

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE
CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 06/02/09
PHILIP G. URRY, CLERK
BY: DN

GREGORY L. LLOYD,) 1 CA-UB 08-0027
)
Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) Rule 28, Arizona Rules
SECURITY, an Agency,) of Civil Appellate
) Procedure)
)
&)
)
FEDERAL EXPRESS CORPORATION,)
)
Appellees.)
_____)

Appeal from the Appeals Board of the Department of Economic
Security of the State of Arizona

A.D.E.S. Appeals Board No. U-1036772-BR

AFFIRMED

Gust Rosenfeld PLC Tucson
By Roger W. Frazier
Attorneys for Appellant

Terry Goddard, Arizona Attorney General Phoenix
By Steven C. Goodrich, Assistant Attorney General
And Karen Boehmer, Assistant Attorney General
Attorneys for Appellee Arizona Department of Economic Security

O R O Z C O, Judge

¶1 Claimant Gregory L. Lloyd (Lloyd) appeals from the
Arizona Department of Economic Security (ADES) Appeals Board
(Board) decision affirming earlier determinations that Lloyd was

disqualified from collecting unemployment insurance benefits due to his discharge for willful or negligent misconduct in connection with his employment at Federal Express Corporation (FedEx). For the following reasons we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On April 20, 2007, Lloyd applied for unemployment insurance benefits through ADES. Lloyd's former employer, FedEx, objected to Lloyd's eligibility for unemployment insurance benefits, alleging that Lloyd's termination was voluntary on the grounds that he neither called in to his supervisor to report his absence nor reported for work for two days. On May 16, 2007, an ADES deputy determined that Lloyd had been terminated as a result of his absence from work due to his incarceration. The deputy determined the confinement was in excess of 24 hours or Lloyd had previously been incarcerated while employed by FedEx.

¶3 Lloyd filed a timely appeal, and an ADES Appeal Tribunal (Tribunal) conducted a telephonic hearing on June 20, 2007. The Tribunal affirmed the decision of ADES, holding that Lloyd committed negligent or willful misconduct pursuant to Arizona Revised Statutes (A.R.S.) section 23-775.2 (Supp. 2008) and Arizona Administrative Code (A.A.C.) R6-3-5115.B and E when he failed to call his employer on each of two days when he was absent due to incarceration. The Tribunal specifically found that Lloyd could

have avoided the incarceration by paying bail and that it was his second instance of incarceration while working for FedEx.¹

¶14 Lloyd filed a timely petition for review with the ADES Office of Appeals and on September 5, 2007, the Board affirmed the decision of the Tribunal. The Board adopted the findings of fact of the Tribunal as its own, except for amending the Tribunal's findings of facts and conclusions of law to delete the part of the Tribunal's findings related to the second incarceration while working for this employer, so that any disqualifying aspect of the two incarcerations was no longer applicable.

¶15 Lloyd timely requested a review of the Board's decision, and on December 7, 2007, the Board affirmed its earlier decision with one member dissenting. The dissenting member argued that FedEx had the burden of proof to establish that Lloyd was required to call in on the two missed days but failed to produce any evidence to dispute Lloyd's denial of that claim by FedEx. The dissenting member asserted that FedEx failed to produce any evidence to dispute Lloyd's testimony regarding what he told his supervisor about his expected absences. The dissenting member also agreed with Lloyd that his incarceration was irrelevant to Lloyd's failure to call in on the two days in question.

¹ A discharge for absence due to incarceration is disqualifying for unemployment compensation when an employee is incarcerated for a second time while working for his last employer. A.A.C. R6-3-5115.E.1.c. Although Lloyd was previously incarcerated while working for FedEx, he was on a leave of absence at the time, so he did not miss work in connection with the earlier incarceration.

¶16 Lloyd timely appealed and we have jurisdiction pursuant to A.R.S. § 41-1993.B (Supp. 2008).

ANALYSIS

¶17 On appeal, Lloyd argues that the Board abused its discretion in (1) affirming the Tribunal's finding that credible evidence of record established that FedEx had adequately and reasonably communicated an instruction to report daily; (2) giving undue weight to the testimony of Lloyd's supervisor; and (3) finding that the reason for the absence had changed upon Lloyd's incarceration.

¶18 We are bound by the Board's findings of fact "unless they are arbitrary, capricious, or an abuse of discretion." *Avila v. Ariz. Dep't of Econ. Sec.*, 160 Ariz. 246, 248, 772 P.2d 600, 602 (App. 1989). "An abuse of discretion is characterized by arbitrariness or capriciousness and failure to conduct an adequate investigation into the relevant facts." *Id.* We view the evidence in a light most favorable to upholding the decision of the Board and will affirm that decision if it is supported by substantial evidence. *Id.*; *Ross v. Ariz. Dep't of Econ. Sec.*, 171 Ariz. 128, 129, 829 P.2d 318, 319 (App. 1991). "However, this court determines whether the Board properly applied the law to the facts before it." *Bowman v. Ariz. Dep't of Econ. Sec.*, 182 Ariz. 543, 545, 898 P.2d 492, 494 (App. 1995) (citations omitted).

¶19 The Tribunal applied A.A.C. R6-3-5115.B and E to its decision. Section R6-3-5115.B concerns proper notice of absence while section E concerns absence due to incarceration. Under R6-3-5115.B, "a claimant's failure to give proper notice of his absence from work in time to permit the employer to make such arrangements as he deems necessary to replace him is tantamount to misconduct connected with the work." The Tribunal found that Lloyd was required to give daily notice after the February 18, 2007, call to his supervisor but failed to give that notice. However, the Tribunal also considered whether Lloyd was unable to give proper notice because he was incarcerated. If Lloyd provided sufficient evidence to show that he made a "reasonable effort to properly notify" FedEx of his absence but was unable to do so because of his incarceration, under A.A.C. R6-3-5115.E.1.a, the Tribunal and the Board might have found that he was excused from such notice. However, the Board found that Lloyd could have avoided incarceration by paying his bail but failed to do so. The Board determined that this was disqualifying misconduct pursuant to R6-3-5115.E.1.b ("the claimant could have avoided his incarceration by the payment of a fine"). Thus, the application of A.A.C. R6-3-5115.B and E by the Tribunal and Board was proper and to Lloyd's potential benefit, because they could have found that he was excused from notifying FedEx during the period of incarceration had there been proof of reasonable attempts to notify FedEx, or if

Lloyd had chosen to bail himself out sooner. The Board was also correct in its agreement with Lloyd that he was not discharged because of his incarceration per se, but instead was discharged for his absences and failure to call into FedEx.

¶10 At the telephonic hearing before the Tribunal, Lloyd's former supervisor at FedEx, Kevin C. (K.C.), testified. K.C. said Lloyd called in sick on Wednesday, February 14, 2007, and again on February 15, stating that he was going to go to a doctor on Friday, February 16. K.C. said Lloyd called him again that Sunday evening. K.C. said Lloyd told him he was not able to get to the doctor on Friday, but that he was going to go to the doctor "sometime that week" and would be "off [work] until he saw the doctor." He testified Lloyd was "vague" about what was ailing him.² He said Lloyd asked him if he needed to continue to call in, and he told Lloyd he needed to call every day. K.C. testified that the next evening, Monday, a bail bondsman called and informed him that Lloyd was in jail. He testified that Lloyd attempted to call him collect from jail on Tuesday, February 20. He said Lloyd did not successfully call in or come in on Tuesday, February 20, 2007. He said Lloyd also failed to come in or call during the day on Wednesday, February 21, 2007, at which point the company considered him to have voluntarily resigned. K.C. testified Lloyd called him

² On cross-examination, K.C. said he could not remember whether or not Lloyd told him that he could not work because he was stressed out and unable to concentrate or sleep.

on Wednesday "when he got out" of jail at 6:10 p.m. and left a message on his cell phone. On cross-examination, K.C. acknowledged that Lloyd told him in the Sunday phone call that he would return to work "sometime later in the week."

¶11 Lloyd testified that he called in sick on the 14th and that he called K.C. on the 15th to say he would not be in on either the 15th or the 16th. He denied telling K.C. on the 15th that he was going to see a doctor on Friday, February 16. Lloyd testified that during the Sunday phone call, he told K.C. he was stressed out and could not concentrate while driving. He said he told K.C. he was going to the doctor "at the end of the week," either February 22 or 23 (Thursday or Friday), and that he would bring him a doctor's note on one of those two days. He stated that "at no time did I hear him say to call in everyday." Lloyd testified that he was incarcerated on February 19, 20 and 21. He admitted he could have bailed himself out sooner, but stated that because he was "very stressed," he chose to stay in jail for awhile because it was "very peaceful." He said he gave K.C.'s number to the bail bondsman because he was supposed to give him contact information for a friend or relative and K.C. was his friend.

¶12 While some of this testimony conflicted, conflict does not render evidence insubstantial. See *Shaffer v. Arizona State Liquor Bd.*, 197 Ariz. 405, 409, ¶ 20, 4 P.3d 460, 464 (App. 2000) ("Even if the record supports inconsistent conclusions, neither we

nor the superior court may substitute our judgment for that of the [Administrative Law Judge], because conflicting evidence can still be 'substantial.'" (citations omitted). The decision was a matter of the credibility of the witnesses, which is a matter peculiarly within the province of the trier of fact, in this case, the Tribunal. *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 302, 681 P.2d 390, 454 (App. 1983). It is not for this court to reweigh the evidence to determine "if we would find some evidence more or less persuasive or give it more or less significance" and then substitute our judgment for that of the Tribunal. *Curtis v. Richardson*, 212 Ariz. 308, 313, ¶ 22, 131 P.3d 480, 485 (App. 2006) (quoting *Shaffer*, 197 Ariz. at 409, ¶ 20, 4 P.3d at 464). Furthermore, K.C. did not waiver on the most important point, that he told Lloyd to call in everyday. Thus, we find that substantial evidence supported the Tribunal's decision that FedEx adequately and reasonably communicated an instruction to Lloyd to call in daily. Because Lloyd failed to call in everyday, his discharge was proper.

CONCLUSION

¶13 For the above mentioned reasons, we find that the Tribunal and Board correctly applied the law to support the decision that Lloyd was properly denied benefits under A.A.C. R6-3-5115.

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

PATRICK IRVINE, Judge

PETER B. SWANN, Judge