DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LENITA NORWOOD, Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, an Agency, and WOMEN'S INTERNATIONAL PHARMACY INC., Appellees.	)	1 CA-UB 12-0129 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the A.D.E.S. Appeals Board

Cause No. U-1288135-BR

REVERSED AND REMANDED

Lenita Norwood — El Mirage
Appellant *in propria persona*

Thomas C. Horne, Arizona Attorney General — Phoenix
By Carol A. Salvati, Assistant Attorney General
Attorneys for the Arizona Department of Economic Security

K E S S L E R, Judge

¶1 Lenita Norwood ("Norwood") appeals the denial of her claim for unemployment insurance benefits. The Arizona

Department of Economic Security ("ADES") Unemployment Insurance Appeals Board ("the Board") determined that Norwood was disqualified from benefits because she was discharged for wilful or negligent misconduct. For the reasons that follow, we reverse and remand for an award of benefits.

FACTS AND PROCEDURAL HISTORY

¶2 Norwood was employed as a lab technician with a pharmacy in Youngtown, Arizona ("Employer"), for approximately three years and ten months prior to her termination on April 27, 2011. Norwood was terminated for violation of the company's tardiness policy.

¶3 Employer requires all employees to start work on time. Employer's official policy is that it expects "all employees to be on time each day. The work done by each Employee is closely coordinated. If one Employee is late, it may delay the work of others. Repetitive tardiness could become an attendance issue resulting in termination of employment." Those employees who are scheduled to start work at 8:00 a.m. are responsible for setting up the lab for the day. Employer testified that any delay "throws off [their] entire schedule" and "the whole work day is just offset." Employer stated that four different employees are assigned to the opening shift, and that each are assigned different duties, including "putting together the machine . . . putting away equipment and dishes . . . setting up

the computers, [and] making sure the scales are accurate and ready for use." As a result, Employer has zero tolerance for repetitive tardiness. Despite that policy, Norwood testified without challenge that Employer had not reprimanded her for approximately three and a half years when she was several minutes late to her workstation.

¶4 Employer claimed that the policy of requiring employees to be at their workstations at the beginning of their shifts was uniformly enforced. However, when asked why Norwood did not receive a "final warning[]" prior to April 26, Employer stated that the previous lab manager said "she would take care of the issue, and did not want [Employer] to document it." Therefore, uniform enforcement of the policy did not actually begin until new management took over.

¶5 Employer further testified that a general announcement to its employees was posted on a wall and stated the following:

> Since the break times are now assigned, it is very important for you to be courteous and not only leave on time, but to also return promptly. This way, no one will have to wait to go on their breaks and we won't have too many people out of the lab at any one time.
>
> Please make sure you are in the lab and ready to begin working at your start time.

Norwood initialed the notice.

¶6 In January 2011, Norwood received a write-up for multiple issues, including breaks, cleanliness, and not being in the lab and working at 8:00 a.m. This write-up did not address a specific instance of tardiness and Norwood and the Employer disputed whether she was at her workstation by 8:00 a.m.

¶7 Norwood testified her supervisor informed her that the notice was specifically in regard to breaks and did not really apply to her. The Employer never disputed this fact and did not seek to identify whether the supervisor's comment was before or after the January write-up.

¶8 On April 26, 2011, Norwood was scheduled to begin work at 8:00 a.m. and entered the lab three minutes late.[1] She received a written warning indicating that termination would result with another tardy.[2] In the employee warning notice, Norwood indicated that she did not agree with Employer's

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[1] Norwood testified that every morning for almost four years her procedure was the same: "I did the same thing as I've done for 4 years. Walked back to the bistro, put up my lunch. Walked to the other side of the building, went up a little bit to my locker. Put my stuff away in my locker. Walked up . . . about another hundred feet . . . put my booties on, and walked into the lab." Employer testified that Norwood's employee file indicates that she often clocks in on time, but does not go into the lab to begin working until five to ten minutes after clocking in.

[2] Employer provided evidence that Norwood also clocked in five minutes late on February 9, 2011. However, Norwood was late to work that day due to car trouble. *See* Ariz. Admin. Code ("A.A.C.") R6-3-51435(B) (misconduct does not include "[l]ate arrival due to unavoidable delay in transportation."). The Board did not rely on that incident in denying benefits.

description of the violation. Norwood claimed that she was not late as she clocked in at 8:00 a.m. In her testimony, Norwood admitted that while discussing her warning, Employer emphasized that she needed to be at her workstation at her designated start time. She testified that she questioned Employer on that issue and did not understand why Employer now had a problem after she had done the same thing for almost four years.

¶9 The next day, on April 27, 2011, Norwood was again three minutes late to her lab station and was subsequently terminated from employment. Employer did not show any effect on its business from these incidents aside from its general statements that employee tardiness "throws off [their] entire schedule" and "the whole work day is just offset."

¶10 Norwood applied for unemployment benefits, which were denied by a department deputy. Norwood appealed, but the Appeal Tribunal affirmed the denial of benefits, concluding that Norwood was "discharged for wilful or negligent misconduct connected with [her] employment." The Appeals Board and the Appeals Board upon Review affirmed the denial of benefits. Norwood timely appealed, and we granted her application pursuant to Arizona Revised Statutes ("A.R.S.") section 41-1993(B) (2011).

ISSUE AND STANDARD OF REVIEW

¶11 On appeal, Norwood disputes her disqualification from unemployment benefits, and argues that her alleged tardiness did not amount to misconduct that would render her ineligible for benefits.

¶12 We view the evidence in the light most favorable to affirming the Board's decision and will affirm if any reasonable interpretation of the record supports it. *Baca v. Ariz. Dep't of Econ. Sec.*, 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (App. 1997). We are bound by the Board's factual findings unless they are arbitrary, capricious, or constitute an abuse of discretion. *Avila v. Ariz. Dep't of Econ. Sec.*, 160 Ariz. 246, 248, 772 P.2d 600, 602 (App. 1989). We review *de novo* whether the Board properly applied the law. *Bowman v. Ariz. Dep't of Econ. Sec.*, 182 Ariz. 543, 545, 898 P.2d 492, 494 (App. 1995).

DISCUSSION

¶13 We are guided by several principles in resolving this appeal. First, "when an employee is discharged for work-connected misconduct, the employer has the burden of proving that the claimant was discharged for reasons that should disqualify her for unemployment benefits." *Ross v. Ariz. Dep't of Econ. Sec.*, 171 Ariz. 128, 129, 829 P.2d 318, 319 (App. 1991); *see also* A.A.C. R6-3-51190(B)(2)(b). "[M]ere allegations

of misconduct are not sufficient to sustain such a charge." A.A.C. R6-3-51190(B)(2)(c).

¶14 Second, "[m]isconduct justifying an employer in terminating an employee and misconduct disqualifying an employee from benefits are two distinct concepts." *Weller v. Ariz. Dep't of Econ. Sec.*, 176 Ariz. 220, 223, 860 P.2d 487, 490 (App. 1993). An employee is disqualified from benefits only if the misconduct constitutes "a *material or substantial* breach of the employee's duties or obligations pursuant to the employment or contract of employment or which *adversely affects a material or substantial interest of the employer*." A.R.S. § 23-619.01(A) (2012) (emphasis added); *see also* A.R.S. § 23-775(2) (2012) (stating an employee is disqualified from benefits if she is "discharged for wilful or negligent misconduct connected with the employment."). "In evaluating misconduct, a claimant's prior history of employment with the same employer shall be considered." A.R.S. § 23-619.01(D).

¶15 Subject to the above principles, "[t]he duty to report to work on time is similar to the duty to be present for work. The responsibility for punctuality is expressed or implied in the contract of employment." A.A.C. R6-3-51435(A). However, "[t]he degree of responsibility may vary in proportion to the potential harm to the employer and to the degree of control the worker had over [her] tardiness." A.A.C. R6-3-51435(B).

Misconduct does not include "[a]n isolated instance of tardiness," A.A.C. R6-3-51435(C), "[l]ate arrival due to unavoidable delay in transportation, emergency situations, or causes not within the claimant's control," A.A.C. R6-3-51435(B). "However, when an employee has special responsibilities such as opening an establishment . . . [her] failure to exercise a high degree of concern for punctuality may amount to misconduct. In the absence of pressing responsibilities, misconduct may be found in repetition of tardiness caused by the worker's failure to exercise due care for punctuality." A.A.C. R6-3-51435(C); *see also Magma Copper Co., San Manuel Div. v. Ariz. Dep't of Econ. Sec.*, 128 Ariz. 346, 349, 625 P.2d 935, 938 (App. 1981) ("Repeated and frequent instances of absence from work or tardiness constitute wilful or negligent misconduct connected with the employment.").

¶16 Norwood began working for Employer in June 2007. Norwood testified that she followed the same routine for almost four years. Ultimately, as the Board recognized, Norwood's termination was the result of arriving at her workstation three minutes late on two consecutive work days in April 2011.

¶17 Employer did not meet its burden of proof to show that Norwood was discharged for reasons that should disqualify her for unemployment benefits. First, limited incidents of slight tardiness ordinarily do not amount to misconduct sufficient to

disqualify an employee from benefits. In *Arizona Department of Economic Security v. Magma Copper Co.*, 125 Ariz. 389, 390-91, 609 P.2d 1089, 1090-91 (App. 1980) ("*Magma Copper*"), *superseded by statute*, A.R.S. § 23-619.01,[3] the claimant was employed by Magma for seven months and then fired for an unexcused absence after having received prior warnings. The final absence was due to his having to see a chiropractor for back pain when the employer's policy did not include chiropractors as acceptable doctors to excuse an absence. *Id.* at 391, 609 P.2d at 1091. Claimant had been absent five times over six months. *Id.* at 392, 609 P.2d at 1092. ADES held that his absences did not amount to misconduct to justify denial of benefits. *Id.* at 391, 609 P.2d at 1091. Magma took judicial review to the superior court, which held that ADES's decision was legally unsupportable and claimant's record of unexcused absences constituted misconduct. *Id.* We reversed, noting that under the employment regulations, A.A.C. R6-3-5105(A)(1)(a), misconduct was defined as a "material breach of duties . . . or an act or course of conduct, in violation of the employee's duties, which is

[3] As noted in *Anderson v. Ariz. Dep't of Econ. Sec.*, 151 Ariz. 350, 353-54, 727 P.2d 845, 848-49 (App. 1986), *Magma Copper* relied on a more limited definition of misconduct. That definition was superseded by A.R.S. § 23-619.01(A). However, as noted below, section 23-619.01(A) actually increased the burden of proof on an employer to show misconduct, requiring a showing of material or substantial breach of duties or acts which adversely affect an employer's substantial or material interest.

tantamount to a disregard of the employer's interests." *Id.* at 393 n.4, 609 P.2d at 1093 n.4. We concluded that the alleged misconduct was not an act of negligent, wanton or wilful disregard of the employer's interest. *Id.* at 393, 609 P.2d at 1094. As to the repeated incidents, we noted that the five unexcused absences in violation of company rules "could be sufficient . . . to discharge claimant . . . [but] it [was] insufficient as a matter of law for disqualification from unemployment insurance benefits." *Id.*[4]

¶18 Here, the statute is even stricter than the regulation in *Magma Copper* because it requires that the alleged misconduct be a "*material or substantial* breach of the employee's duties or obligations pursuant to the employment or contract of employment or which *adversely affects a material or substantial interest of the employer*." A.R.S. § 23-619.01(A) (emphasis added). In addition, the evidence here on misconduct is weaker than in

[4] Other Arizona cases on tardiness and unemployment benefits are distinguishable. *See Magma Copper Co., San Manuel Div.*, 128 Ariz. at 349, 625 P.2d at 938 (noting that repeated unexcused absences or incidents of tardiness can constitute wilful or negligent misconduct to disqualify a claimant from unemployment but the employee was not discharged for repeated absences); *Gardiner v. Ariz. Dep't of Econ. Sec.*, 127 Ariz. 603, 604, 607, 623 P.2d 33, 34, 37 (App. 1980) (holding that repeated acts of tardiness or absences can result in disqualification for unemployment compensation, but facts showed employee had reported to work on time only five times in three months, was usually thirty minutes to two or more hours late, sometimes did not appear for work at all, and did not notify the employer about the absences).

Magma Copper where the claimant had five unexcused absences. Norwood had two documented incidents in which she was late to her workstation by three minutes, and Employer did not show how such a *de minimis* tardiness actually affected its interests.[5]

¶19 Employer had the burden of proof to show that there was misconduct and it affected its substantial and material interests. *Ross*, 171 Ariz. at 129, 829 P.2d at 319. Although Employer alleged that Norwood's two documented instances of tardiness constituted misconduct, Employer did not provide specific evidence showing that its interests were substantially

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[5] Decisions in other jurisdictions further support our conclusion that the slight tardiness shown here is not sufficient to disqualify a claimant from benefits. Several courts have held that limited incidents of tardiness do not amount to misconduct affecting the right to unemployment compensation. *E.g.*, *Hernandez v. Fla. Orthopedics, Inc.*, 861 So.2d 525, 526 (Fla. Dist. Ct. App. 2003) (finding that although the claimant's tardiness on several occasions was sufficient for termination from employment, it did not rise to the level of misconduct necessary to deny unemployment benefits); *see also* James D. Lawlor, *Discharge for Absenteeism or Tardiness as Affecting Right to Unemployment Compensation*, 58 A.L.R. 3d 674, § 6(b) (1974 & Cum. Supp.) [hereinafter Lawlor] (listing cases where frequent absences or tardiness were not considered misconduct). While several courts have held that repeated instances of unexcused tardiness after receiving warnings is misconduct which can result in disqualification from unemployment compensation benefits, most of those cases deal with habitual tardiness or tardiness of more than a few minutes. *E.g.*, *Am. Process Lettering, Inc. v. Commonwealth Unemployment Bd. of Review*, 412 A.2d 1123, 1125 (Pa. Commw. Ct. 1980) (finding that because claimant was habitually tardy and acted in disregard of the employer's interest his actions constituted wilful misconduct and warranted a denial of benefits); *see also* Lawlor, 58 A.L.R. 3d at § 6(a) (listing cases where frequent absences or tardiness was considered misconduct).

or materially harmed by her being three minutes late to her workstation. "[M]ere allegations of misconduct are not sufficient to sustain such a charge." A.A.C. R6-3-51190(B)(2)(c). While Employer presented generalized statements of how tardiness at 8:00 a.m. can result in further delays during the day, it offered no evidence that Norwood being three minutes late actually caused further delays. In the absence of evidence proving Employer's charge, this allegation cannot be sustained.[6]

¶20 Second, Employer failed to demonstrate "repetition of tardiness caused by the worker's failure to exercise due care for punctuality." A.A.C. R6-3-51435(C). A careful review of the record shows that Employer did not show repetitive tardiness. Rather, Employer tolerated Norwood's slight tardiness for almost four years, until there was a change in management. Employer, who had the burden to show misconduct, did not provide any evidence that Norwood violated its new policy in January 2011. Thus, the first time Employer documented a slight tardiness was on April 26, and she was then terminated for being a few minutes tardy the very next day.

[6] For this same reason, Employer failed to meet the burden to establish misconduct based on incidents of tardiness coupled with time-sensitive duties. *See* A.A.C. R6-3-51435(C) ("[W]hen an employee has special responsibilities such as opening an establishment . . . [her] failure to exercise a high degree of concern for punctuality may amount to misconduct.").

Norwood's one documented instance of slight tardiness once she knew the policy applied to her being at her workstation by 8:00 a.m., did not amount to repetitive violations or a failure to exercise due care for punctuality. As such, it also does not violate the Employer's policy that termination will follow repetitive incidents of tardiness. *See supra*, ¶ 3.

CONCLUSION

¶21 For the foregoing reasons, we reverse the decision of the Board and remand for an award of benefits.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
JON W. THOMPSON, Acting Presiding Judge

/s/
PATRICIA K. NORRIS, Judge