

Claimant worked in a distribution center that supplied local drugstores with merchandise, including controlled substances. Employer has a drug-free workplace policy which provides that an employee who is unlawfully involved with alcohol, drugs, or a controlled substance at any time may be subject to disciplinary action, up to and including termination. Claimant was given a copy of Employer's policy on his first day of work. (Findings of Fact Nos. 1-3; Notes of Testimony (N.T.) at 8.)

In February 2011, Claimant was arrested and charged with several drug-related offenses. Claimant informed Employer of the incident in May 2011, after information about his arrest appeared in local newspapers. On May 12, 2011, Employer suspended Claimant for several days, after which he returned to work. On October 19, 2011, Claimant pleaded guilty to the charge of manufacturing a controlled substance, and, on October 24, 2011, Employer terminated Claimant's employment. (Findings of Fact Nos. 4-7.)

On December 16, 2011, the local service center denied Claimant's application for benefits, determining that Claimant was ineligible for benefits under section 3 of the Law.² Claimant appealed, and a referee held a hearing on February 15, 2011, at which Claimant and a witness for Employer testified.

Colleen Shearn, Employer's human resources representative, testified that Employer discharged Claimant for violating the company's drug-free workplace

² Section 3 of the Law, the Law's declaration of public policy, provides in part that "[s]ecurity against unemployment and the spread of indigency can best be provided by the systematic setting aside of financial reserves to be used as compensation for loss of wages by employees during periods when they become unemployed through no fault of their own." 43 P.S. §752. To establish a claimant's ineligibility under section 3, the employer must demonstrate that the claimant's conduct is inconsistent with acceptable standards of behavior and directly affects the claimant's ability to perform his or her duties. Martin v. Unemployment Compensation Board of Review, 713 A.2d 753 (Pa. Cmwlth. 1998).

policy following Claimant's guilty plea to charges of manufacturing a controlled substance. Shearn stated that an employee's conviction or guilty plea to a controlled substance violation outside of work is a direct violation of the policy and cause for termination. Shearn also stated that because Claimant's misconduct was reported in the newspapers, it could have been damaging to Employer's reputation. Employer introduced a copy of the policy into evidence, and Shearn noted that Claimant reviewed and signed a copy of Employer's policy shortly after being hired. (N.T. at 6-8.)

Claimant acknowledged that he pleaded guilty to manufacturing a controlled substance. However, Claimant introduced a copy of a recent performance evaluation and asserted that Employer had not demonstrated that the conduct at issue had any effect on the performance of his job duties. In addition, Claimant cited a portion of Employer's policy stating that employees who acknowledge and seek treatment for substance abuse and dependency issues will not be subject to discipline on the basis of their prior conduct, drug abuse; however, Claimant conceded that having a drug or alcohol problem is different from pleading guilty to manufacturing an illegal substance. (N.T. at 10-13.)

Based on the findings summarized above, the referee concluded that Claimant engaged in unacceptable conduct for which he was at fault and which negatively affected his ability to perform his job. The referee rejected Claimant's assertions that his criminal activity did not affect his work or Employer. The referee also concluded that Claimant's conduct directly violated Employer's policy. Accordingly, the referee affirmed the determination of the local service center that Claimant was ineligible for benefits under section 3 of the Law.

Claimant appealed to the Board. Claimant stipulated that his criminal conviction was conclusive proof of the facts charged and that his non-work related misconduct was inconsistent with acceptable standards of behavior. Claimant also admitted that his drug-related conviction was in violation of Employer's policy. However, Claimant argued that the activity at issue did not directly affect his ability to perform his assigned duties and, therefore, the referee erred in ruling him ineligible for benefits under section 3 of the Law.

By decision and order dated March 29, 2012, the Board affirmed the referee's decision, adopting and incorporating the referee's findings of fact. However, the Board concluded that Claimant's violation of Employer's policy amounted to willful misconduct and modified the substantive basis for the denial of benefits from section 3 of the Law to section 402(e) of the Law.³ Claimant requested reconsideration, but the Board denied Claimant's request on April 30, 2012.

On appeal to this Court,⁴ Claimant first argues that the Board erred in concluding that he was ineligible for benefits based on willful misconduct under section 402(e) absent proof that his conviction affected his job performance. We disagree.

Initially we note that the term "willful misconduct" has been judicially defined as including the wanton or willful disregard of the employer's interests; the

³ Section 402(e) of the Law provides that a claimant shall be ineligible for unemployment compensation for any week in which his or her unemployment is due to discharge or suspension from work for willful misconduct connected with his or her work.

⁴ Our scope of review in an unemployment compensation appeal is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704.

deliberate violation of the employer's rules; the disregard of standards of behavior that an employer can rightfully expect from an employee; or negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or the employee's duties and obligations. Webb v. Unemployment Compensation Board of Review, 670 A.2d 1212, 1214 (Pa. Cmwlth. 1996). Whether a claimant has committed willful misconduct is a question of law, reviewable by this Court. Harris v. Unemployment Compensation Board of Review, 447 A.2d 1060 (Pa. Cmwlth. 1982). The employer bears the burden of proving that the employee's actions rose to the level of willful misconduct. Stauffer v. Unemployment Compensation Board of Review, 455 A.2d 300 (Pa. Cmwlth. 1983).

Where, as here, a claimant is discharged for violation of a work rule or policy, the employer must establish both the existence of a reasonable work rule and its violation. Webb. Citing Martin v. Unemployment Compensation Board of Review, 713 A.2d 753 (Pa. Cmwlth. 1998), Webb, and Gallagher v. Unemployment Compensation Board of Review, 388 A.2d 785 (Pa. Cmwlth. 1978), Claimant contends that a determination of willful misconduct also requires proof that the conduct at issue adversely affected the performance of an employee's job duties. However, these cases are distinguishable and provide no support for Claimant's argument.⁵

⁵ The claimant in Martin was discharged for off-duty criminal misconduct, but the claimant's eligibility was analyzed under section 3 of the Law and, therefore, the holding in Martin is inapplicable here. In Webb, the claimant was discharged for violating the employer's rule that an employee must remain alcohol free for a period of five years following a detoxification program. The rule specifically applied to an employee's consumption of any alcohol at any time and at any place, regardless of whether the alcohol intake affected the employee's attendance of work performance. This Court held that because the employer presented no evidence concerning the **(Footnote continued on next page...)**

Moreover, we specifically rejected Claimant’s argument in Maskerines v. Unemployment Compensation Board of Review, 13 A.3d 553 (Pa. Cmwlth. 2011). The claimant in Maskerines signed a last chance agreement stating that he would abstain from using alcohol or illegal substances and would comply with all provisions of the employer’s drug and alcohol policy. The employer’s policy prohibited the manufacture, distribution, possession, sale, or use of illegal drugs, as well as the conviction under any criminal drug statute for a violation in or outside the workplace. The claimant was fired after he admittedly possessed marijuana while off-duty and off the employer’s premises.

(continued...)

purpose of the work rule, i.e., no evidence that application of the rule served to accomplish a legitimate interest of the employer, the employer failed to meet its initial burden under section 402(e) to establish the existence of a reasonable work rule. In Gallagher, a bartender who was at his employer’s premises on his day off was discharged after he called his girlfriend a “b----.” Ultimately, this Court concluded that while an employer can discharge an employee for failing to live up to the employer’s standards of behavior, conduct that merits an employer’s disapproval will not disqualify an employee from receiving benefits under section 402(e) of the Law unless his conduct is connected with his work. Each of these cases is significantly distinguishable from the present matter. Moreover, none holds that an employer that establishes a reasonable work rule and the claimant’s violation thereof must also demonstrate that the claimant’s misconduct affected the performance of his job duties.

Claimant states that “[Employer’s] rule governing my conduct in non-working hours is unreasonable and unconstitutional,” (Claimant’s brief p. 10), but he does not elaborate further. Nevertheless, we note that in Derry v. Unemployment Compensation Board of Review, 693 A.2d 622 (Pa. Cmwlth. 1997), we specifically determined that the YMCA’s rule prohibiting off-duty, illegal drug activity by its child care workers was reasonable. We explained that the rule established a standard of conduct that the employer had a right to expect from its employees, who are supposed to serve as role models for youth, and also served to protect the employer’s interest in maintaining the confidence of the community. Because Employer’s business involves the distribution of controlled substances, we would conclude in this case that its rule proscribing off-duty illegal drug activity serves similar purposes and, therefore, is reasonable.

The Board concluded that the claimant was ineligible for benefits under section 402(e) of the Law because he violated the employer's drug and alcohol policy. On appeal, the claimant argued that the employer was required to prove that his off-duty violation of the work rule directly affected his workplace performance. We rejected that argument and explained as follows:

Where an employer seeks to deny a discharged employee unemployment compensation benefits *pursuant to Section 3* of the Law, the employer bears the burden of showing that the alleged misconduct directly affects an employee's ability to perform his or her assigned duties. *Gillins v. Unemployment Compensation Board of Review*, 534 Pa. 590, 597, 633 A.2d 1150, 1154 (1993). Where an employer seeks to deny a discharged employee unemployment compensation benefits for a work rule violation *pursuant to Section 402(e)*, the employer must prove only that the work rule existed and that the employee violated it. *Caterpillar, Inc. v. Unemployment Compensation Board of Review*, 550 Pa. 115, 123, 703 A.2d 452, 456 (1997). Because Claimant was discharged for a work rule violation, the Board applied Section 402(e) to the case, and Employer was not required to show that Claimant's possession of marijuana off-premises directly affected Claimant's job performance. *Section 3* and *Section 402(e)* are not parallel legal theories, but are independent bases on which to deny an employee unemployment compensation, and the legal analysis under each section is different.

Maskerines, 13 A.3d at 556-57 (footnotes omitted) (emphasis in original).

In addition, contrary to Claimant's assertions, we explained in Maskerines that whether a claimant's undesirable conduct occurred at or during work does not, in and of itself, determine whether section 3 of the Law or section 402(e) of the Law is applicable. Here, because Claimant's misconduct was a violation of Employer's policy, we conclude that the Board's application of section 402(e) of the Law was proper.

Alternatively, Claimant cites Raimondi v. Unemployment Compensation Board of Review, 863 A.2d 1242 (Pa. Cmwlth. 2004), and argues that because he was arrested in February 2011 but not discharged until October 2011, the remoteness doctrine precludes a denial of benefits in this case. As we noted in Raimondi, “where there is an *unexplained* substantial delay between the claimant’s misconduct and the employer’s act to terminate the claimant, the remoteness doctrine will preclude an employer from seeking a denial of benefits based on allegations of willful misconduct.” Id. at 1247 (emphasis in original). However, where the record establishes an explanation for the delay and there is no indication that the employer condoned the claimant’s conduct, the remoteness doctrine does not apply to preclude a denial of benefits. Id. In Raimondi we held that the seventy-four-day delay from the discovery of the claimant’s misconduct until his ultimate discharge was explained by the lengthy nature of the employer’s investigative review process, a valid reason for delay. See also Department of Transportation v. Unemployment Compensation Board of Review, 755 A.2d 744 (Pa. Cmwlth. 2000) (remoteness doctrine did not apply where the employer learned of a problem three years later, confirmed the claimant’s misconduct only after completing a seven-month investigation and then promptly discharged him); Wideman v. Unemployment Compensation Board of Review, 505 A.2d 364 (Pa. Cmwlth. 1986) (remoteness doctrine did not apply where the record demonstrated that the fifty-day delay between the claimant’s infraction and his discharge was occasioned by the nature of the employer’s administrative review process).

Here, Shearn testified that Employer learned of Claimant’s arrest in May 2011, suspended Claimant at that time, and thereafter acted upon the advice of legal counsel, terminating Claimant’s employment upon the conclusion of his legal

proceedings. (N.T. at 8-10.) We conclude that the record establishes a valid reason for the delay, and, therefore, the remoteness doctrine does not preclude a denial of benefits for willful misconduct.

Accordingly, for all the above reasons, we affirm.

PATRICIA A. McCULLOUGH, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Christopher A. Mari,	:	
	:	
Petitioner	:	
	:	No. 945 C.D. 2012
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 4th day of January, 2013, the order of the Unemployment Compensation Board of Review, dated March 29, 2012, is hereby affirmed.

PATRICIA A. McCULLOUGH, Judge