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ARKANSAS COURT OF APPEALS

DIVISION II
No. E 12-463

KENNETH O. CRISP APPELLANT V. DIRECTOR, DEPARTMENT OF WORKFORCE SERVICES, and CLOYES GEAR & PRODUCTS, INC. APPELLEES	**Opinion Delivered** April 3, 2013 APPEAL FROM THE ARKANSAS BOARD OF REVIEW [NO. 2011-BR-01466] AFFIRMED

KENNETH S. HIXSON, Judge

Appellant Kenneth Crisp appeals a decision of the Arkansas Board of Review, which reversed a decision by the Arkansas Appeal Tribunal awarding him unemployment benefits. The Board of Review found that appellant was discharged from work for misconduct connected with work on account of dishonesty. He appeals, contending that the Board's decision is not supported by substantial evidence; that his actions did not constitute misconduct; that his former employer, Cloyes Gear & Products, Inc. (hereinafter Cloyes), violated its own policies; and that the allegations of misconduct against him were false and pretextual. We disagree with his arguments and we affirm.

Appellant was employed by Cloyes for approximately fourteen years. At the time of his dismissal, he was a supervisor on the second shift. Cloyes had a policy in place that was communicated to its employees at the time of their hiring through a handbook, which stated:

> It is inappropriate for managers and supervisors at any level to have a sexual, intimate, or romantic relationship with any other employee when the manager or supervisor has, or appears to have, authority over the other employee as a result of their respective positions within Company. This is a violation of our Code of Conduct even if both individuals agree to the personal relationship. Consenting relationships between a manager or supervisor and another employee may also create a conflict, or the appearance of favoritism in the workplace. Accordingly, should a manager or supervisor elect to pursue a personal relationship with another employee, it is their obligation to promptly notify the Human Resources Manager or the Chief Operating Officer.

Various employees informed plant management that appellant was involved in a relationship with an employee whom he supervised. Appellant was questioned about it in November 2010, and he denied that the relationship existed. Subsequently, management discovered emails with verbiage depicting a personal relationship between the appellant and the other employee. In March 2011, appellant was fired for lying.

The appellant applied for unemployment benefits. He stated on his application that he had been fired for "lying." The Department of Workforce Services denied benefits finding that appellant was disqualified because he was discharged for misconduct in connection with work on account of dishonesty. He appealed, and a hearing was held before the Arkansas Appeal Tribunal.

At the Tribunal hearing, Jennifer Morton, human-resource manager for Cloyes, and Randy Blaschke, plant manager, each testified that appellant was a shift supervisor. Blaschke also testified that he read emails that were exchanged on the company email system between appellant and another employee referred to as "Luwanda." Blaschke testified that the emails contained messages, such as "When are you going to come see me," and "When are you

going to come cook for me at my house," and that appellant and Luwanda referred to each other as "baby."

Appellant testified that he was not a supervisor and that he and Luwanda were just close friends. He admitted that they had been on a four-wheeler ride on the mountain, but stated that the relationship was platonic. However, appellant also testified: "[T]he relationship that we started out with ended by the two-page letter that I wrote you, February 24, I believe, because she went to . . . she wanted a baby. I'm 51 years old. I didn't want a child. Didn't want to start over, and we ended the relationship in February. We were real super close friends. You ask . . . just like I stated in the letter, I loved her but there's no law against being in love."

The Appeal Tribunal reversed and awarded him benefits finding that

> [t]he employer determined such a relationship existed by looking at the claimant's emails, but they did not provide those emails and were unable to provide specific testimony about their contents. . . . The claimant did not engage in the type of relationship which would require disclosure and his conduct did not show a willful disregard of the employer's interests, or dishonesty on his part.

Cloyes appealed the award of benefits to the Board of Review. The Appeal Tribunal's decision was reversed by the Board, which found that an inappropriate work relationship between Luwanda and appellant existed, that he did not report the relationship as required by company policy, and that when questioned about the relationship, appellant was dishonest. This appeal followed.

On appeal, we review the findings of the Board of Review and affirm if they are supported by substantial evidence. *Bergman v. Dir.*, 2010 Ark. App. 729, 379 S.W.3d 625.

Walls v. Dir., 74 Ark. App. 424, 49 S.W.3d 670 (2001). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Bergman*, *supra*; *Walls*, *supra*. We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Bergman*, *supra*; *Lovelace v. Dir.*, 78 Ark. App. 127, 79 S.W.3d 400 (2002). 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. *Perdrix-Wang v. Dir.*, 42 Ark. App. 218, 856 S.W.2d 636 (1993). In our review, we do not pass on the credibility of the witnesses; it is a matter that is left to the Board of Review. *Bergman*, *supra*.

A person shall be disqualified for benefits if he or she is discharged from his or her last work for misconduct in connection with work. Ark. Code Ann. § 11-10-514(a)(1) (2012). Misconduct is defined in unemployment-compensation jurisprudence as (1) disregard of the employer's interests; (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; or (4) disregard of the employee's duties and obligations to the employer. *Maxfield v. Dir.*, 84 Ark. App. 48, 129 S.W.3d 298 (2003).

For appellant's first point on appeal, he argues that the Board of Review erred in denying benefits because substantial evidence did not exist to support the findings that he misrepresented material facts to his employer or that he was Luwanda's supervisor. He states that the employer offered no evidence of his job responsibilities, but only said that he was a

shift supervisor in a position of responsibility. He contends that in fact he and Luwanda held the same job title. Therefore, he states that the employer failed to meet its burden of proving with sufficient evidence that he was a supervisor of Luwanda. In addition, he contends that he did not fraternize with her. He states that in fact, he did not want to date her because she wanted a baby and he did not. He stated that they were "just good friends."[1]

While the appellant denied he was a supervisor, testimony was presented that appellant was employed in a supervisory role. Both the plant manager, Randy Blaschke, and the human resource manager, Jennifer Morton, testified that appellant was a supervisor of Luwanda. There is substantial evidence from which the Board could determine that the appellant was a supervisor.

While the appellant denied a relationship existed between Luwanda and him, there is testimony otherwise. Blaschke testified that he read emails on the company email system in which the verbiage of the emails led him to believe that appellant was in a relationship with Luwanda. More importantly, the appellant admitted that a relationship existed with Luwanda but that the relationship had ended. Specifically, the appellant stated in pertinent part:

> [T]he relationship that we started out with ended by the two-page letter that I wrote you, February 24, I believe, because she went to . . . she wanted a baby. I'm 51 years old. I didn't want a child. Didn't want to start over, and we ended the relationship in February. . . . You ask . . . just like I stated in the letter, I loved her but there's no law against being in love.

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[1]Appellant also contends that the employer attempted to submit email records when it appealed to the Board and that the emails were untimely. The Board did not accept the late-tendered emails into evidence. Testimony regarding the contents of the emails was considered by the Board, but the emails themselves were not introduced before the Board and are not, therefore, considered by this court.

However one chooses to label or describe the relationship vis-a-vis the appellant and Luwanda, there was testimony that the relationship lasted several months, that it included discussions of having a baby, that the appellant was in love, and that the appellant did not want to start his life over.

It is not within our purview when reviewing a decision of the Board of Review to pass upon the credibility of witnesses. We cannot say that the Board erred in finding the testimony of the plant manager and the human-resource manager of the company to be more credible than appellant's testimony. There is substantial evidence that the appellant and Luwanda were engaged in a relationship that subjected the appellant to the application of the employer's policy.

For his second point on appeal, appellant contends that the Board erred in denying him benefits because his actions did not constitute misconduct in that his conduct was not a willful, intentional, or deliberate violation or disregard or carelessness or negligence of such degree as to manifest wrongful intent or evil design. He states that the employer presented no evidence that he disregarded the employer's interest, violated its rules, disregarded its standards of behavior, or disregarded his obligations to it. He states that he did not want to pursue a relationship with Luwanda and that there was nothing going on between them. He contends that he was under no obligation to report the relationship because it was not romantic.

As we have stated, misconduct is defined in unemployment-compensation jurisprudence as (1) disregard of the employer's interests; (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; or (4) disregard of the employee's duties and obligations to the employer. *Maxfield v. Dir.*, *supra*.

Testimony was presented establishing that company policy barred managers and supervisors from having a sexual, intimate, or romantic relationship with any other employee when the manager or supervisor has, or appears to have, authority over the other employee. As set forth above, there was testimony from which the Board could determine the appellant was Luwanda's supervisor and therefore, subject to the application of the employer's policy. The Board of Review chose to believe that when confronted by the plant manager, the appellant lied about the existence of the relationship and it was this dishonesty that resulted in the appellant's termination.

For appellant's third point on appeal, he contends that the employer violated its own policies in terminating him. He states that rather than being fired for not reporting the relationship, according to its own policy as set forth in its handbook, the company was under an obligation to transfer him or the employee. If a transfer was not possible, then the employer was under an obligation, per its handbook, to discuss or explore the possibility of termination. We reject this argument because appellant was terminated for failing to report the relationship, and then, when confronted about it, for dishonesty about the relationship.

For appellant's last point on appeal, he contends that the Board's decision was in error because the employer's allegations concerning the relationship with Luwanda were simply a pretext for terminating him, and that he was actually terminated for failing to meet production requirements. We will not address this argument as it is being raised for the first time in this

appeal. The record does not show that this argument was addressed below. *Perdrix-Wang*, *supra*.

Affirmed.

GRUBER and VAUGHT, JJ., agree.

The Law Offices of Craig L. Cook, by: *Trella A. Sparks*, for appellant.

Phyllis Edwards, Associate General Counsel for Artee Williams, Director, Dep't of Workforce Servs., for appellee.