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CATHY S. GAMPER, CLERK
KANAWHA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

LIGHTNING ENERGY SERVICES, LLC,
PETITIONER,

v.

Civil Action No. 13-AA-77
Judge Carrie Webster

BOARD OF REVIEW, WORKFORCE
WEST VIRGINIA
RESPONDENT.

ORDER
AFFIRMING THE FINAL DECISION OF THE BOARD OF REVIEW, WORKFORCE WEST VIRGINIA

This matter is before the Court on Petitioner Lightning Energy Services, LLC's ("Petitioner") timely appeal of the May 21, 2013 decision of the Board of Review, Workforce West Virginia ("Board of Review") with regard to Aaron Horne's ("Claimant") unemployment-compensation claim.[1] Based upon the underlying record, as well as the filings related to this appeal, the Court hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Petitioner is an oil-and-gas-field services company with operations extending throughout the Marcellus and Utica Shale Basin.

[1] At the outset the Court would note that both it and the tribunals below have been put in the awkward position of affirming the award of unemployment benefits to a person charged with embezzlement from his employer. But as the ALJ in this matter correctly noted, the lodging of criminal charges alone is not proof of guilt. *See Nobel v. Sheahan*, 132 F. Supp.2d 626, 637 (N.D. Ill. 2001) (holding that "mere placement of criminal charges is not evidence of misconduct."). Indeed, Claimant may be entirely innocent of the charges against him.

However, even if he were ultimately convicted, Petitioner would have no one to blame but itself for the award of unemployment benefits to an embezzler. The relevant inquiry under West Virginia Code §21A-6-3 is not whether an employee was guilty of misconduct, but whether he was discharged for misconduct. As discussed in detail below, throughout this process, Petitioner has steadfastly maintained that it did not discharge Claimant at all, let alone that it did so for embezzlement. Thus, Petitioner's late-in-the-day prayer to offer evidence of embezzlement is without merit, as any such evidence would be irrelevant.

Having chosen not to discharge Claimant for suspected embezzlement, Petitioner has tied the hands of the Agency and of this Court regarding any evidence Petitioner may have had regarding such claim.

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2. Claimant, who was the Petitioner's Chief Operating Officer ("COO"), was employed by the Petitioner from November 21, 2011, to January 15, 2013. (ALJ FOF ¶ 1.)

3. During the weekend of January 12, 2013, through January 13, 2013, Claimant cleaned out his work office and removed all of his personal effects from Petitioner's premises. (Deputy Decision.)

4. Claimant did not report to his office for work on Monday, January 14, 2013, and did not return telephone calls from members of Petitioner's Board of Directors, including Tracy Turner, the Petitioner's Chairman of the Board. (Tr. at 28-30.)

5. The fact that Claimant was not at his office that morning was not unusual, since, as he testified at the hearing in this matter, his job often required him to be out of the office, at the shop and in the field in the normal course of his duties, sometimes for days at a time. (Tr. 15-19)

6. Claimant further testified that he had cleaned out his office and removed the personal effects therefrom because he had been informed by various named individuals that he was going to be fired, and he wished to avoid the embarrassment of cleaning out his office in front of co-workers during normal office hours. (Tr. 17-19)

7. The morning after he cleaned out his office, he nonetheless went to work at the shop. (Tr. 15) While working there, he received a call from Petitioner's Chief Financial Officer, Michael Juliucci, asking him to report to the main office. (Tr. 15)

8. According to Claimant, upon reporting to the office, Mr. Juliucci and Mr. Turner informed him that he was being terminated for failure to return a phone call from Mr. Turner the previous day.

9. At the hearing, Mr. Juliucci testified that during that meeting "it was let

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known it was official he is no longer an employee of Lightening Energy because of his actions [absence from the office and failure to return telephone calls]." (Tr. 30) Mr. Juliuci characterized this action as "just confirming what [Claimaint] had already done" in "abandoning his job." (Tr. 32)

10. At that meeting, Claimant was asked to turn in his keys and equipment.

11. Petitioner paid Claimant wages due to him within 72 hours.

12. Subsequently, the Claimant filed a claim for unemployment-compensation benefits.

13. In filling out the Workforce West Virginia Unemployment Compensation Division Request for Separation Information attendant to that claim, Petitioner informed the Agency that Claimant had not quit.

14. Instead, Petitioner informed the Agency that Petitioner had discharged Claimant because "he refused to communicate or answer phone calls of chairman. [Claimant] did not show up for work nor contact anyone regarding his absence." *Id.*

15. Although Claimant had received reprimands regarding his performance before, no evidence was presented to indicate that he had been reprimanded for failure to communicate or to come to work.

16. Notwithstanding Petitioner's own admission that it had discharged Claimant, the Deputy concluded that the Claimant voluntarily quit without fault on the part of the Petitioner. (Deputy Decision.) Thus, the Deputy ruled that the Claimant was disqualified from receiving unemployment-compensation benefits until he returned to covered employment for thirty days. (Deputy Decision.)

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17. Upon the Claimant's appeal of the Deputy's decision, the Administrative Law Judge ("ALJ") reversed the Deputy. (ALJ Decision at p. 2.) In doing so, the ALJ found that the Claimant was discharged, but not for misconduct, and that the Claimant was not disqualified from receiving unemployment-compensation benefits. (ALJ Decision at p. 2.)

18. Contrary to representations it had made on the Request for Separation Information form, Petitioner maintained at the ALJ hearing that it had not discharged Claimant; that instead he had abandoned his job, as indicated by his cleaning out his office, failing to report to his office, and failing to return phone calls.

19. This was the entire basis for Petitioner's position that Claimant was not entitled to unemployment benefits both before the Deputy, and before the ALJ.

20. It was not until the ALJ asked at the close of Petitioner's case "is there anything further you want to tell me?" that Petitioner's CFO, Mr. Juliucci, stated that Claimant had been charged with embezzlement from the company and that Petitioner had proof thereof. (Tr. 30-31)

21. Mr. Juliucci offered to have copies of checks faxed to the ALJ as proof of Claimant's alleged embezzlement. The ALJ refused to accept such checks or any other offer of written evidence that had not been submitted 24 hours prior to the hearing in accordance with the instructions that Petitioner had been provided in the hearing notice. (Tr. 30-31)

22. After Mr. Juliucci had been cross examined, the ALJ offered him a chance to offer "anything further on behalf of the company."

23. Although this would have provided Petitioner an opportunity to question

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Claimant regarding the alleged embezzlement,[2] or at least to offer some evidence or argument that such embezzlement had been the cause for his dismissal, Mr. Juliucci simply testified regarding some post-employment separation allegations and re-asserted Petitioner's position that Claimant had "voluntarily left his position." (Tr. 35)

24. On March 22, 2013, the ALJ reversed the Deputy's decision, finding that "Claimant was discharged but not for misconduct. The Claimant is not disqualified."

25. Petitioner appealed the ALJ's ruling to the Board of Review, and also requested that the case be remanded to the ALJ for an opportunity to offer evidence regarding alleged embezzlement.

26. On May 23, 2013, the Board of Review affirmed the decision of the ALJ and denied the request for remand, finding that good cause for remand had not been shown.

27. Thereafter, on June 21, 2013, the Petitioner timely appealed the Board of Review's decision to this Court. In furtherance of its appeal, the Petitioner has taken the position that the Board of Review erred as follows: (a) in finding that the Claimant was discharged; (b) in finding that the Petitioner's decision to pay the Claimant within 72 hours of his separation from employment is evidence of a discharge; (c) in improperly shifting the burden to the Petitioner to establish that the Claimant was discharged for misconduct; (d) even assuming arguendo that the Claimant was discharged, in finding that the Petitioner did not prove misconduct (simple or gross) on the Claimant's part; (e) in finding that there was no evidence of the Claimant having embezzled from the Petitioner; (f) in denying the Petitioner's request for remand to present additional evidence of the Claimant's purported embezzlement from the company; (g) in failing

[2] On Claimant's direct examination, Petitioner had asked him if he had been charged with embezzlement, which Claimant affirmed. (Tr. 27) After the ALJ noted that mere charges of embezzlement did not constitute proof thereof, Petitioner ceased any questioning regarding such allegations and resumed questioning regarding Petitioner's contention that Claimant had voluntarily left his employment. The ALJ did not, however, prohibit Petitioner from any further cross examination regarding embezzlement.

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to give appropriate weight to the Claimant's lack of responsiveness and abandonment of his job; (h) in finding that the Claimant justifiably relied upon credible information that he was going to be discharged; and (i) in applying both the evidence and the law, insofar as the Board of Review failed to conclude that the Claimant quit without good cause involving fault on the part of the Petitioner.

CONCLUSIONS OF LAW

1. This Court's review of the Board of Review, Workforce West Virginia's Final Order was enunciated in Syllabus Point 3 of *Adkins v. Gatson*, 192 W.Va. 561, 453 S.E.2d 395 (1994), as follows:

> [t]he findings of fact of the Board of Review of the West Virginia Department of Employment Security are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is one purely of law, no deference is given and the standard of judicial review by the court is de novo.

2. Additionally, the Court observed that, "the findings of fact of the Board of Review of the West Virginia Department of Employment Security are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong." *Id.* at 399.

3. The West Virginia Supreme Court holds that, "[a] reviewing court must evaluate the record of an administrative agency's proceeding to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is conducted pursuant to the administrative body's findings of fact, regardless of whether the court would have reached a different conclusion on the same set of facts." Syllabus Point 1, *Walker v. West Virginia Ethics Com'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997). "The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid

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as long as the decision is supported by substantial evidence or by a rational basis." Syl. Pt. 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).

4. The claimant has the burden to establish that he qualifies for unemployment benefits by, *inter alia* proving that he did not "leave employment voluntarily without good cause involving fault on the part of the employer[.] W.Va. Code §21A-6-3(a).

5. The employer has the burden of proof to show that a claimant is disqualified for unemployment benefits, such as by reason of discharge for misconduct. *Herbert J. Thomas Memorial Hosp. v. Board of Review of West Virginia Bureau of Employment Programs*, 218 W.Va. 29, 620 S.E.2d 169 (2005) (holding that the employer has the "burden of persuasion to demonstrate by a preponderance of the evidence that a claimant's conduct falls within the disqualifying provisions.").

6 After due and mature consideration of the briefs and the entire record made before the agency, the Court is of the opinion that a hearing on this matter is not necessary to render its decision. The Court finds that the Board of Review, Workforce West Virginia's application of law to the facts presented in this case, as indicated in its final decision, is not clearly wrong in view of the reliable, probative and substantial evidence on the whole record.

7. Petitioner asserts that the Agency erred in in finding that the Claimant was discharged. First, Petitioner itself informed the agency that it had, in fact, discharged Claimant in its answers on the "Information Regarding Separation" form. Petitioner explicitly stated that it had discharged Claimant for failure to report to the office and failure to communicate with corporate officer. On that same form Petitioner also explicitly informed the Agency that Claimant had <u>not</u> quit. Petitioner's own CFO testified at the hearing on this matter that Claimant

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had been summoned to the main office and informed that he was no longer employed. Therefore, Petitioner's protestations to the contrary after the fact are of no avail.

8. It would be amply evident from Petitioner's own representations to the Agency that Claimant did not quit even if he had offered no evidence at all. But in fact, he did offer ample evidence from which the ALJ could reasonably find that he had not voluntarily left his employment: (1) Claimant testified that he cleaned his office to avoid embarrassment in anticipation of being terminated; (2) he plausibly explained his absence from the main office thereafter by establishing that his work regularly took him off-site for days at a time; (3) he plausibly explained his failure to return phone calls by noting that he was often out of cell phone coverage when he was working off-site; (4) although he had cleaned out his office, he retained his company equipment, keys and car until he was instructed to turn them over after management informed him he was no longer employed.

9. Further undercutting Petitioner's position is the fact that it paid him wages due within 72 hours as it was then statutorily required to do when employees were terminated rather than at the next regular pay day as required when an employee voluntarily quit.[1] Notwithstanding Petitioner's protestations to the contrary, the fact that Petitioner acted *consistently* with statutory provisions for payment after *discharge* rather than the statutory requirements for payment after an employee *quit* is highly relevant and probative in this matter.

[1] At the time Claimant's discharge, W.Va. Code § 21-5-4 provided that:

> (b) Whenever a firm or corporation discharges an employee, such person, firm or corporation shall pay the employee's wages in full within seventy-two hours.
>
> (c) Whenever an employee quits or resigns, the person, firm or corporation shall pay the employee's wages no later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, except that if the employee gives at least one pay period's notice of intention to quit the person, firm or corporation shall pay all wages earned by the employee at the time of quitting.

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10. Against all of this evidence that Claimant was discharged, all that Petitioner offered to the contrary was Mr. Juliucci's assertion that, when Petitioner's agents told Claimant he was no longer employed, they were merely confirming the action Claimant had already taken in cleaning out his desk, not reporting to the office and failing to return phone calls. Given the foregoing evidence in Claimant's favor, the Court finds that the ALJ did not err in finding that the preponderance of the evidence lay with Claimant.

11. Inexplicably, Plaintiff next alleges that the Agency erred by improperly shifting the burden to the Petitioner to establish that the Claimant was discharged for misconduct. As discussed above, it is well established that proof of disqualification falls squarely on employers. *Thomas Memorial Hosp. v. Board of Review of West Virginia Bureau of Employment Programs*, 218 W.Va. 29, 620 S.E.2d 169. Therefore, this assignment of error is without merit.

12. All of Petitioner's assignments of error in his Petition for Appeal to the Board of Review were based on the ALJ's finding that Claimant had not voluntarily abandoned his job. Throughout the document, Petitioner unwaveringly clung to the position that Claimant abandoned his job, and was not discharged at all, let alone for embezzlement.

13. In fact, Petitioner explicitly stated that the ALJ *erred* in concluding that Claimant had been discharged for embezzlement. Petitioner continued to insist that it did not discharge Claimant for embezzlement, explaining that at the time of separation from employment it did not know of such conduct. Although Petitioner suspected embezzlement, it went to great pains in its Petition for Appeal to the Board of Review to explain once again that embezzlement played no role in Claimant's separation, and that instead, Claimant had simply abandoned his employment.

14. Perplexingly, Petitioner then moved the Board of Review to remand the case to the ALJ for an opportunity to offer further evidence on the ground for which it did not

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discharge Claimant, and now claims that the Board erred in denying it this opportunity. This assignment is without merit.

15. First, Petitioner utterly failed to meet the standard for remand. As the Board of Review clearly informed Petitioner, in order for a case to be remanded for presentation of additional evidence, the a petitioner must show, *inter alia* "the importance of such evidence to the issues in the case and the reasons for failure to offer the evidence prior to the hearing before the Administrative Law Judge." (R.3) In his Request for Remand, Petitioner failed to show any reason whatsoever for his failure to offer evidence of embezzlement.

16. Instead, Petitioner simply noted that the ALJ had prohibited it from offering documentary evidence at the hearing because of its failure to timely offer such evidence at least 24 hours before the hearing in accordance with the rules. Neither at the hearing nor in its Request for Remand did Petitioner ever offer good cause for its failure to present such evidence in a timely fashion. Therefore, the Board did not err in denying the Request.

17. Petitioner also complained that the ALJ denied it the opportunity to "examine the Claimant and offer testimony regarding the Claimant's embezzlement from the company." (R. 7, p.3) This is also erroneous. As discussed above, Petitioner had every opportunity to question Claimant on the subject. When Petitioner stated that Claimant had been charged with embezzlement, the ALJ simply noted that charges alone were not proof. He did not prohibit Petitioner from questioning Claimant or offering its own testimony regarding embezzlement. Therefore, this claim is without merit.

18. Moreover, even if Petitioner had shown good cause as to why it had failed to offer embezzlement evidence before the ALJ, the Board's denial would still have been proper, as no such evidence would have had any relevance whatsoever to the proceedings.

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19. Under W.Va. Code §21A-6-3, an employee is disqualified from unemployment benefits if the employer proves by a preponderance of the evidence that it discharged the employee for misconduct.

20. Petitioner has adamantly and steadfastly maintained that it did not discharge Claimant at all. The fact that it may have found evidence of misconduct after employment separation is of no moment. The statute does not disqualify an employee for committing misconduct. It disqualifies an employee from employment benefits if he was discharged for misconduct.

21. For the foregoing reasons, therefore, the Court finds that each of Petitioner's assignments of error is without merit.

ORDER

Accordingly, the Court does hereby **ORDER** the decision of the Board of Review, Workforce West Virginia entered May 21, 2013 **AFFIRMED**, finding that the claimant is not disqualified from receiving unemployment compensation benefits and denying Petitioner's request for remand for presentation of further evidence. Therefore, this matter is hereby **DISMISSED** and **STRICKEN** from the open docket of the Court. Additionally, this Court **DIRECTS** the Circuit Clerk to distribute certified copies of this order to the following:

The Circuit Clerk is **DIRECTED** to mail a certified copy of this Order to:

Matthew Hansberry, Esq.
400 White Oaks Blvd.
Bridgeport, WV 26330

Greg Schillace, Esq.
PO Box 1526
Clarksburg, WV 26302

Joseph Leonoro, Esq.
707 Virginia St., 8th Floor
Charleston, WV 25301

Entered this 5th day of November, 2013.

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Carrie Webster

Carrie Webster, Judge
Thirteenth Judicial Circuit

11/7/13
M. Hansberry
J. Leonard
J. Wallace
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