

ARKANSAS COURT OF APPEALS

DIVISION IV

No. E-12-665

ROSIE PARHAM

APPELLANT

V.

DIRECTOR, DEPARTMENT OF
WORKFORCE SERVICES, and
HABILITATION CENTER

APPELLEES

Opinion Delivered May 29, 2013

APPEAL FROM THE ARKANSAS
BOARD OF REVIEW
[No. 2011-BR-03534]

AFFIRMED

LARRY D. VAUGHT, Judge

Appellant Rosie Parham appeals from the decision of the Arkansas Board of Review (Board), denying her unemployment benefits. On appeal, Parham argues that she did not receive a fair hearing before the Arkansas Appeal Tribunal (Tribunal), the Board abused its discretion in refusing to order an additional hearing to accept additional evidence, and substantial evidence does not support the Board's decision. We affirm.

From August 1993 to September 2011, Parham was employed at the Habilitation Center (the Center) as a developmental trainer, supervising mentally disabled children and young adults. On September 28, 2011, the residents of the Center were on a break under the supervision of Parham and co-employees Latasha Rochelle, Dorothy Buchanan, and Chanale Miller. When a fight occurred between J.T. and J.M. (both resident children), employees intervened and separated the children. J.T. returned to playing with his toys, but became upset again after Miller took one of his toys. When J.T. pulled Miller's hair, she struck and kicked

J.T. The incident was investigated by Doug Freeman, the Center's director of risk management, and he concluded that Miller abused J.T., Parham witnessed the abuse, and she did not report the abuse. Parham was terminated September 29, 2011.

Parham filed for unemployment benefits, but her claim was denied by the Arkansas Department of Workforce Services (Department), which found that she was discharged from her job for the deliberate failure to follow her employer's policy on mandated reporting of abuse. It further found that her actions adversely affected her employer's interests. Parham appealed to the Tribunal, and a telephone hearing was held December 20, 2011.

During that hearing, Freeman testified that Parham was terminated based on her failure to report child abuse in violation of her employer's policy and state law. He stated that he concluded that Parham witnessed the abuse based on a statement from Charles Potter, a maintenance worker for the Center, who witnessed the abuse and said that he believed Parham witnessed the abuse; a statement from Rochelle, who reported that Parham was attempting to restrain J.T. when he was struck by Miller;¹ and two other witnesses, who gave statements that Parham was on the porch near where the abuse took place.² Freeman testified

¹This was Rochelle's second statement. Her first statement (like Parham's) reported the fight between J.T. and J.M. but did not report abuse of J.T. by a staff member. According to Freeman, Rochelle (who was also fired for failing to report the abuse) called him the day after the incident, said that she did not tell the truth, asked to make another report, and requested that her job be reinstated.

²Veronica Eddington, the milieu coordinator at the Center, also testified that witness reports of the incident revealed that Parham was on the porch in close vicinity of the abuse and that the incident report filed by Parham failed to disclose the abuse.

that Parham told him that she had witnessed the two children fighting, but she did not witness a staff member abuse J.T., which is why she did not report any abuse. Freeman also stated that he and Veronica Eddington called Parham on at least two occasions to advise her that her story was not consistent with other witness statements and to give her the opportunity to amend her statement.

The Center's director of human resources, Cheryl Jordan, offered testimony similar to that of Freeman. She said that Parham was a mandated reporter, she was trained to report incidents of child abuse, and she was terminated for not reporting the abuse. Jordan also said that she was in the office when Rochelle recanted her initial statement failing to report the abuse by the staff member. According to Jordan, Rochelle said that she gave her first statement after she, Miller, and Parham agreed on what to say. But Rochelle changed her statement later because she "could not stand the fact that she did not tell the truth," and she "wanted to set the record straight." Charles Potter testified that he witnessed and reported the abuse of J.T., he saw Parham standing on the front porch while the abuse took place, and in his opinion Parham witnessed the abuse.

Parham was the final witness at the hearing. She testified that she saw the fight between J.T. and J.M. and that J.T. was unable to calm down afterward. She heard J.T. "cussing," saw him moving back and forth "trying to get back at [J.M.]" J.T.'s aggressive behavior led Parham to believe that he might get "out of hand," requiring staff members to restrain him. Therefore, she turned away from J.T. and started clearing out toys and chairs for safety purposes. According to Parham, the abuse occurred while her back was turned. She said that

she was aware of “some commotion going on and [J.T.] was trying to get away,” but she insisted that she did not witness a staff member strike or kick him. She also said that she knew the two staff members who separated Miller and J.T.

The Tribunal subsequently entered a decision denying Parham unemployment benefits. For support, the Tribunal cited witness statements that indicated Parham was in close proximity to the fight between Miller and J.T. and/or helped break it up. The Tribunal also cited Parham’s testimony admitting that she was on the porch, that she knew a fight between Miller and J.T. had taken place, and knew who had broken it up. Based on these findings, the Tribunal concluded that “it is more likely than not that [Parham] saw the fight when it occurred and then failed to report it when she was asked to provide a statement.” The Tribunal further found that Parham’s failure constituted willful disregard of the employer’s interests; accordingly, it found that she was discharged from her last work for misconduct in connection with the work. Parham appealed the Tribunal’s decision to the Board, which affirmed and adopted the Tribunal’s decision. From that decision, Parham timely appealed.

Parham’s first two points on appeal are that the Tribunal did not conduct a fair hearing and that the Board abused its discretion in refusing to order another hearing to accept additional evidence. However, these arguments were not made below, and this court does not consider issues raised for the first time on appeal. *Rossini v. Dir.*, 81 Ark. App. 286, 288, 101 S.W.3d 266, 268 (2003).

Parham's third and final point on appeal is that substantial evidence does not support the Board's decision. She insists that she did not witness the abuse and that she had no incentive to lie about it. Our standard of review of decisions of the Board is well settled:

We do not conduct a de novo review in appeals from the Board of Review. In appeals of unemployment compensation cases we instead review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board of Review's findings. The findings of fact made by the Board of Review are conclusive if supported by substantial evidence; 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 have reasonably reached its decision based on the evidence before it. Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion.

Valentine v. Dir., 2012 Ark. App. 612, at 2 (quoting *Snyder v. Dir.*, 81 Ark. App. 262, 263, 101 S.W.3d 270, 271 (2003)). Additionally, the credibility of witnesses and the weight to be accorded their testimony are matters to be resolved by the Board. *Valentine*, 2012 Ark. App. 612, at 2.

Arkansas Code Annotated section 11-10-514(a)(1) (Repl. 2012) provides that a person shall be disqualified from receiving unemployment benefits if the Department finds that the person is discharged from her last work for misconduct in connection with the work.

"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. 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. Instead, there is an element of intent associated with a determination of misconduct. 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. 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. 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.

Valentine, 2012 Ark. App. 612, at 1–2 (internal citations omitted).

Reviewing the evidence in the light most favorable to the Board, as we are required to do, we hold that there is substantial evidence supporting the Board's decision that Parham was discharged from her last work for misconduct in connection with the work. The evidence relied on by the Board to support its finding of misconduct included (1) witness statements that Parham was either in the vicinity of the fight between the staff member and J.T. or was one of the persons who was restraining J.T. when the abuse occurred, and (2) Parham's own testimony that she knew that a commotion involving J.T. took place, knew who was involved in the commotion, thought that J.T. was going to be restrained, and knew who broke up the commotion. Based on this evidence, the Board found that it was more likely than not that Parham saw the abuse. This finding, coupled with the undisputed facts that Parham knew she had a duty to report abuse and did not do so (despite being given multiple opportunities by her employer), constitutes substantial evidence supporting the Board's conclusion that her actions contemplated a willful or wanton disregard of her employer's interest. Therefore, we affirm.

Affirmed.

GRUBER and GLOVER, JJ., agree.

Cross & Kearney, PLLC, by: *Jesse L. Kearney*, for appellant.

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