Cite as 2022 Ark. App. 264

ARKANSAS COURT OF APPEALS

DIVISION III
No. E-21-476

CHARLES SCHOCK, M.D. APPELLANT V. DIRECTOR, DIVISION OF WORKFORCE SERVICES; AND BIOTEST PHARMACEUTICALS CORP. APPELLEES	**Opinion Delivered** May 25, 2022 APPEAL FROM THE ARKANSAS BOARD OF REVIEW [NO. 2021-BR-2034] REVERSED AND REMANDED

KENNETH S. HIXSON, Judge

Appellant Charles Schock, M.D., appeals from a decision of the Arkansas Board of Review (Board) in favor of appellees, Director of the Division of Workforce Services (DWS) and Biotest Pharmaceuticals Corporation (Biotest), denying him unemployment benefits upon a finding that he was discharged for misconduct in connection with the work. On appeal, Dr. Schock argues that substantial evidence does not support the Board's findings. We agree and reverse and remand for an award of benefits.

I. *Relevant Facts*

Dr. Schock was employed as the company physician by Biotest for approximately three or four years until he was discharged on October 14, 2020. He applied for unemployment-compensation benefits on October 21, 2020. The employer, which is located in Boca Raton, Florida, did not respond to the claim and did not participate in any

of the proceedings. Dr. Schock indicated on the application form that he had been discharged because he was late in renewing his medical license. He checked the box indicating yes to the question asking whether he violated company policy and explained that he violated his employer's policy regarding late renewals of medical licenses. However, he claimed he was not aware of the policy but was instead verbally informed of the policy on the date he was discharged. DWS sent him a notice of agency determination on March 16, 2021, stating that he was disqualified from receiving benefits on the finding that he was discharged from his last work for misconduct in connection with his work. It found that he "was discharged from [his] job on 10-14-20 for the loss of [his] license, which was one of the requirements of the job. The claimant's willful actions resulted in this loss and were against the employer's best interest." Dr. Schock timely appealed that decision to the Arkansas Appeal Tribunal (Tribunal), and a telephonic hearing was held on May 20, 2021.

Because Biotest elected not to participate in this proceeding, Dr. Schock was the only witness to testify at the hearing. Dr. Schock testified that he was a licensed medical doctor and had been serving as the company physician for Biotest for approximately three years. Each year, Biotest would inform Dr. Schock when it was time to renew his medical license. Dr. Schock would, in turn, remit the license fee to the State of Arkansas for renewal. However, in August 2020, when his license was due for annual renewal, for some reason not disclosed in the record, Biotest did not inform him of the renewal until a week and a half after the due date had already passed. Once Biotest advised Dr. Schock on September 10, 2020, that the renewal date had passed, Dr. Schock immediately renewed his license the same day, retroactive to the date it was due, August 31. Therefore, there was no gap in his

licensure. Dr. Schock continued to work for Biotest until October 14, 2020, when he was discharged.

Dr. Schock testified that Biotest told him that he was discharged on October 14, 2020, due to his failure to timely renew his medical license. Dr. Schock testified that he was not aware of any specific policy regarding license renewal, although he knew his medical license must be renewed annually. Dr. Schock stated that he was not written up for this incident but simply told to renew his license and continued to work until October 14. Dr. Schock opined that he thought the reason given was simply pretext for age discrimination because a younger physician had recently been hired and because he admitted that hospitals do not let physicians practice beyond the age of seventy years old. He also admitted that he has hip problems and uses a rolling walker. However, he maintained that he has no trouble performing his duties. He further offered,

> Well, I had just worked for three – three years, and I'd never gotten any negative feedback. There were a couple of items that they counseled me on; that – that I should reduce my cell phone usage and that I occasionally was nodding at the computer screen. And I cured that with medications. So that – that wasn't an ongoing problem.

On May 22, 2021, the Tribunal mailed a written decision affirming the DWS's decision to deny benefits, and Dr. Schock timely appealed to the Board. The Board did not accept any additional evidence. In its decision mailed on August 6, 2021, the Board affirmed the Tribunal's decision and made the following relevant findings:

> In this case, the claimant worked for the employer as a physician for approximately four years. However, the claimant was discharged from the employment for failing to pay his medical license fee on time. According to the claimant, the employer usually reminded him when it was time to renew his license. On this occasion, the claimant maintained the employer informed him that he had not paid the renewal

> fee on September 10, 2020. The fee was due on August 31, 2020. The claimant conceded that he could not legally practice medicine without a license.
>
> Upon learning of the lapse in payment, the claimant said he immediately paid the fee the same day the employer reminded him. Moreover, the payment was backdated to cover the timeframe that he practiced medicine without a valid license. Further, the claimant denied the employer had a policy regarding non-payment of medical license fees. On the contrary, the claimant maintained that it was simply understood that he had to renew his license annually. Notwithstanding, the claimant was discharged approximately one month later for failing to renew his medical license on time.
>
> Although the claimant argued that he had otherwise performed his job duties satisfactorily, he later admitted that he had been counseled by the employer on two other occasions. Specifically, the claimant conceded he had been warned about excessive usage of his cell phone while at work. Furthermore, the claimant acknowledged that he was counseled for "nodding at the computer." However, the claimant denied that he fell asleep at work on a regular basis. Conversely, the claimant explained that he corrected the issue with medication.
>
> After reviewing the evidence, the Board finds the claimant was discharged from last work for misconduct. It is the opinion of the Board that the claimant failed to renew his license to practice medicine in a timely manner. Although the claimant argued the employer did not have a policy regarding the payment of licensing fees, the Board finds the claimant was aware maintaining his medical license was a condition of employment. Since the evidence established the claimant received prior warnings from the employer in addition to the final incident which resulted in discharge, the Board finds the employer has proven the claimant intentionally violated its rules and disregarded its interests. Accordingly, the Board finds the claimant was discharged from last work for misconduct connected with the work.

This appeal followed.

II. *Analysis*

Dr. Schock argues that substantial evidence does not support the Board's findings. He more specifically argues that the reason given for his discharge was simply pretext for age discrimination because he continued to practice after the retroactive renewal of his license for several more weeks before he was discharged. He states that even if his failure to timely renew was a genuine ground for his discharge, there is no evidence that his action

was intentional or deliberate but was merely "a one-time-only oversight, which caused no damage to the employer."

Our standard of review in unemployment-insurance cases is well settled. We review the Board's findings in the light most favorable to the prevailing party and affirm the Board's decision if it is supported by substantial evidence. *Hopkins v. Dir.*, 2019 Ark. App. 84, 571 S.W.3d 524. Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support the conclusion. *Id.* Even when there is evidence upon which the Board might have reached a different decision, the scope of our review is limited to a determination of whether the Board reasonably could have reached the decision it did on the basis of the evidence before it. *Id.* The credibility of witnesses and the weight to be accorded their testimony are matters to be resolved by the Board. *Burgos v. Dir.*, 2021 Ark. App. 270. However, our function on appeal is not merely to rubber stamp decisions arising from the Board. *Hopkins*, *supra*.

Pursuant to Arkansas Code Annotated section 11-10-514(a) (Supp. 2021), if an individual is discharged from last work for misconduct in connection with the work, the individual is disqualified from benefits until, subsequent to filing a claim, he or she has had at least thirty days of covered employment. Section 11-10-514(a) further provides in part,

> (3)(A) *Misconduct in connection with the work includes* the violation of any behavioral policies of the employer as distinguished from deficiencies in meeting production standards or accomplishing job duties, and
>
> (B) *Without limitation*:
>
> (i) Disregard of an established bona fide written rule known to the employee; or
>
> (ii) *A willful disregard of the employer's interest*.

(4)(A) *Misconduct in connection with the work shall not be found for instances of poor performance unless the employer can prove that the poor performance was intentional*.

(B) An individual's repeated act of commission, omission, or negligence despite progressive discipline constitutes sufficient proof of intentional poor performance.

(C) An individual who refuses an alternate suitable job rather than being terminated for poor performance shall be considered discharged for misconduct in connection with the work.

(Emphasis added.)

In other words, misconduct includes the violation of any behavioral policies of the employer, disregard of the employer's rules, disregard of the standards of behavior that the employer has a right to expect from its employees, and disregard of the employee's duties and obligations to her employer. *Dillinger v. Dir.*, 2020 Ark. App. 138, 596 S.W.3d 62. Misconduct in connection with the work shall not be found, however, for instances of poor performance unless the employer can prove that the poor performance was intentional. *Zenaro v. Dir.*, 2017 Ark. App. 290, 521 S.W.3d 164. There is an element of intent associated with a determination of misconduct. *Dillinger*, *supra*. 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 do not constitute misconduct. *Keith v. Dir.*, 2018 Ark. App. 541, 564 S.W.3d 296. 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 wrongful intent or evil design. *Id.* When the employer has no written policy or fails to follow its written policy, then the facts must be evaluated to determine whether the employee's behavior was a willful disregard of the employer's interest. *Hopkins*, *supra*. Whether an employee's behavior is

misconduct that justifies the denial of unemployment benefits is a question of fact for the Board to decide. *Dillinger*, *supra*.

Here, the Board found that Dr. Schock "was aware [that] maintaining his medical license was a condition of employment" and that "[s]ince the evidence established [Dr. Schock] received prior warnings from the employer in addition to the final incident which resulted in discharge . . . [he] intentionally violated its rules and disregarded its interests." However, having reviewed the evidence in this case, we cannot conclude that the Board's finding of misconduct is supported by substantial evidence. The employer did not appear at the hearing, did not present any evidence to contradict Dr. Schock's testimony, and did not contest Dr. Schock's entitlement to unemployment benefits. Therefore, Dr. Schock's undisputed testimony was that, although he was required to maintain his medical license, Biotest informed him in years past when he needed to renew his license, and he did not keep track of it. In 2020, Biotest did not inform him of his date of renewal until after the date had already passed. When Biotest informed him, Dr. Schock immediately renewed his license retroactively so that there was no gap in his licensure. Moreover, he continued to practice for weeks afterwards before Biotest discharged him.

Further, there is no evidence that the fact Dr. Schock stated at the hearing that he was "counseled" to reduce his cell-phone usage and had cured occasionally nodding off at his computer screen with the use of medications was related to his discharge. Moreover, those two other issues that occurred sometime while he was employed at Biotest were different, unrelated issues than the one that Biotest gave as a reason for his discharge. *See Keith*, *supra*. Biotest bore the burden of proving that Dr. Schock's actions rose to the level

of wrongful intent sufficient to disqualify him from receipt of unemployment benefits. Biotest failed to carry that burden here. Especially considering that the employer did not appear at the hearing or provide any other evidence as to how Dr. Schock's actions amount to misconduct, we hold that on this record, the Board's finding of misconduct is not supported by substantial evidence. Thus, we reverse and remand for an award of benefits.

Reversed and remanded.

GRUBER and WHITEAKER, JJ., agree.

Baker, Schulze & Murphy, by: *J. G. "Gerry" Schulze*, for appellant.

Jennifer Janis, for appellee.