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ARKANSAS COURT OF APPEALS

No. E09-120

Opinion Delivered April 7, 2010

BRENDA C. HAYDEN APPELLANT V. DIRECTOR, DEPARTMENT OF WORKFORCE SERVICES AND CMC STEEL FABRICATORS APPELLEES	APPEAL FROM THE ARKANSAS BOARD OF REVIEW [2009-BR-00446] AFFIRMED

DAVID M. GLOVER, JUDGE

At the agency level, appellant, Brenda Hayden, an accounts-payable clerk, was initially denied unemployment benefits on the bases that she was discharged for misconduct in connection with the work and that she was not available for suitable work. The denial of benefits was upheld by both the Appeal Tribunal and the Board of Review. On appeal, Hayden argues that there is not substantial evidence to support the Board of Review's findings under either provision. We affirm the Board of Review's denial of benefits on both bases.

In *Lewis v. Director*, 90 Ark. App. 219, 221, 205 S.W.3d 161, 162 (2005), this court set forth the standard of review employed in unemployment cases when the issues are ones of sufficiency of the evidence:

> On appeal, the findings of the Board of Review are conclusive if they are supported by substantial evidence. *Walls v. Director*, 74 Ark. App. 424, 49 S.W.3d 670 (2001). Substantial evidence is such relevant evidence as a reasonable mind might accept to

> support a conclusion. *George's, Inc. v. Director*, 50 Ark. App. 77, 900 S.W.2d 590 (1995). We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Id.* Issues of credibility of witnesses and weight to be afforded their testimony are matters for the Board of Review to determine. *Bradford v. Director*, 83 Ark. App. 332, 128 S.W.3d 20 (2003). Even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Id.*

The credibility of witnesses and the weight to be accorded testimony are matters to be resolved by the Board of Review. *Williams v. Director*, 79 Ark. App. 407, 88 S.W.3d 427 (2002).

Hayden first challenges the Board's finding that she was discharged for misconduct in connection with the work. A person will be disqualified for unemployment benefits if it is found that she was discharged from her employment on the basis of misconduct in connection with the work. Ark. Code Ann. § 11-10-514(a)(1) (Repl. 2002). In *Johnson v. Director*, 84 Ark. App. 349, 351–52, 141 S.W.3d 1, 2–3 (2004), this court set forth the definition of "misconduct":

> "Misconduct," for purposes of unemployment compensation, involves: (1) disregard of the employer's interest; (2) violation of the employer's rules; (3) disregard of the standards of behavior which the employer has a right to expect; and (4) disregard of the employee's duties and obligations to his employer. *Rossini v. Director*, 81 Ark. App. 286, 101 S.W.3d 266 (2003). To constitute misconduct, however, the definitions require more than mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good-faith errors in judgment or discretion. *Id.* Instead, there is an element of intent associated with a determination of misconduct. *Blackford v. Director*, 55 Ark. App. 418, 935 S.W.2d 311 (1996). There must be an intentional and deliberate violation, a willful and wanton disregard, or carelessness or negligence of such a degree or recurrence as to manifest wrongful intent or evil design. *Rossini v. Director, supra.* Misconduct contemplates a willful or wanton disregard of an employer's interest as is manifested in the deliberate violation or disregard of those standards of

> behavior which the employer has a right to expect from its employees. *Blackford v. Director, supra*.
>
> Whether an employee's actions constitute misconduct in connection with the work sufficient to deny unemployment benefits is a question of fact for the Board. *Thomas v. Director*, 55 Ark. App. 101, 931 S.W.2d 146 (1996).

Hayden argues that the finding of misconduct cannot stand because her former employer did not participate before the Appeal Tribunal in the telephone hearing; that because the employer did not participate in the telephone hearing, it failed on its burden of proof. She cites *Grigsby v. Everett*, 8 Ark. App. 188, 649 S.W.2d 404 (1983), for the proposition that it is the employer's burden of proof to show by a preponderance of the evidence that at least one instance of misconduct occurred. In *Grigsby*, the evidence before the Appeal Tribunal was conflicting; here, the only evidence provided at the Appeal Tribunal hearing was from Hayden. But unlike *Grigsby*, Hayden's testimony before the Appeal Tribunal and the information she had already provided at the agency level on her claimant-statement forms provide substantial evidence to support the Board of Review's denial of her claim.

Hayden argues that at no point in the record is there any indication that her conduct was deliberate, intentional, or amounted to anything more than ordinary negligence; that the alleged misconduct began after the death of her son and the doubling of her workload; and that she had no evil design in falling behind in her work. However, her own words on her "Discharge Insubordination - Claimant Statement" belie these assertions. First, she stated on this form that she was suspended from January 7, 2009, until January 9, 2009, which was the date she was discharged from work. In response to the question, "What was the final incident

that caused the discharge," she responded, "Delinquent in paying bills after I had been forewarned several times; not answering e-mails and phone in a timely manner and insubordination." When asked on the form what specific instructions she had failed to follow, she replied, "all of them," and when asked her reason for not following the instructions, she replied, "none at all." She further acknowledged on the form that she had been verbally warned to "get herself together."

At the telephone hearing, Hayden testified that she had "gotten behind" on some of the bills due to a heavy workload because of cutbacks in personnel and because her son had suddenly passed away. She admitted that she had allowed one accounts-payable balance to grow to $32,000, and that there were some other vendors that had been inquiring about the status of their accounts. Hayden said that there was only one other account that she could think of that was delinquent, but that it was not as much as the other account. She also admitted that she was slow in answering her e-mails and phone calls. Hayden said that she was suspended for two days; when she came back, she was told that her employer had reviewed the accounts and that she was terminated.

Based on our standard of review, we hold that there is substantial evidence to support the Board's denial of benefits for misconduct. Hayden admitted that she had been warned previously about paying the accounts payable in a timely manner and that she was eventually suspended for failing to do so before she was terminated. The issue of misconduct is a question of fact for the Board of Review; we must affirm the decision if it is supported by substantial evidence and if the Board could reasonably reach its decision based upon the

evidence before it, even if there was evidence on which the Board might have reached a different decision. *Kimble v. Director*, 60 Ark. App. 36, 959 S.W.2d 66 (1997).

Hayden next challenges the Board's finding that she was not available for suitable work pursuant to Arkansas Code Annotated section 11-10-507(3)(A) (Supp. 2009). This statutory provision provides that an insured worker will be eligible to receive benefits for any week if it is determined that "[t]he worker is unemployed, is physically and mentally able to perform suitable work, and is available for such work. Mere registration and reporting at a local employment office shall not be conclusive evidence of ability to work, availability for work, or willingness to accept work unless the individual is doing those things which a reasonably prudent individual would be expected to do to secure work." Arkansas law requires that claimants be available for work during the entire week for which they claim benefits in order to be eligible for unemployment benefits that week. *Lanoy v. Daniels*, 271 Ark. 922, 611 S.W.2d 524 (1981).

Here, Hayden returned to school after she was terminated. Hayden argues that she was available for work "a couple of hours a day," even though she reported that she would rather focus on school than look for work. However, at the agency level, on her Department of Workforce Services "Able and Available - Claimant Statement," Hayden had marked that she was not able and available for work from January 19, 2009, and she then left the ending date open, writing in "until." She also marked that she was still not able and available for work, and the reason she gave was "attending school full time." Then, at the telephone hearing, Hayden again testified that she was not looking for work because she was devoting

all of her time to school. She said that it would be difficult to work and go to school, but that others had done it and she had done it before, but that she could only work "just a couple of hours a day." Therefore, Hayden's own statements and testimony undermine her present contentions that she is now available for work. The Board of Review's denial of benefits on this basis is supported by substantial evidence, and we affirm on this point as well.

Affirmed.

GLADWIN and KINARD, JJ., agree.