

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
DECEMBER 1, 2009 Session

**DURA AUTOMOTIVE SYSTEMS, INC. v. JAMES G. NEELEY,  
Commissioner of the Tennessee Department of Labor and Workforce  
Development, and EUSEBIO FLORES**

**Direct Appeal from the Chancery Court for Smith County  
No. 7285 Charles K. Smith, Chancellor**

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**No. M2009-00908-COA-R3-CV - Filed January 21, 2010**

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This appeal involves a terminated employee's claim for unemployment compensation. The Department of Labor and Workforce Development initially determined that the employee was ineligible for unemployment benefits on the basis that he was discharged for misconduct connected with his work. However, the Department's Appeals Tribunal and its Board of Review both concluded that the employee's actions did not constitute work-related misconduct. The chancery court reversed, finding misconduct connected with work. We reverse the chancery court, finding that substantial and material evidence supports the Board of Review's decision, which is hereby reinstated.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Reversed**

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the Court, in which HOLLY M. KIRBY, J., and J. STEVEN STAFFORD, J., joined.

Andrae Crismon, Murfreesboro, Tennessee, and David Kozlowski, Columbia, Tennessee, for the appellant, Eusebio Flores

Tara L. Ferguson, Thomas Anthony Swafford, Nashville, Tennessee, for the appellee, Dura Automotive Systems, Inc.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, Warren A. Jasper, Senior Counsel, Nashville, Tennessee, for the appellee, Tennessee Department of Labor and Workforce Development

## OPINION

### I. FACTS & PROCEDURAL HISTORY

Eusebio Flores was one of several employees selected for random drug testing by his employer, Dura Automotive Systems, Inc. (“Dura”), on or about December 6, 2005. Mr. Flores submitted to the drug screen as instructed. The following night, after work, he said goodbye to his supervisor, explaining that he had recently smoked marijuana, and that he had taken two at-home drug screen tests and failed. The next day, the supervisor relayed this information to the human resources manager, who contacted Mr. Flores by telephone. Mr. Flores admitted to the human resources manager that he told his supervisor that he had smoked marijuana “about a week ago.” The human resources manager then informed Mr. Flores that his employment with Dura was terminated. The following day, Dura received the results of its drug screens, and Mr. Flores had passed his drug test.<sup>1</sup>

Mr. Flores subsequently filed a claim with the Tennessee Department of Labor and Workforce Development for unemployment compensation. The Department issued an “Agency Decision” denying the request for benefits pursuant to Tennessee Code Annotated section 50-7-303(a)(2)(A), finding that Mr. Flores was discharged for work-related misconduct.<sup>2</sup> Mr. Flores then appealed the Agency Decision to the Appeals Tribunal. At the hearing before the Appeals Tribunal, Mr. Flores testified on his own behalf, and his former supervisor and the human resources manager both testified for Dura. The supervisor conceded that Mr. Flores never showed any signs or symptoms of being under the influence while at work. Dura’s employee handbook provided that it was “a violation of Company policy for any Employee to use, possess, sell, trade, offer for sale, or offer to buy illegal drugs or otherwise engage in the illegal use of drugs or activity involving drugs on or off the job.” The handbook further provided that violations of the policy were subject to disciplinary action up to and including termination.<sup>3</sup>

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<sup>1</sup> According to the human resources manager, she asked the person who administers Dura’s tests why the test would come back negative, and she was told that at-home drug screening kits detect any level of THC or drugs whatsoever, whereas Dura’s drug screen gave positive results only if a threshold amount was detected.

<sup>2</sup> The statute provides that a claimant shall be disqualified for unemployment benefits if it is determined that he or she was discharged for “misconduct connected with the claimant’s work.” Tenn. Code Ann. § 50-7-303(a)(2)(A).

<sup>3</sup> The handbook provided that employees must abide by the terms of the drug-free policy “as a condition of employment,” but it also stated that the handbook was “not a contract of employment, express or implied.”

Following the hearing, the Appeals Tribunal reversed the Agency Decision and found Mr. Flores eligible for unemployment benefits. Its written decision states, “Even though the company policy prohibits off site drug use, unless the drug use affects employment, either through job performance or a failed drug test, it is not work related for the purpose of unemployment benefits.” The Appeals Tribunal found that “the claimant’s work had never indicated that he was under the influence of any intoxicant.” Because there was “no evidence that the drug affected his job performance,” and Mr. Flores “passed the drug test,” the Appeals Tribunal found “no evidence of work related misconduct.”

Dura then appealed to the Department’s second appellate level, the Board of Review. The Board of Review affirmed the decision of the Appeals Tribunal and expressly adopted its findings of fact and conclusions of law. In addition, the Board of Review’s written decision addressed Dura’s argument on appeal that Mr. Flores violated a duty to his employer by admitting that he used marijuana on his own time. The Board stated, “Without proof that such conduct away from the workplace affected the claimant’s work or resulted in positive drug testing results, the Board agrees with the Appeals Tribunal that work-connected misconduct has not been reasonably established in this case.”

Dura then filed a “Petition for Review of the Decision of [the] Board of Review” in the Smith County Chancery Court. After reviewing the record,<sup>4</sup> the trial court reversed the decision of the Appeals Tribunal and Board of Review and found Mr. Flores ineligible for unemployment benefits due to work-related misconduct. Mr. Flores timely filed a notice of appeal to this Court.

## II. ISSUES PRESENTED

On appeal, Mr. Flores asserts that the chancery court “erred in concluding that [his] alleged off-duty and off-workplace actions amounted to work-related misconduct.” The Tennessee Department of Labor and Workforce Development also submitted a brief on appeal contending that there is substantial and material evidence in the record to support the finding of the Board of Review that Mr. Flores did not engage in work-related misconduct. Dura, on the other hand, argues on appeal that the chancery court correctly reversed the decision of the Board of Review.

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<sup>4</sup> We note that Dura attached additional documents to the petition, which it concedes “were not made evidence on record to the Board of Review, but were presented on appeal to the Chancery Court for the first time.” (**Br. at 6**). “Consideration of additional evidence not properly before the Appeals Tribunal and the Board of Review is [] beyond the chancellor’s scope of review.” *Mitchell v. Davenport*, No. 02A01-9510-CH-00230, 1997 WL 61509, at \*5 (Tenn. Ct. App. W.S. Feb. 14, 1997); *see also Gore v. Memphis Light, Gas & Water*, No. M2009-01237-COA-R3-CV, 2009 WL 4801703, at \*2 (Tenn. Ct. App. Dec. 14, 2009).

For the following reasons, we reverse the decision of the chancery court and reinstate the decision of the Board of Review.

### III. STANDARD OF REVIEW

On appeal, we review the decision of the Board of Review utilizing the same standard of review as that applied by the trial court, which is set forth in Tennessee Code Annotated section 50-7-304(I):

(2) The chancellor may affirm the decision of the board or the chancellor may reverse, remand or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (A) In violation of constitutional or statutory provisions;
- (B) In excess of the statutory authority of the agency;
- (C) Made upon unlawful procedure;
- (D) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (E) Unsupported by evidence that is both substantial and material in the light of the entire record.

(3) In determining the substantiality of evidence, the chancellor shall take into account whatever in the record fairly detracts from its weight, but the chancellor shall not substitute the chancellor's judgment for that of the board of review as to the weight of the evidence on questions of fact.

Thus, our review in this case involves a determination of whether there is substantial and material evidence to support the Board's legal conclusion that the claimant's actions did not constitute misconduct. *Simmons v. Culpepper*, 937 S.W.2d 938, 943 (Tenn. Ct. App. 1996); *see also Cherry v. Suburban Mfg. Co.*, 745 S.W.2d 273, 276 (Tenn. 1988) (finding that "there was material and substantial evidence to justify the conclusions of the administrative agency and of the Chancellor that the appellee had indeed been guilty of misconduct connected with his work within the meaning of the applicable statute"). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration." *Millen v. Tenn. Dep't of Labor & Workforce Dev.*, 205 S.W.3d 929, 932 (Tenn. Ct. App. 2006) (quoting *Ford v. Traughber*, 813 S.W.2d 141, 144 (Tenn. Ct. App. 1991)). Courts generally interpret the requirement of substantial and material evidence as requiring "something less than a preponderance of the evidence, but more than a scintilla or glimmer." *Dickson v. City of Memphis Civil Serv. Comm'n*, 194 S.W.3d 457, 464

(Tenn. Ct. App. 2005) (quoting *Wayne County v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 280 (Tenn. Ct. App. 1988)). “Courts should not disturb a reasonable decision of any agency which has expertise, experience and knowledge in a particular field.” *Millen*, 205 S.W.3d at 932.

#### IV. DISCUSSION

A claimant is disqualified for unemployment benefits if it is determined that he or she was discharged for “misconduct connected with the claimant’s work.” Tenn. Code Ann. § 50-7-303(a)(2)(A).<sup>5</sup> The standard to be applied is that of the employment contract, whether express or implied, which fixes the employee’s duties in connection with his work. *Weaver v. Wallace*, 565 S.W.2d 867, 870 (Tenn. 1978). An essential element of “misconduct connected with work” is a breach of a duty owed to the employer, as distinguished from society in general. *Id.* “Unless the employee’s wrongdoing violates a duty owed to the employer, it cannot amount to that ‘misconduct connected with his work’ which serves to disqualify him to receive unemployment insurance benefits, although it may fully justify the employer in discharging him.” *Id.*

“It has long been settled in this state [] that a justifiable discharge is not, in and of itself, ‘misconduct connected with his work’ so as to disqualify an employee under the statute.” *Cherry v. Suburban Mfg. Co.*, 745 S.W.2d 273, 275 (Tenn. 1988); *see also Trice v. Traugher*, 797 S.W.2d 886, 887 (Tenn. 1990). The circumstances may be such that an employee is deemed unsuitable for the work that he was doing, but that does not necessarily constitute grounds for denial of unemployment benefits. *See Mayes v. Culpepper*, No. 03A01-9801-CH-00032, 1999 WL 39505, at \*2 (Tenn. Ct. App. E.S. Feb. 1, 1999). For instance, in *Armstrong v. Neel*, 725 S.W.2d 953, 956 (Tenn. Ct. App. 1986), an employee was deemed eligible for unemployment benefits after he was fired for threatening a co-

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<sup>5</sup> Tennessee Code Annotated section 50-7-303(a)(2)(A) provides, generally, that a claimant is disqualified from receiving benefits if he or she was “discharged from the claimant’s most recent work for misconduct connected with the claimant’s work,” but at the time of the proceedings below, the statute did not define the phrase “misconduct connected with work.” Tennessee Code Annotated section 50-7-303 was amended, effective January 1, 2010, to contain a definition of work-connected misconduct. *See* 2009 Pub. Acts Ch. No. 479, § 2.

We note that subsection (a)(2)(B)(i) of the statute specifically provides that “[a] discharge resulting from a positive result from a drug test for drugs administered in conformity with the provisions of Title 50, Chapter 9 [the Drug-Free Workplace Act], will be deemed to be a discharge for misconduct connected with such claimant’s work.” However, this subsection does not disqualify Mr. Flores from receiving benefits because this case does not involve “a *positive* result from a drug test for drugs administered in conformity with the provisions of Title 50, Chapter 9 [the Drug-Free Workplace Act].” Tenn. Code Ann. § 50-7-303(a)(2)(B)(i) (emphasis added).

worker. The Court found that his conduct did not “materially interfere[] with his employer’s business” and stated, “While it may have provided the company with an adequate basis to discharge him, we have concluded that this was an isolated incident that does not warrant denying Mr. Armstrong unemployment compensation pursuant to Tenn. Code Ann. § 50-7-303(a)(2)(B).” *Id.*

Each case must be determined in light of all the facts and circumstances attendant upon the employee’s termination. *Cherry*, 745 S.W.2d at 275. In *Weaver*, 565 S.W.2d at 870, our Supreme Court, quoting 81 C.J.S. *Social Security* § 222 (1977), described the “general outline” of the scope of disqualifications for work-related misconduct as follows:

Depending on the specific provisions of the statute, in order to disqualify an employee for unemployment benefits his misconduct must be in the course of his most recent work, connected with his work, or connected with the employment. Under such provisions, it is not necessary that the act of misconduct occur during the working hours or at the place of employment, so long as it is connected with the employment, and the fact that misconduct relates to the private life or off-duty activities of the employee does not necessarily preclude its having a connection with the employment requisite to bar the right to compensation. Ordinarily, however, an employee's conduct off the working premises or outside the course or scope of his employment is not considered as misconduct in connection with employment.

In support of their respective arguments, the parties rely upon several unemployment cases involving employee drug use. None of the cases involves facts similar to this case, but a few of them are instructive regarding the issues before us. In *Cherry v. Suburban Manufacturing Co.*, 745 S.W.2d 273, 274 (Tenn. 1988), an employer agreed to grant an employee a leave of absence from work so that he could enter a 90-day drug rehabilitation program. The drug use had affected the employee’s job performance by causing him to miss ten days of work, and by his own admission, the drug problem had become so severe that he was no longer able to work. *Id.* at 275-76. Nevertheless, the employee failed to comply with the terms of the leave of absence by deciding not to enter the rehabilitation program, so he was fired. *Id.* at 276. The Court held that the employee’s actions “not only justified the employer in terminating him but also violated a duty to and an agreement made with his employer;” thus, substantial and material evidence supported the Agency’s determination that the employee was discharged for work-related misconduct. *Id.* at 276-77.

In *Zang v. Davenport*, No. 01A01-9501-CH00024, 1995 WL 322628, at \*1 (Tenn. Ct. App. M.S. May 26, 1995), an employee failed a drug test that was administered after he was injured on the job. Pursuant to an agreement between the employer and the union, all

employees who failed a drug test were required to complete a rehabilitation program.<sup>6</sup> *Id.* The employee failed to complete the rehabilitation program and was discharged. *Id.* However, the Court determined that the employee’s failure to undergo rehabilitation was not shown to be “connected with his work.” *Id.* at \*6. The Court distinguished *Cherry* because, in *Zang*, “there [was] no evidence that plaintiff’s job performance was in any way unsatisfactory, or that he had ever experienced any ill effects from taking drugs, or (except for ‘failing a test’) that he ever took any prohibited or controlled drugs.”<sup>7</sup> *Id.* at \*10. The Court explained, “If the record contained any evidence of any misconduct of plaintiff ‘connected with his work’ which might be reasonably related to his use of addictive drugs, then a failure to submit to treatment might be deemed to be ‘connected with this work.’ No such evidence appears in this record.” *Id.* at \*6.

In *Weaver v. Wallace*, 565 S.W.2d 867, 869 (Tenn. 1978), a federal employee was terminated after he was arrested and convicted for possession of marijuana off the premises of his employer. The employer contended that the employee did not meet the “suitability standards for federal employment” due to the arrest and conviction. *Id.* However, our Supreme Court concluded that the employee had not engaged in misconduct connected with his work because there was “no evidence that this offense in any way involved the violation of any duty owed to the employer.” *Id.* at 871.

Finally, the parties cite *Jackson v. Hayes*, No. 02A01-9210-CH-00286, 1993 WL 248046, at \*1 (Tenn. Ct. App. W.S. July 8, 1993), which involved a surgical assistant whose

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<sup>6</sup> Although the employee was not a union member, the Court assumed that the collective bargaining agreement affected all employees of the employer, meaning that it would be binding upon the non-union employees in regard to their working conditions and continued employment as set out in the agreement. *Id.* at \*6 (citing 51 C.J.S. *Labor Unions* § 255, p. 1115 n.10).

<sup>7</sup> The Court found no Tennessee cases on point, but quoted extensively from *National Gypsum Co. v. State Employment Security*, 772 P.2d 786 (Kan. 1989), wherein the Kansas Supreme Court stated:

In the absence of evidence that an employee's drug usage had actual on-the-job impact, an employee's dismissal for failing a urine drug test based on off-the-job drug usage does not disqualify the employee from receiving unemployment compensation benefits.

*Id.* at 792-93. The *Zang* Court also quoted *Glide Lumber Products Co. v. Employment Division*, 741 P.2d 907, 910 (Or. App. 1987), where the Court concluded that being discharged for failing a random drug test did not constitute “misconduct connected with work,” despite the company's policy that drug detection was grounds for discharge, because there was no actual impact in the workplace. After *Zang* was decided, Tennessee Code Annotated section 50-7-303 was amended, effective July 4, 1999, to provide that “[a] discharge resulting from a positive result from a drug test for drugs administered in conformity with the provisions of Title 50, Chapter 9 [the Drug-Free Workplace Act], will be deemed to be a discharge for misconduct connected with such claimant's work.”

employment with a hospital was terminated after he was arrested, off-duty and off hospital property, and charged with the felony offense of possession of an unlawful substance (cocaine) with intent to sell. It was the policy and practice of the hospital to discharge employees who were arrested on any felony charge, and also, the employee handbook specifically provided that employees were subject to discharge for the unauthorized possession of controlled substances. *Id.* Therefore, the hospital argued that the employee's possession of illegal drugs was a violation of the duty he owed to the hospital to comply with its regulations and rules and that a violation of the regulations and rules constituted misconduct connected with his work. *Id.* at \*5. The Court rejected the hospital's arguments as follows:

In the case at bar, the record clearly establishes that Jackson continued performing his duties at Hospital apparently in a satisfactory manner for a year after his arrest. . . .What Hospital is saying in essence is that Jackson is not "suitable" for his job and this test was specifically rejected in *Wood v. Wallace*, [slip op. at 7 (Tenn. Ct. App. filed June 30, 1978)].

Hospital also argues that possession of drugs is a violation of Hospital policy as set out in the Hand Book and constitutes a violation of the duties that Jackson owed to Hospital to comply with employment policies. In *Weaver v. Wallace*, 565 S.W.2d 867 (Tenn. 1978), the Court said:

In our opinion, the standard to be applied is that of the employment contract, whether express or implied, which fixes the employee's duties in connection with his work; an essential element of "misconduct connected with the work" is a breach of duty owed to the employer, as distinguished from society in general. (citations omitted) Unless the employee's wrongdoing violates a duty owed to the employer, it cannot amount to that "misconduct connected with his work" which serves to disqualify him to receive unemployment insurance benefits, although it may fully justify the employer in discharging him.

565 S.W.2d at 870. In the instant case, Jackson, while off from work, clearly owed the duties relied upon by Hospital to society in general.

The Hand Book calls for disciplinary action for various circumstances, but surely Hospital would not have us believe that an arrest of an employee for public drunkenness in Nankipoo would be considered misconduct in connection with the employee's work. There is simply not sufficient proof in this case that Jackson's offense "has adversely affected [his] ability and capacity to perform his duties" as established by the proof. *Wood v. Wallace*,



*supra*. Certainly, we do not and cannot condone Jackson's involvement with illicit drugs, but our abhorrence to the use and sale of illicit drugs cannot justify a disregard of the law providing unemployment compensation.

*Id.*

Again, we find no Tennessee case addressing the unusual situation before us. We do not question Dura's right to terminate Mr. Flores for his actions; we merely decide whether his discharge was for "misconduct connected with his work" so that he was ineligible for unemployment compensation. See *Weaver*, 565 S.W.2d at 871, n.2. The employer has the burden of proving that an employee should be disqualified from receiving unemployment benefits. *Id.* at 870. Because the unemployment statutes were enacted for the benefit of unemployed workmen, they are to receive a liberal interpretation by the courts. *Id.* at 869. "The disqualification because of 'misconduct connected with their work' provision, being penal in nature, is to be construed liberally in favor of the employee so as to minimize the penal character of the provision by excluding cases not clearly intended to be within the exception." *Id.* at 869-70 (citations omitted).

Keeping all of the aforementioned principles in mind, it is the opinion of this Court that substantial and material evidence supported the Board of Review's decision that Mr. Flores did not engage in misconduct connected with his work within the meaning of the applicable statute. Ordinarily, an employee's conduct off the working premises and outside the course and scope of his employment is not considered misconduct connected with work. *Weaver*, 565 S.W.2d at 870 (quoting 81 C.J.S. *Social Security* § 222 (1977)). Here, Dura did not demonstrate that Mr. Flores' actions had any adverse effect on his work, and Mr. Flores passed the drug test required by Dura. As in *Jackson*, we conclude that the duty relied upon by Dura was owed to society in general.<sup>8</sup> Mr. Flores' conduct may have provided Dura with an adequate basis to discharge him, but it does not warrant denying him unemployment compensation.

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<sup>8</sup> We recognize that in *Weaver*, 565 S.W.2d at 870, the Court stated that "the standard to be applied is that of the employment contract, whether express or implied, which fixes the employee's duties in connection with his work." However, Dura's handbook specifically stated that it was "not a contract of employment, express or implied."

## V. CONCLUSION

For the aforementioned reasons, we reverse the decision of the chancery court and reinstate the decision of the Board of Review. Costs of this appeal are taxed to the appellee, Dura Automotive Systems, Inc., for which execution may issue if necessary.

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ALAN E. HIGHERS, P.J., W.S.