

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-175

NOVEMBER TERM, 2008

Thomas J. Berno	}	APPEALED FROM:
	}	
	}	
v.	}	Employment Security Board
	}	
	}	
Department of Labor	}	DOCKET NO. 12-07-100-12
(East Coast Metal Systems, Inc., Employer)	}	

In the above-entitled cause, the Clerk will enter:

Claimant appeals the Employment Security Board’s decision denying his request for unemployment benefits because claimant was discharged for misconduct from his last employment. On appeal, employee argues that the facts do not support a finding of misconduct and that the Board erred in denying his request to remand the case to an administrative law judge for the purpose of considering additional documentary evidence. We affirm.

The basic facts are undisputed. Claimant had been working for East Coast Metal Systems, Inc. as a sheet metal mechanic for two months, when on Friday, October 26, 2007, he left work at 10:30 a.m. without notifying his foreman. When he returned on Monday, October 29, 2007, his foreman informed him that he was no longer employed. Claimant filed for unemployment benefits on November 6, 2007. The claims adjudicator concluded that claimant’s last employer had discharged him for misconduct and consequently disqualified him for benefits for November 3 to December 29, 2007. See 21 V.S.A. § 1344(a)(1)(A) (providing that an individual is disqualified for benefits for six to twelve weeks if he is discharged for misconduct). Claimant appealed to an administrative law judge. Before the hearing, claimant contends that he faxed several pages of documents to the appeals unit, but they were apparently not received. During the telephonic hearing, claimant asked to have the hearing continued for submission of the material. The judge declined the request and held the hearing without the materials. The employer did not appear at the hearing, but claimant testified on his own behalf. Claimant testified that on Friday morning his foreman made false accusations against him, which angered him. He also contended that later that morning he discovered that some of the materials were not appropriate for his work and he would need the foreman’s approval to proceed. Because he was so angry with the foreman, he decided that it was better to leave than possibly get into a physical altercation. He told his coworkers and left for the day. He testified that it was not against any policy to leave early.

In a written order, the administrative law judge affirmed the denial of benefits. The judge reasoned that claimant had not quit his job because he returned to work on Monday morning, indicating that he did not intend to end his employment. The judge further found that claimant's walking off without informing his foreman or asking permission "showed a substantial disregard of the employer's interests in refusing to work his scheduled hours and thereby possibly delaying the completion of the project." The judge found that claimant's anger with his foreman did not excuse claimant's conduct.

Claimant appealed to the Employment Security Board. Before the Board, claimant requested that the matter be remanded to an administrative law judge to consider his evidence. He proffered that the evidence consisted of union contracts, work contracts and site plans. The Board denied claimant's motion to remand because (1) it was within the judge's discretion to deny a continuance where claimant had been forewarned to submit all exhibits at least twenty-four hours in advance, and (2) none of the proffered evidence appeared relevant to the central issue of whether claimant's unauthorized early departure was misconduct. As to the merits, claimant argued that the administrative law judge's decision was erroneous because his action did not cause his employer harm. The Board concluded that there was sufficient evidence to support the findings and affirmed the judge's decision.

Claimant first argues that the Board lacked credible evidence to support its finding that he was dismissed for misconduct. Claimant contends that the Board's findings are erroneous because he was justified in leaving work early and his departure was not detrimental to his employer. "This Court will not disturb the findings of the Employment Security Board unless they are clearly unsupported by the evidence." Johnson v. Dep't of Employment Sec., 138 Vt. 554, 555 (1980) (per curiam). To disqualify claimant for benefits, the employer has the burden of demonstrating "substantial disregard of the employer's interest, either wilful or culpably negligent." Id. (quotations omitted).

In this case, the Board found that claimant acted willfully in leaving work without notification to his foreman. The Board further found that this action was in disregard of the employer's interest because it could have delayed completion of the construction work. These findings are supported by the evidence. Claimant does not dispute that he intentionally left early and did not inform the foreman of his departure; rather, claimant argues that his absence did not harm his employer.

A similar situation was presented in Johnson v. Department of Employment & Training, where the employee called his employer in advance to inform him of his absence, but did not provide any explanation for such absence. 146 Vt. 418, 418 (1985). The Board upheld the appeals referee's determination that the employee's conduct was not in substantial disregard of his employer's interests, in light of the employee's excellent work record and lack of other problems. On appeal, we affirmed the Board's decision and held: "A single isolated unexplained day's absence from employment by one with a previous excellent work record and to whom no warnings concerning absenteeism or tardiness have been given does not constitute misconduct as contemplated by the statute." Id. at 419.

The administrative law judge and the Board reached the opposite conclusion in this case, finding that claimant's act of leaving the worksite for the day without informing his supervisor

was in substantial disregard of his employer's interest and therefore misconduct. Given our deferential standard of review, we affirm this decision. The evidence supports the Board's conclusion that claimant's act of walking off the job harmed his employer's need to complete the construction project on time and was therefore in substantial disregard of his employer's interest. Romeo v. Dep't of Employment & Training, 150 Vt. 591, 592 (1988) ("The evidence, taken as a whole, was credible, and the Board's findings must be affirmed since they are supported by credible evidence.").

Furthermore, unlike in Johnson where the employee informed his employer in advance of his absence, in this case, claimant was so angry he could not effectively communicate with the foreman so as to accomplish his job, and instead, claimant simply walked off the job site without informing the foreman. See Del Dee Foods, Inc. v. Miller, 390 N.W.2d 415, 418 (Minn. Ct. App. 1986) (distinguishing cases where absence did not constitute misconduct, in part, on grounds that employee notified employer). We agree that the Board could conclude that claimant's anger with his foreman does not excuse his misconduct.

Next, claimant contends that the Board erred in denying his request to remand to the administrative law judge for consideration of additional evidence. Claimant argues that it was unfair for the judge to deny his motion to continue when claimant made a good faith effort to submit his materials in a timely fashion. We conclude that any error in failing to remand for consideration of claimant's evidence was harmless, given the nature of the materials that claimant sought to submit. Claimant proffered that he had sent the administrative law judge copies of union contracts, side agreements and site plans. As the Board explained, none of this information was relevant to the issue of whether claimant committed misconduct in leaving the worksite early without informing the foreman.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice