the company vehicle and sat inside it. Claimant told Greg, "Let's quit goofing off, there's work to be done." Greg locked the door of the vehicle, gave Claimant the middle finger, and stuck his tongue out at Claimant. Claimant raised his voice and told Greg to get out of the truck. Greg got out of the truck and exchanged profanities with Claimant. Greg shoved Claimant; Claimant then threw a punch at Greg, which missed. The foreman immediately told Claimant and Greg that they were discharged. (*Id.*, Nos. 2-10.)

During Employer's investigation of the incident, Claimant provided the following written statement: "We exchanged some words and I was shoved. Instead of responding in an appropriate manner, I reacted by swinging and missing." At the conclusion of Employer's investigation, Employer converted Greg's discharge to a one-week suspension. Employer upheld Claimant's discharge because Claimant threw a punch during the altercation. (*Id.*, Nos. 11-13.)

Claimant applied for UC benefits with the local service center, which granted UC benefits on November 21, 2013. (Referee's Decision at 1.) Employer

² Claimant worked for Employer in separate employment periods subject to rehire for a total of five years prior to his discharge. His latest rehire by Employer started the employment period beginning approximately 30 days before his discharge.

appealed to the referee, who held a hearing on December 30, 2013. On December 31, 2013, the referee reversed the service center's determination, concluding that Claimant was discharged for willful misconduct and, therefore, was ineligible for UC benefits under section 402(e) of the Law. (*Id.*) Claimant appealed to the UCBR, which affirmed. (UCBR's Decision at 3.) Claimant now petitions this court for review.³

Here, Claimant argues that the UCBR erred in determining that his conduct escalated the altercation and was not in self-defense. We agree.

The employer bears the burden of proving that the discharged employee committed willful misconduct. *Oliver v. Unemployment Compensation Board of Review*, 5 A.3d 432, 438 (Pa. Cmwlth. 2010) (*en banc*). "Willful misconduct" is defined 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 the employer can rightfully expect from its employee; or (4) negligence that "manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer's interest or [the] employee's duties and obligations." *Id.* "[F]ighting is considered inimical to the best interests of the employer and, as such, willful misconduct." *Rivera v. Unemployment Compensation Board of Review*, 526 A.2d 1253, 1255 (Pa. Cmwlth. 1987). However, "[w]here an employee's conduct is justifiable or reasonable under the circumstances, it cannot be considered willful

³ Our review is limited to determining whether constitutional rights were violated, an error of law was committed, or the findings of fact were unsupported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

misconduct because it is not a willful disregard of standards of behavior that an employer has a right to expect.” *Miller v. Unemployment Compensation Board of Review*, 83 A.3d 484, 488 (Pa. Cmwlth. 2014). An employee’s actions may be reasonable under the circumstances where that employee acts in self-defense in response to another employee’s physical aggression against him. *See Mula v. Unemployment Compensation Board of Review*, 407 A.2d 477, 477 (Pa. Cmwlth. 1979) (recognizing that an employee has a right to defend himself).

Here, the UCBR concluded that Claimant, rather than acting in self-defense, participated in and escalated the fight. However, the facts as found by the UCBR do not support this conclusion. Specifically, Claimant was furthering Employer’s interest by communicating the foreman’s instructions to his co-workers, including Greg. Greg disregarded the instructions, displayed obscene gestures, and engaged in a verbal confrontation with Claimant. Greg then placed his hands on Claimant and shoved him. Claimant attempted to punch Greg but did not touch him.⁴ The record indicates that the entire physical exchange lasted a matter of seconds. Whether an employee’s actions are reasonable depends on the circumstances; our prior cases suggest such circumstances include the degree and duration of the employee’s actions. *See Miller*, 83 A.3d at 488 (holding that the claimant’s conduct was justified and reasonable where the entire physical altercation consisted of the other co-worker shoving the claimant and the claimant shoving the co-worker back); *Peeples v. Unemployment Compensation Board of Review*, 522 A.2d 680, 682-83 (Pa. Cmwlth. 1987) (holding that the claimant’s striking back at the

⁴ We note that the UCBR failed to address Claimant’s ability to retreat after Greg shoved him.

employee who struck him was in self-defense, reasonable, and justified). Here, the circumstances suggest that Claimant's actions were in self-defense and reasonable under the circumstances.

Despite these circumstances, the UCBR determined that Claimant did not act in self-defense. However, the UCBR did not explain this determination, which the record does not support. In failing to do this, the UCBR failed to apply *Miller* insofar as it did not analyze whether Claimant's actions were reasonable under the circumstances. It appears the UCBR based this determination solely on Claimant's statement to Employer. However, Claimant's statement was not an admission of willful misconduct; at most it was an expression of regret that the incident occurred.

Accordingly, we reverse.⁵

ROCHELLE S. FRIEDMAN, Senior Judge

⁵ Because we determine that Claimant's actions did not constitute willful misconduct, we need not address Claimant's argument that he received disparate treatment compared to Greg, who received only a one-week suspension.

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Unemployment Compensation	:	
Board of Review,	:	
	:	
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ORDER

AND NOW, this 17th day of February, 2015, we hereby reverse the April 15, 2014, order of the Unemployment Compensation Board of Review.

ROCHELLE S. FRIEDMAN, Senior Judge

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OPINION NOT REPORTED

**DISSENTING OPINION BY
JUDGE COHN JUBELIRER**

FILED: February 17, 2015

I respectfully dissent. The Majority holds that Tyrone William Gallo's (Claimant) actions did not constitute willful misconduct because he was acting in self-defense when he attempted to punch a co-worker. However, the Unemployment Compensation Board of Review (Board) did not credit Claimant's testimony that he felt threatened by his co-worker's actions or that he acted instinctively when he attempted to punch the co-worker. (Board Decision at 3.) The Board found that "[C]laimant intentionally threw a punch at" his co-worker, and determined that "[C]laimant's actions in swinging and attempting to punch [his co-worker] were not actions of reasonable retaliatory force." (Findings of Fact

(FOF) ¶ 9; Board Decision at 3.) Based on these determinations, the Board rejected Claimant’s claim that he acted in self-defense and concluded that Claimant had “not credibly established good cause for throwing [that] punch.” (Board Decision at 3.) I do not believe the Board committed reversible error.

The Majority relies upon Miller v. Unemployment Compensation Board of Review, 83 A.3d 484 (Pa. Cmwlth. 2014), and Peeples v. Unemployment Compensation Board of Review, 522 A.2d 680 (Pa. Cmwlth. 1987), to find that Claimant’s actions were reasonable under these circumstances. However, Miller and Peeples are distinguishable from the case before us.

In Miller, the claimant was discharged for fighting when he pushed a co-worker in response to having been shoved. Miller, 83 A.3d at 486. The claimant pushed his co-worker in Miller after the off-duty co-worker instigated an argument by interfering with the claimant’s ability to perform his work duties, the claimant attempted to diffuse the situation and avoid physical conflict by telling the co-worker that they did not have to fight, the co-worker grabbed the claimant by the shirt and asked the claimant “You want to live?,” and the co-worker shoved the claimant backwards. Id. at 486 (citation omitted). In Peeples, the claimant also was discharged for fighting, despite claiming self-defense. Peeples, 522 A.2d at 681. In Peeples, a co-worker instigated a verbal and physical altercation with the claimant, the claimant attempted to diffuse the situation, the co-worker threatened physical harm to the claimant, and the co-worker began to slap the claimant, who was unable to escape from the physical altercation because he was trapped in his fork lift truck. Id. at 680-82. Thus, the claimant had no alternative but to protect

himself by fighting back. Id. at 682. In both Miller and Peeples, we held that the claimants' actions were justifiable under those circumstances, noting in particular the claimants' attempts to diffuse the situations before they escalated into physical altercations. Miller, 83 A.3d at 487-88; Peeples, 522 A.2d at 682.

Here, Claimant actively engaged in the verbal altercation, exchanged profanities with his co-worker before the co-worker shoved Claimant, and, as determined by the Board, "willfully continued and escalated the confrontation" when he threw the punch. (FOF ¶¶ 6-7, 11; Board Decision at 3.) Claimant admitted that he did not respond in an appropriate manner when he attempted to punch his co-worker. (FOF ¶ 11.) Moreover, Claimant's co-worker did not, as in Miller or Peeples, threaten Claimant during the verbal altercation leading up to physical conflict. Thus, I believe the circumstances here differ from those in Miller and Peeples and do not require us to reverse the Order of the Board, which is supported by its findings of fact.

Accordingly, I would affirm the Board's Order.

RENÉE COHN JUBELIRER, Judge