

No. 1-10-2904

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHRISTOPHER LIZAK,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	
)	No. 10 L 50872
ILLINOIS DEPARTMENT OF EMPLOYMENT)	
SECURITY; DIRECTOR, ILLINOIS DEPARTMENT)	
OF EMPLOYMENT SECURITY; BOARD OF)	
REVIEW; and WILLIAMS LEA, INC./DONNELLEY,)	Honorable
)	Sanjay T. Tailor,
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

- ¶ 1 *Held:* The unemployment compensation claimant was properly found to be ineligible for benefits where the evidence established he was terminated from his employment for work misconduct after willfully and deliberately filing a false time record.
- ¶ 2 Plaintiff Christopher Lizak appeals from a circuit court order affirming a decision of the Board of Review (Board) of the Illinois Department of Employment Security. The Board found that Lizak was ineligible to receive unemployment benefits because his employer, Williams Lea, Inc. (Williams Lea), had discharged him for work misconduct after he filed a false time record.

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On appeal, Lizak contends the Board's decision was erroneous because there was no evidentiary basis for the alleged misconduct and no evidence of harm to the employer. We affirm.

¶ 3 Lizak was hired by Williams Lea as a mail room associate in 2007. He was discharged on September 21, 2009, for submitting a false timecard amendment sheet. Lizak applied for unemployment compensation but was found ineligible for benefits because he had been discharged by his employer for misconduct connected with his work. Lizak applied for reconsideration of the claims adjudicator's determination of ineligibility. On January 11, 2010, a hearings referee conducted a hearing by telephone, at which Lizak appeared in his own behalf and Marlys Harris appeared on behalf of Williams Lea. Harris testified that Lizak's employment was terminated because he provided a false supplemental "Kronos sheet," a timekeeping sheet that employees would use if for some reason they were unable to punch in and out of work electronically. On September 17, 2009, Lizak reported for work some time after 9 a.m. However, later that day he signed and turned in a correction sheet which stated that his start time that day was 9 a.m. Harris determined, however, that he had come in late that day, "I believe it was after 10:00." When the referee asked Harris how she knew that, she responded that when Lizak's absence was noted, "we couldn't find him, he had specific tasks that had to be done when he started at 9:00."

¶ 4 Lizak and everyone else coming into the building had to pass through a turnstile with a security badge. Also, Lizak would have had to punch in to record the time he started work. Harris checked the Kronos timekeeping system and Lizak had not yet punched in. Harris subsequently obtained the turnstile records which showed Lizak came through the turnstile after 10 a.m. Harris also viewed the security camera which showed Lizak entering the turnstile area. Harris testified, "I believe it was 7 minutes after 10:00, if memory serves me right."

¶ 5 After Harris received Lizak's correction sheet, as well as the turnstile information and the picture from the security camera, she presented the facts to Michael O'Donnell, the employer's

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Human Resources manager. O'Donnell and Harris met with Lizak and told him they had his correction sheet showing a start time of 9 a.m., but that the records showed he was not in the building at that time. Harris stated that Lizak said something like, "I know." Lizak "did not contest it at all" and "did not offer any kind of rebuttal at all." Lizak was paid hourly and would have been paid from 9 a.m. on the day in question if Harris had not determined he was late.

¶ 6 Lizak had not had any attendance problems in the past. However, all employees go through a "new hire orientation" and receive an employee handbook. They must sign a statement saying they received the handbook and understood the company guidelines. The company has "a pretty hard and fast line" of terminating employment for falsification of a time record.

¶ 7 Harris explained that O'Donnell was in possession of the documentation, including the still picture from the video and the turnstile record, but an emergency kept him from participating in the telephone hearing as scheduled. Consequently, the records were not available to Harris during the hearing, and she reported their contents from memory.

¶ 8 Christopher Lizak testified that he was supposed to start work at 9 a.m., but that on the day in question, he started "around like 9:20, or 9:30. It was nowhere past 9:30." When he arrived, he punched in at the Kronos computer at 9:20 or 9:30. Lizak never came in late. "So at the end of the day I'm rushing home and stuff, and I just noticed it said like 9:20 or 9:30, so I automatically thought it's not right. I always come in on time. So I just filled out the sheet. And that's when I turned it in." When Harris and O'Donnell confronted him, he remembered why he was late "and I [tried] to explain." Lizak testified that he did not intend to falsify the time card for a mere 20 minutes, that it was just a mistake. He explained to the referee why he was late that one day:

"Because I had previously complained about the environment in the mailroom because they're always like surfing

pornography on their phone, and I couldn't like bear coming into work because they're always doing that. Even though I had complained to her, complained to HR, it just keeps going on. So every time I come to work, you know, and a lot of the work just stays for me when I get in there. They say that it doesn't, but it does. So then I have to like do the work while they're either talking on the phone, on their cell phones which they're not allowed to do.

Because coming to work every day like that, and then you just don't want to like come in. So I was right there by the building and I was just walking around, because I just really hated to come in the morning and see that stuff happening every single day, even after you file complaints about it."

¶ 9 On January 12, 2010, the referee rendered his decision, affirming the determination of the local office that Lizak was disqualified from receiving benefits. The referee's written decision concluded that the evidence showed Lizak was fired for misconduct after he provided false information on a time sheet. "Because he knew he was late on the day he submitted his time correction sheet he made his false time sheet entry willfully and deliberately."

¶ 10 Lizak appealed to the Board. On April 23, 2010, the Board affirmed the denial of unemployment benefits. Lizak sought judicial review, and the circuit court affirmed the Board's decision "as it is neither against the manifest weight of the evidence nor contrary to law."

¶ 11 On appeal to this court, Lizak contends the Board's decision denying him unemployment compensation benefits was error because his testimony, that his timecard correction was an

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honest mistake, was unrebutted and there was no independent evidence of the alleged work misconduct.

¶ 12 In reviewing a final decision under the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2008)), we review the administrative agency's decision, not the trial court's determination. *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010). It is the responsibility of the administrative agency to weigh the evidence, determine the credibility of witnesses, and resolve conflicts in testimony. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 329 (2009). We will reverse an agency's factual findings only where they are against the manifest weight of the evidence. *Young-Gibson v. Board of Education of City of Chicago*, 2011 IL App (1st), 103804, ¶56. Where the agency's ultimate determination is a mixed question of fact and law, *i.e.*, whether the facts satisfy the statutory standard, the "clearly erroneous" standard applies. *Livingston v. Department of Employment Security*, 375 Ill. App. 3d 710, 715-16 (2007). The agency's final decision will be overturned only where clearly erroneous. *Czajka v. Department of Employment Security*, 387 Ill. App. 3d 168, 173 (2008)

¶ 13 The denial of unemployment benefits is governed by the Unemployment Insurance Act (Act) (820 ILCS 405/100 *et seq.* (West 2008)). Individuals discharged for misconduct are ineligible to receive unemployment benefits under the Act. *Messer & Stilp, Ltd. v. Department of Employment Security*, 392 Ill. App. 3d 849, 856 (2009). Deliberate and willful falsification of time records has been held to constitute misconduct under the Act. *DeBois v. Department of Employment Security*, 274 Ill. App. 3d 660, 665-66 (1995). Three elements must be proven to establish disqualifying misconduct under the Act: (1) there was a deliberate and willful violation of a rule or policy; (2) the rule or policy of the employer was reasonable; and (3) the violation either has harmed the employer or was repeated by the employee despite previous warnings. *Id.*;

820 ILCS 405/602(A) (West 2008). An employee deliberately or willfully violates a work rule or policy when he is aware of and consciously disregards that rule. *Odie v. Department of Employment Security*, 377 Ill. App. 3d 710, 713 (2007).

¶ 14 At the outset, we take exception to Lizak's claim that neither his employer nor the Board disputed that his incorrect timecard correction sheet "was all a big, honest mistake," that the decision of neither the referee nor the Board rejected Lizak's claim of honest mistake, and that he was denied unemployment benefits simply because his correction sheet was incorrect. The record refutes his claims. When Harris and O'Donnell confronted Lizak with the false information on his correction sheet, he offered no explanation and acknowledged that he knew he had not arrived at work on time, and his employment was terminated that day. When Lizak applied for a reconsideration of the claims adjudicator's denial of unemployment benefits, his employer filed a protest and participated in the appeal hearing. The referee's decision concluded in relevant part: "The evidence has shown that the employer fired the complainant for misconduct within the meaning of Section 602A. He provided false information on a time sheet. *** Because he knew he was late on the day he submitted his time correction form he made his false time sheet entry willfully and deliberately." After finding that the referee's decision was "supported by the record and the law," the Board incorporated that decision into its own written decision. Patently, neither the employer nor the referee nor the Board considered Lizak's misconduct a "big, honest mistake."

¶ 15 After carefully reviewing the record, we find that the Board's determination, that Lizak deliberately and willfully falsified his time correction sheet, was supported by sufficient evidence. It is uncontested that the correction sheet was false. Lizak testified at the hearing that the falsification was a mistake and not a deliberate or willful falsification. His reliance on *Mitchell v. Jewel Food Stores*, 142 Ill. 2d 152 (1990) in support of his position is misplaced, as that case involved a suit for breach of contract by a fired employee against his former employer

where there was no question that the plaintiff's submission of an incorrect timecard was unintentional. Here, however, the Board reasonably could have inferred from circumstantial evidence that Lizak deliberately and willfully falsified his time record amendment sheet.

¶ 16 Harris testified that Lizak's failure to report to work at 9 a.m. on the day in question was noted at that time, and Harris immediately conducted a search for him. Lizak had still not arrived at the time Harris checked the Kronos timekeeping system. There was conflicting testimony as to how late Lizak was. Lizak testified he was only 20 or 30 minutes late. Harris testified that the turnstile computer record showed he passed through the turnstile after 10 a.m. and the security camera video showed him entering at 10:07 a.m. The testimony was also conflicting as to what Lizak said when Harris and O'Donnell confronted him with the evidence his time card amendment was false. Harris testified that Lizak admitted he had been late and offered no explanation, whereas Lizak stated that at that time: "I tried to explain." At the hearing, Lizak stated in great detail that he was intentionally late to work that day, that he was "right there by the building *** just walking around" and "just really hated to come in," because he was upset with his co-workers for shirking their duties and creating more work for him, a situation that he stated was a continuing problem despite his complaints about it to Harris. However, Lizak also stated that when he filled out the Kronos form just hours later, he had no recollection of his intentional late arrival that same morning after becoming upset about his work conditions. Resolving conflicting testimony and determining a witness' credibility falls within the purview of the Board.

¶ 17 Lizak also contends there was no competent evidence of misconduct. He asserts that where the turnstile and timecard records and security camera picture were not in evidence, Harris's testimony violated the best evidence rule and the proscription against hearsay. We note that Harris had personally viewed the time record and turnstile records and the security camera video. Consequently, her testimony about her observations was not hearsay where it did not rely

on the credibility of someone other than herself. *Village Discount Outlet v. Department of Employment Security*, 384 Ill. App. 3d 522, 525 (2008). Lizak correctly asserts, however, that Harris's description of timecard and turnstile records and a picture from a security camera ran afoul of the best evidence rule. The result is that the testimony was admissible, with its evidentiary flaws affecting only its weight. *Id.* at 526. Lizak contends that the evidence should be given no weight at all where it was the only evidence. However, the record demonstrates it was not the only evidence of willful misconduct. The referee could consider all of the circumstances, including the conflicting testimony about Lizak's failure to explain the falsification and the fact he submitted the false timecard information just hours after anger and resentment drove him to intentionally arrive for work late. It was the referee's duty to decide the weight to be given to the testimony and to make credibility determinations based on his personal conversations with both Harris and Lizak. The Board determined the referee's decision was supported by the record and the law, and the Board incorporated the referee's conclusions into its own decision affirming the denial of benefits. Upon reviewing the record, we cannot conclude that the factual determinations of the Board are against the manifest weight of the evidence.

¶ 18 We also conclude that Lizak's misconduct violated a reasonable policy of his employer. Harris testified that the employer's policy was that the filing of a false timecard was a basis for termination of employment. The existence and reasonableness of the employer's policy, as well as Lizak's knowledge of that policy, are not contested.

¶ 19 The referee's decision concluded that Williams Lea was harmed by Lizak's conduct. "Any worker who knowingly submits a false report of time at work has directly injured the employer's interest." On appeal, Lizak's opening brief states in an argument heading that Williams Lea was not harmed, but Lizak has advanced no argument or citation of authority in support of that bald claim. Accordingly, Lizak has waived any issue on this element. Moreover, harm to the employer need not be actual harm but may consist instead of potential harm.

Livingston, 375 Ill. App. 3d at 716. Thus, in *DeBois*, 274 Ill. App. 3d at 665-66, we concluded that where an unemployment compensation claimant had filed a false timecard claiming she was entitled to more money than she was actually owed, the Board could conclude that the claimant's actions resulted in harm to her employer.

¶ 20 Lizak contends that Williams Lea failed in its responsibility as the employer "to put on its case" at the hearing. However, Harris, the representative of Williams Lea, made a compelling case that employee misconduct precluded Lizak from entitlement to benefits. Moreover, we look at all the information contained in the record, not only at evidence presented by Williams Lea. In fact, the Act provides that even the failure of any party (other than the appellant) to appear at the hearing "shall not preclude a decision in his favor if, on the basis of all the information in the record, he is entitled to such decision." 820 ILCS 405/801 (West 2008). We have already concluded that, based on all the information in the record, Lizak's ineligibility for benefits was clearly established.

¶ 21 Lizak also complains that the referee "did nothing to elicit the most basic information." It is undisputed that the referee was required to conduct a fair hearing. *Village Discount Outlet*, 384 Ill. App. 3d at 527. We noted therein that "we do not believe that the duty of the referee to conduct a hearing that comports with due process requires him to take such an active role that all evidentiary deficiencies in *pro se* presentations are remedied." *Id.* We also reject Lizak's complaint that the record fails to show an adequate timeline. The parties do not contest that Lizak's employment was terminated on September 21, 2009. We take judicial notice that that date was a Monday. The record indicates that it was on the previous Thursday, September 17, 2009, when Lizak came in late and later turned in the false time correction sheet.

¶ 22 We conclude that the finding of the Board, that Lizak was properly disqualified from receiving unemployment benefits because he was discharged for misconduct related to his work, was not clearly erroneous. Accordingly, we affirm the decision of the circuit court.

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¶ 23 Affirmed.