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ARKANSAS COURT OF APPEALS

DIVISION II
No. E 11-292

ELMER MARSHALL APPELLANT V. DIRECTOR, DEPARTMENT OF WORKFORCE SERVICES, AND McDONALDS APPELLEES	Opinion Delivered May 2, 2012 APPEAL FROM THE ARKANSAS BOARD OF REVIEW [NO. 2011-BR-00224] REVERSED AND REMANDED

DOUG MARTIN, Judge

Appellant Elmer Marshall was denied unemployment benefits by the Board of Review, which had affirmed the Appeal Tribunal's decision finding that Marshall was discharged from his job for misconduct connected with the work. We reverse and remand for an award of benefits.

Marshall had worked for five years as a "maintenance man" at McDonald's in Stuttgart. On September 21, 2010, Marshall was outside the restaurant cleaning debris from the parking lot when he was summoned inside by Gonzalo Zayago, a new supervisor.[1] Gonzalo instructed Marshall to cook french fries. Marshall explained that he was dirty and requested a clean shirt, which he was denied. Marshall later testified that "I had been using chemicals all day and [Gonzalo] still wanted me to do fries, as I was." Marshall then informed Gonzalo that he did

[1]There is confusion in the record as to the supervisor's name, but we will refer to him as Gonzalo.

not know how to cook french fries. Marshall later testified that he had never cooked french fries in the past and had never worked in the kitchen area, aside from his cleaning duties. Gonzalo insisted that Marshall cook the fries. Marshall refused, stating that he had been told by the owner ("Mike") that his job was to keep the place clean. Gonzalo fired Marshall.

At the hearing, Delores Mason, the store manager, testified that Marshall was fired for insubordination and being uncooperative. Marshall posed a question to Mason: "Why did fries all of a sudden become a maintenance job and it wasn't . . . I wasn't hired to do fries?" Mason responded:

> Well, with that . . . you know the new supervisor coming in, this is spec . . . this was specifically told to me from the owner/operator, Mike, who you had previously spoke with that whatever Gonzalo wanted to do, however he wanted to get the store in the right direction that he could do it; that he had his permission. So, during the peak time, which you know our sales are at the most high, he wants everybody in a position, so, you know, doing something. And he states that the maintenance person can do french fries or even the grill. I mean it doesn't matter, but regardless of the situation; whenever you're asked to do a position or do a task and it is, you know, you have to follow through with it. I mean (indiscernible) regardless of what . . . nobody has a specific job. I understand your [sic], you know, primary maintenance, you know, you do have your title, as far as you know, that position goes. But when you're asked to do other tasks, then it doesn't fall under a specific position.

Mason conceded that all positions at McDonald's entail training and that Marshall was not trained to cook french fries.

In finding that Marshall was discharged for misconduct, the Appeal Tribunal found that, "[t]he claimant acknowledged that he refused to cook. He contends he was hired to be a maintenance person. As the claimant was asked to cook on a temporary basis, he willfully violated the duties and obligations owed the employer by refusing to follow the instruction of the supervisor."

The Board of Review affirmed and adopted the Appeal Tribunal's decision, and found it "appropriate to note the language" from a Pennsylvania case decided in 1974:

> Normally, when a person is employed, he is employed to do a particular task at an assigned time, and at an assigned place. It does not follow that the employer agrees never to modify or change the task, the time, or the place. If the employer should decide to modify or change any of these and the change is reasonable, the employee must abide by the employer's decision at the risk of being ineligible for unemployment compensation if he refuses.

Tucker v. Commonwealth, 319 A.2d 195, 196 (Pa. Commw. Ct. 1974).

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. Ark. Code Ann. § 11-10-514(a)(1) (Repl. 2002). "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 that the employer has a right to expect of his employees, and (4) disregard of the employee's duties and obligations to his employer. *Rouse v. Dir.*, 2012 Ark. App. 186. To constitute misconduct, however, more is required 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 v. Dir.*, 94 Ark. App. 381, 231 S.W.3d 96 (2006). Rather, there must be an intentional or deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest culpability, wrongful intent, or evil design. *Id.*

On appeal, the Board of Review's findings of fact are conclusive if they are supported by substantial evidence. *Mitchell v. Dir.*, 2012 Ark. App. 173. Substantial evidence is such

relevant evidence as a reasonable mind might accept as adequate to support the Board's conclusion. *Id*. We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Id*. 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*. 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. *Grace Drilling Co. v. Dir.*, 31 Ark. App. 81, 790 S.W.2d 907 (1990). Findings of fact made by the Board of Review are conclusive if they are supported by substantial evidence. *Washington Reg'l Ctr. Bd. of Review v. Dir.*, 64 Ark. App. 41, 979 S.W.2d 94 (1998). Whether the Board's findings concerning entitlement to unemployment benefits are supported by substantial evidence is a question of law, and, on appeal, this court may reverse if those findings are not supported by substantial evidence. *Grace*, *supra*.

In the Pennsylvania decision, the Commonwealth affirmed the decision that Tucker was not entitled to unemployment benefits. Tucker, a field representative, refused his employer's assignment transferring him from his current location to northwest Philadelphia because Tucker believed that the area was "too dangerous." Tucker's own statement indicated that his employer had attempted to accommodate his wishes at one time but that the employer was not bound by any agreement not to assign Tucker to another location. The *Tucker* opinion is clearly distinguishable from the facts of the case at bar, given that Tucker was asked only to change locations and was not asked to perform a duty any different from

what he had been performing up until the time of the requested transfer. The *Tucker* court concluded that, "[i[f the employer should decide to modify or change [the task, the time, or the place] *and the change is reasonable*, the employee must abide by the employer's decision at the risk of being ineligible for unemployment compensation if he refuses." *Tucker*, 319 A.2d at 196 (emphasis added). In the present case, the requested change in Marshall's duties from maintenance man to cook, despite Marshall's unsanitary condition and lack of training, was not reasonable.

Marshall's refusal to cook the french fries did not demonstrate any wrongful intent or evil design. In fact, Marshall acted in his employer's best interest by not complying with the supervisor's request, which would have created a health and safety hazard. The supervisor was well aware of McDonald's peak business times, and Marshall should not be denied benefits based on the supervisor's failure to schedule a sufficient number of qualified staff to work in the kitchen area. According to Mason, Gonzalo wanted the employees "in a position . . . doing something." Marshall was fulfilling his duties as a maintenance man by cleaning, among other things, the parking lot. The Board could not reasonably reach the conclusion that Marshall committed misconduct sufficient to deny unemployment compensation upon the evidence before it. Because there is no substantial evidence to support the Board of Review's decision, we reverse and remand for an award of benefits.

Reversed and remanded.

ROBBINS and HOOFMAN, JJ., agree.