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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/26/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOHN R. THOMAS,) No. 1 CA-UB 10-0080
)
Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
ARIZONA DEPARTMENT OF ECONOMIC) (Not for Publication -
SECURITY, an Agency,) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
and)
)
CCA OF TENNESSEE, LLC,)
)
Appellees.)
)
_____)

Appeal from the Appeals Board of the Department of Economic
Security of the State of Arizona

A.D.E.S. Appeals Board No. U-1144683-BR

AFFIRMED

John R. Thomas
Appellant in *Propria Persona*

Huachuca City

Thomas C. Horne, Arizona Attorney General
By Eric Devany, Assistant Attorney General
Attorneys for Arizona Department of Economic Security

Mesa

J O H N S E N, Judge

¶1 John R. Thomas appeals the decision of the Appeals
Board of the Arizona Department of Economic Security ("ADES")

disqualifying him from unemployment insurance benefits. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Thomas was a teacher in a medium-security prison in Eloy operated by CCA of Tennessee, LLC ("CCA"). In May 2008, Thomas twice was discovered sleeping in the classroom when "very dangerous inmates" were present. Although sleeping on the job typically is a terminable offense at CCA, the company did not discharge Thomas because he explained his long motorcycle commute caused him to be tired and he was moving closer to work. The company issued a written reprimand documenting Thomas's violations and noting if the conduct recurred, it would result in "more severe action." When counseled about his sleeping on the job in May 2008, Thomas did not mention any medical condition or medications.

¶3 Later that year, Thomas was hospitalized for sleep apnea and congestive heart failure. After Thomas was out of work for approximately one month, his doctor released him to work without restrictions, and Thomas returned to duty. Due to his medical condition, Thomas regularly took three medications that could cause drowsiness. Although Thomas took the medications before work each day, he did not notify the company of the medications' potential side effects.

¶14 Approximately six months after returning to work, Thomas again was caught sleeping in the presence of inmates, and CCA terminated his employment. It was not until then that Thomas alerted CCA that his medical condition required him to take medications that caused drowsiness.

¶15 An ADES deputy found Thomas eligible for unemployment benefits, and the employer appealed. After hearing the evidence, the Appeal Tribunal found Thomas to be disqualified from benefits because he was discharged for "willful or negligent misconduct." Thomas petitioned for review of the decision. The Appeals Board affirmed the Tribunal's decision, expressly accepting its findings of fact, reasoning and conclusions of law.

¶16 Thomas requested further review, and the Board affirmed its earlier decision. The Board concluded that the evidence "does not rule out" that something other than prescription medication caused Thomas to fall asleep on the occasion he was fired. Acknowledging Thomas's contention that the medications caused his drowsiness, the Board noted that Thomas had not notified CCA ahead of time that the medications could impair his ability to perform his duties. The Board held that a prudent employee working in a correctional institution would have alerted his employer if he was taking medications that caused drowsiness.

¶17 Thomas then requested review by this court, and we granted his application for appeal pursuant to Arizona Revised Statutes ("A.R.S.") section 41-1993(B) (Supp. 2010).

DISCUSSION

¶18 We will affirm the Board's decision if any reasonable interpretation of the record supports it. *Prebula v. Ariz. Dep't of Econ. Sec.*, 138 Ariz. 26, 30, 672 P.2d 978, 982 (App. 1983). We view the evidence in the light most favorable to upholding the decision. *Id.* We are bound by the Board's findings of fact unless they are arbitrary, capricious or an abuse of discretion, but we review the Board's legal conclusions *de novo*. *Rice v. Ariz. Dep't of Econ. Sec.*, 183 Ariz. 199, 201, 901 P.2d 1242, 1244 (App. 1995).

¶19 An individual is disqualified from receiving unemployment benefits if he or she was discharged for willful or negligent misconduct connected with employment. A.R.S. § 23-775(2) (Supp. 2010). Negligent misconduct includes "[n]egligence to such a degree . . . that [it] [s]hows [a] . . . substantial disregard of the employer's interest or of the employee's duties and obligations to the employer." Ariz. Admin. Code ("A.A.C.") R6-3-5105(A)(1)(d)(ii). "Misconduct may be established if there is . . . neglect of the duties required of the worker by the . . . terms of employment." A.A.C. R6-3-5105(A)(2)(a).

¶10 In this case, CCA's Code of Ethics and Business Conduct specifically identifies sleeping on the job as a "neglect of duty." In the normal course, the first time an employee is caught sleeping on duty at CCA, termination for misconduct is "immediate" and "automatic." CCA communicates its policy to employees through distribution of its Code of Ethics and Business Conduct, through open meetings with employees, and in Thomas's particular case, through personal disciplinary action administered by the facility's warden. See A.A.C. R6-3-5105(A)(2)(b)(i) ("[T]he Department shall consider the worker's knowledge of the worker's responsibilities through past experience, explanations, warnings, or other similar occurrences.").

¶11 Thomas contends on appeal that he should not be disqualified from benefits because the drugs his physician had prescribed for him made him drowsy. Although sleeping on the job usually constitutes misconduct under the Arizona Administrative Code, drowsiness induced by medically prescribed drugs "may not establish misconduct." A.A.C. R6-3-51310(B)(2)(b). Thomas's argument fails, however, because the evidence supports the Board's conclusion that he did not advise his employer of the potential side effects of his medication, nor did he ask for accommodation before his termination. The evidence supports the Board's determination that in neglecting

to inform CCA of his potential drowsiness, Thomas demonstrated a "substantial disregard of [CCA's] interest[s] or of [his] duties and obligations to [CCA]." A.A.C. R6-3-5105(A)(1)(d)(ii).

¶12 As noted above, CCA clearly communicated its policy that no employee was permitted to sleep while on duty. Implicit in the duty to stay awake during work hours is the duty to inform CCA if a medical condition might impair an employee's ability to remain awake throughout his shift. See A.A.C. R6-3-5105(A)(2)(b) ("Misconduct may be established if there is [a] material breach of any . . . duty . . . when the employer . . . impliedly sets forth the duty . . . and the facts show the worker should have reasonably been able to avoid the situation that brought about the discharge."). Assuming the truth of Thomas's contention that the medications he was taking caused him to fall asleep on the day in question, Thomas failed to give CCA the opportunity to accommodate his medical situation so that he would not fall asleep in the presence of inmates.

¶13 Thomas further argues on appeal that his supervisor knew he might suffer drowsiness because his supervisor visited him at the hospital and knew he was taking medication. Thomas admits, however, that he never told anyone at CCA that his medications would impair his ability to fulfill his duties. Moreover, all three employer witnesses testified that they were unaware that Thomas's medications might cause drowsiness.

CONCLUSION

¶14 For the foregoing reasons, we affirm the Board's decision that Thomas was discharged for willful or negligent misconduct and therefore is disqualified from benefits.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Judge

/s/
JON W. THOMPSON, Judge