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ARKANSAS COURT OF APPEALS

DIVISION IV
No. E-12-1006

	Opinion Delivered May 29, 2013
DOMINGO ROBERTO RODRIGUEZ APPELLANT V. DIRECTOR, DEPARTMENT OF WORKFORCE SERVICES, and WALMART APPELLEES	APPEAL FROM THE ARKANSAS BOARD OF REVIEW [2012-BR-02378] REVERSED AND REMANDED

DAVID M. GLOVER, Judge

Domingo Rodriguez was discharged from his job as a truck driver for Wal-Mart following an incident that occurred on May 19, 2012. The Appeal Tribunal determined that he was discharged for misconduct in connection with his work "on account of willful violation of bona fide rules of the employer pertaining to the safety of company property," under Arkansas Code Annotated section 11-10-514(b) (Repl. 2012). Rodriguez appealed to the Board of Review, which denied him benefits, finding that he "did not intentionally violate the rules of the employer pertaining to the safety of company property. However, due to the claimant's testimony that he did not check the truck, the Board found that the claimant's actions were a violation of the employer's policy and a willful disregard of the employer's interests." The Board modified the Appeal Tribunal's decision from denying benefits under section 11-10-514(b) to denying them under section 11-10-514(a). In

appealing the Board's decision to our court, Rodriguez contend 1) that the Board erred in finding that he was discharged for misconduct because, in the same decision, it found that he did not intentionally violate his employer's rules, and 2) that there was no substantial evidence to support a finding that he was discharged for misconduct. We reverse and remand for an award of benefits.

Background

Rodriguez testified that he was a driver for Wal-Mart and was told that he was discharged because he violated a company policy. He explained that he picked up a load of cargo from Bentonville, Arkansas, and delivered it to Wal-Mart Store 59 in Joplin, Missouri. He stated that he spoke with the store manager on the radio after delivering the load; that the manager told him to get a trailer located at the back of the store; and that the manager told him it was swept out, empty, and ready to go. Rodriguez testified that he hooked the trailer to his vehicle and drove a couple of feet before becoming aware that the trailer door was open. He acknowledged that he had relied upon the store manager's instructions instead of verifying for himself whether the trailer door was properly secured. He stated that six months before this incident, he had received a step-three reprimand for "hitting a yellow pole." He characterized the final incident leading to his discharge as one in which he was doing what the store manager told him to do, rather than one in which he forgot to close the trailer door.

Standard of Review

We review the Board's findings in the light most favorable to the prevailing party and affirm the Board's decision if it is supported by substantial evidence. *Price v. Dir.*, 2013 Ark. App. 205. Substantial evidence is such relevant evidence that a reasonable mind might accept

as adequate to support a conclusion. *Id.* Even when there is evidence upon which the Board might have reached a different decision, the scope of our review is limited to a determination of whether the Board reasonably could have reached the decision that it did based upon the evidence before it. *Id.* Our function on appeal, however, is not merely to rubber stamp decisions arising from the Board. *Id.*

Discussion

As previously asserted, Rodriguez raises two points in challenging the Board's denial of his claim for benefits. First, he notes inconsistent language in the Board's decision concerning whether his conduct was intentional or unintentional, and, second, he contends that the Board's decision was not supported by substantial evidence. For ease of discussion, we address the points together.

In reaching its decision to deny Rodriguez benefits, the Board's opinion provides:

> [Rodriguez] did *not* intentionally violate the rules of the employer pertaining to the safety of company property. However, due to the claimant's testimony that he did not check the truck, the Board finds that the claimant's actions were a violation of the employer's policy and a *willful* disregard of the employer's interests.

(Emphasis added.) Rodriguez argues that there is no reasonable way to square the Board's finding of misconduct with its contemporaneous finding that Rodriguez did not intentionally violate his employer's rules pertaining to the safety of company property. We, too, are confused by the Board's opinion in this regard because the language in the two sentences is inconsistent, and the Director's attempt to harmonize the two in its brief is not convincing. Moreover, we also find convincing Rodriguez's challenge to the sufficiency of the evidence supporting the Board's decision that he was discharged for misconduct.

Arkansas Code Annotated section 11-10-514(a)(1) (Repl. 2012) provides, "If so found by the Director of the Department of Workforce Services, an individual shall be disqualified for benefits if he or she is discharged from his or her last work for misconduct in connection with the work." The employer has the burden of proving by a preponderance of the evidence that an employee engaged in misconduct. *Price v. Dir.*, 2013 Ark. App. 205. "Misconduct" involves disregard of the employer's interest, violation of the employer's rules, disregard of the standards of behavior the employer has a right to expect of its employees, and disregard of the employee's duties and obligations to the employer. *Id.* For purposes of unemployment insurance, the definition of misconduct requires more than mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good-faith errors in judgment or discretion. *Id.* Conduct that may well provide a sufficient basis for the discharge of an employee may not be sufficient to deny that employee unemployment benefits. *Id.* The two inquiries are entirely different. *Id.* To conclude that there has been misconduct for unemployment-insurance purposes, we have long required an element of intent: mere good-faith errors in judgment or discretion and unsatisfactory conduct are not misconduct unless they are of such a degree or recurrence as to manifest culpability, wrongful intent, evil design, or intentional disregard of an employer's interest. *Id.*

Here, Rodriguez acknowledged that Wal-Mart had a rule that drivers were to make certain trailer doors were properly secured before leaving the dock. It is undisputed that Rodriguez did not do so, relying, he contends, on the store manager telling him that the trailer was ready to go. The question we must decide is whether his conduct demonstrated

the necessary level of intent, viewing the evidence in the light most favorable to the Board's decision, to support the conclusion that he engaged in misconduct that thereby disqualified him from receiving unemployment compensation. We conclude that there was not substantial evidence to support such a conclusion.

We note that Rodriguez testified that he had received a step-three reprimand, six months earlier, for "hitting a yellow pole." We also note that the Board stated in its findings that Rodriguez had received prior warnings for punctuality and violation of operational procedures. Nowhere in the Board's decision, however, does the Board incorporate those facts into its discussion of how Rodriguez had engaged in misconduct. Rather, the Board's conclusion that Rodriguez had engaged in misconduct was based solely on the May 19, 2012 incident, explaining:

> The claimant testified that he relied on a manager telling him that the trailer was ready, but admitted that he did not check the trailer himself prior to pulling away. The Board finds that the claimant did not intentionally violate the rules of the employer pertaining to the safety of company property. However, due to the claimant's testimony that he did not check the truck, the Board finds that the claimant's actions were a violation of the employer's policy and a willful disregard of the employer's interests. Therefore, the decision of the Appeal Tribunal is modified from denying the claimant benefits under Ark. Code Ann. § 11-10-514(b) to denying benefits under Ark. Code Ann. § 11-10-514(a) on finding that the claimant was discharged from last work for misconduct in connection with the work.

Accordingly, what we are left to review is a decision that bases misconduct entirely on the May 19 incident, and a decision that contains conflicting statements about Rodriguez's intent or lack thereof. Moreover, even taking into account the undisputed fact that Rodriguez had received prior disciplinary action, there is nothing in the record that demonstrates how such a fact contributes to the Board's conclusion that Rodriguez engaged in misconduct.

In *Clark v. Director*, 83 Ark. App. 308, 312–13, 126 S.W.3d 728, 730–31 (2003), we explained:

> In rendering its decision, the Board cited the standard set forth in *Nibco, supra*, and *Kimble v. Director, Arkansas Empl. Sec. Dep't*, 60 Ark. App. 36, 959 S.W.2d 66 (1997). In *Kimble*, the court held that a truck driver involved in five accidents in six months, all of which were attributable to her negligence, evidenced such disregard for the interests of her employer that she was discharged for misconduct relating to her work and was therefore unable to receive unemployment compensation. In affirming the Board's finding of misconduct, this court in *Kimble* did not rely solely on the driver's liability. We emphasized that even numerous accidents will not alone support a finding of misconduct. Instead, the court contrasted the driver's previous work performance, which indicated that she performed her job without incident prior to the spate of accidents, with the high number of incidents in a short time span. The driver's performance prior to the series of accidents was evidence that the driver had the ability and capacity to perform her job duties. Therefore, the evidence showed a pattern of carelessness from which one could infer an indifference that constituted a substantial disregard of the employer's interest as well as of the driver's duties and obligations to the employer.
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> Unlike *Kimble*, nothing in the record in this case indicates that the driver had an accident-free period from which the Board could conclude that he had the capacity and ability to back his truck up without incident, but deliberately failed to act within his ability. The first accident occurred in March after he was hired in February. The only time he was involved in accidents is when he was backing up his truck.
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> The Board found that appellant violated the employer's written policy limiting the number of accidents occurring within a specified time and that this constituted misconduct sufficient to create a statutory bar to benefits. It is true that appellant violated the employer's policy by exceeding the number of accidents allowed. However, we hold that there is no evidence that appellant ever intentionally violated the rules so as to manifest wrongful intent or evil design, or engaged in conduct from which the Board could infer wrongful intent or evil design. *See Walls v. Director, Empl. Sec. Dep't*, 74 Ark. App. 424, 426-27, 49 S.W.3d 670, 672-73 (2001) (reversing Board finding no evidence of intentional violation of written policy regarding absenteeism); *B.J. McAdams, Inc. v. Daniels*, 269 Ark. 693, 600 S.W.2d 418 (Ark. App. 1980) (holding that mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute applied to award of benefits to truck driver having three accidents in 11-month period of time).

As we noted in *Clark*, *supra*, here, too, Wal-Mart may well have acted prudently in deciding to discharge Rodriguez from his employment as a truck driver, but, just as in *Clark*, there is no substantial evidence to support the Board's determination that Rodriguez's conduct amounted to misconduct. We therefore reverse and remand for an award of benefits.

Reversed and remanded.

GRUBER and VAUGHT, JJ., agree.

The Kester Law Firm, by: *Joseph Hall*, for appellant.

Phyllis A. Edwards, for appellee Artee Williams, Director, Department of Workforce Services.