DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, Judge

E06-36

NOVEMBER 1, 2006

MICHAEL HILTON

APPELLANT

V.

ARTEE WILLIAMS, DIRECTOR, DEPARTMENT OF WORKFORCE SERVICES and ARKANSAS DEPARTMENT OF COMMUNITY CORRECTION

APPELLEE

APPEAL FROM THE ARKANSAS BOARD OF REVIEW
[NO. 2005-BR-02066]

AFFIRMED

This is an appeal of a decision of the State of Arkansas Board of Review affirming and adopting the decision of the Arkansas Appeal Tribunal, which affirmed the Department of Workforce Services' determination denying appellant Michael Hilton benefits under Ark. Code Ann. §11-10-514(a). On appeal, appellant argues that there is insufficient evidence to support the Board of Review's decision that he was discharged for misconduct in connection with the work within the meaning of Ark. Code Ann. § 11-10-514. We affirm.

Appellant began working for the Arkansas Department of Community Correction as a substance abuse counselor on May 7, 2005. Reports indicated that appellant: (1) reported to work on two occasions in a condition that prohibited him from performing his job duties; (2) reported for work late or not at all; (3) lost assessment files; (4) used other employees'

computers to surf inappropriate web sites. A meeting was held on August 29, 2005, to discuss policies and procedures with appellant. Appellant subsequently failed to appear at a counseling session he was scheduled to conduct on September 7, 2005, and he was also sent home after arriving late and in poor condition for work on September 22, 2005, which also resulted in a patient counseling session being canceled.

On or about October 4, 2005, an attempt was made to secure appellant's signature on an "exit letter" that contained a "list of incidents that occurred during the past 120 days"; however, appellant refused to sign the letter and was thereafter discharged. Appellant filed for unemployment benefits and was denied. He appealed that decision to the Arkansas Appeal Tribunal which affirmed the determination, finding that the discharge was for misconduct. Appellant then appealed to the Board of Review, which also affirmed the decision. This appeal followed.

Arkansas Code Annotated section 11-10-514(a)(1) provides that a person shall be disqualified from receiving unemployment benefits if the Director of the Employment Security Department finds that the person is discharged from his or 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 of his employees, and (4) disregard of the employee's duties and obligations to his employer. *See West v. Director*, 94 Ark. App. 381, ___ S.W.3d ___ (2006).

To constitute misconduct, 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. *West*, *supra*. Instead, there is an element of intent associated with a determination of misconduct. *Johnson v. Director*, 84 Ark. App. 349, 141 S.W.3d 1 (2004). There must be an intentional and deliberate violation, a wilful and wanton disregard, or carelessness or negligence of such a degree or recurrence as to manifest wrongful intent or evil design. *West*, *supra*. The employer has the burden of proving misconduct by a preponderance of the evidence. *See Maxfield v. Director*, 84 Ark. App. 48, 129 S.W.3d 298 (2003).

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 of Review. *Pacheco v. Director*, 92 Ark. App. 122, __ S.W.3d __ (2005). Our standard of review of the Board of Review's findings of fact 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.

Id. at 92 Ark. App. at 127-28, S.W.3d at __ (internal citations omitted). Additionally, the credibility of witnesses and the weight to be accorded their testimony are matters to be resolved by the Board of Review. *Id.* That is not to say that our function on appeal is merely to ratify whatever decision is made by the Board of Review. *See Carraro v. Director*, 54 Ark. App. 210, 924 S.W.2d 819 (1996). Further, we are not at liberty to ignore our responsibility to determine whether the standard of review has been met. *Id.* When the Board of Review's decision is not supported by substantial evidence, we will reverse. *Id.*

Appellant argues that the evidence to support the Board of Review's findings is insufficient due to inconsistent testimony presented by appellee's witness. Appellant's supervisor, Mr. Jack Downing, testified that appellant was discharged "because he appeared to have problems showing up to work on time"; however, Mr. Downing was unable to state the attendance policy that was supposedly in place. Appellant contends that his admitted occasional tardiness is insufficient proof that he manifested culpability, wrongful intent, evil design, or intentional disregard of his employer's interest. Appellant explains that on those occasions, he called in and explained the mitigating circumstances, such as waiting for a lumber delivery and attending a doctor's appointment. He claimed that appellee presented no evidence to meet the burden of proof that the tardiness met the required level of

intentional misconduct, and further, neither the attendance policy nor other testimonial evidence thereof was ever submitted into the record to prove that he actually violated it.[1]

Regarding the allegations that appellant failed to either show up for work or call in, appellant claims that appellee's evidence was inconsistent. Mr. Downing initially could not specify how many occurrences there were, then later stated there were two times. He contends that the inconsistencies show that the employer's record keeping was careless and/or inaccurate, or that Mr. Downing was not a credible witness. Likewise, he asserts that inconsistent testimony was presented with respect to the claim that appellant lost or misplaced offender assessments. He claims that appellee's witness did not specify how many times this occurred, whether the files were ever located, or what problems were created because of appellant's actions. Additionally, he points out that no evidence was presented regarding a specific, or even a general, intent on the part of appellant to lose, misplace, or wrongfully take assessment files that belonged to his employer. To the contrary, appellant maintains that he unintentionally lost or misplaced only one assessment file and that it was an honest mistake.

Finally, with respect to the charge that he arrived at work on one occasion in a condition that prohibited him from performing his duties, appellant contends there was

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[1] Mr. Downing did testify that the attendance policy was on the Internet and available to each and every employee, although the actual policy is not included in the record.

mitigating evidence regarding that issue as well. Subsequent to his wife leaving him and filing for divorce, appellant obtained a prescription for depression and/or anxiety medication. The medication caused "adverse effects and discomfort." Appellant contends that the medication "may have rendered him temporarily incapable of performing his duties, but not incompetent to do so." No evidence was presented that the medication caused him intrinsic problems that caused him to be incompetent to perform his job duties. He testified that he called and informed his employer that he would be late, and upon his arrival, he explained that his medication had been changed and requested to go home because he did not want any problems. He contends that this attempt to avoid problems at the workplace indicated that he was acting in the employer's best interest rather than intentionally disregarding them.

Appellant also raises the possibility that he was fired in retaliation for informing superiors of an incident in which Mr. Downing cursed at another employee. Mr. Downing resigned but subsequently returned in a supervisory capacity. Appellant testified that he noticed a difference in the way Mr. Downing treated him upon his return.

There is substantial evidence to support the Board of Review's findings. Mr. Downing testified on behalf of appellee that he received several e-mails from the assistant area manager that appellant had shown up late, or not at all, without notification. Mr. Downing detailed a specific incident that occurred on August 2, 2005, when appellant stopped in at the office. Mr. Todd Thorpe, the assistant area manager, was concerned enough about appellant's condition that day to ask appellant if he needed to be driven home; the offer

was declined by appellant. Appellant stated that he was going to Heber Springs to conduct his evening counseling class, but he left his briefcase and other belongings behind when he left the office. Mr. Thorpe thought that appellant might need the items for the class and drove to the Heber Springs location to deliver them. Upon his arrival, Mr. Thorpe waited with another assistant manager, but appellant failed to arrive for the counseling session and did not call to inform anyone that he would not be attending. As a result, the class had to be canceled after clients had already arrived.

Subsequently, appellant was late to work on September 7, 2005, and on September 22, 2005, appellant called in to work an hour and fifteen minutes late giving two or three different reasons why he had not shown up as scheduled. He indicated that he was sick then later stated that he had been unloading lumber for a remodeling project. Appellant reported to work later that day but was sent home by the assistant area manager because appellant displayed "slurred speech, eyes sagging and hands shaking." Another counseling session appellant had scheduled with patients had to be canceled due to appellant's absence.

The Board of Review found, and the record supports, that appellant acknowledged that he was warned on August 29, 2005, about the importance of reporting to work as scheduled. Further, he also acknowledged that he was late to work on September 22, 2005, because he was taking care of personal business. The Appeal Tribunal determined that failing to report to work because he was taking care of personal business constituted an intentional disregard for the best interest of the employer. The Appeal Tribunal did not cite

authority for that premise, but this court discussed such behavior as misconduct in *Johnson*, *supra*:

> In *St. Vincent Infirmary v. Daniels*, 271 Ark. 654, 609 S.W.2d 675 (Ark. App.1980), two employees who worked at the hospital's day-care center were discharged for leaving the workplace one afternoon to attend to personal business. We concluded that this single incident of leaving work amounted to misconduct because the employees had left without permission and without clocking out; because they were absent during a busy time of day at a time that did not correspond to their lunch hour; and, most significantly, because their absence placed the day care in violation of regulations concerning the ratio of adult employees to the number of children present. We held that the employees' acts were intentional and displayed a substantial disregard for their employer's interests and their own duties and obligations.

Johnson, 84 Ark. App. at 354, 141 S.W.3d at 4. With respect to this case, the Board of Review articulated very specific findings in its decision affirming the Appeal Tribunal related to the evidence presented, noting "the weight of the evidence that the employer discharged the claimant on October 4, 2005, for a variety of persistent problems in his work performance, especially his failure to adhere to even a flexible work schedule, despite intensive counseling about such problems about five weeks before the separation." The Board of Review found appellant's presentation unconvincing and pointed out that his acknowledgment that the employer counseled him on August 29, 2005, conflicted with his presentation to the Department of Workforce Services, in which he stated that "at no time was I warned or counseled with about any of the accusations on this letter."

To reiterate, the credibility of witnesses and the weight to be accorded their testimony are matters to be resolved by the Board of Review. *Pacheco*, *supra*. Under our standard of

review, we hold that the Board of Review could have reasonably reached its decision based on the evidence before it; accordingly, we affirm.

Affirmed.

BIRD and ROAF, JJ., agree.