

No. 1-10-1622

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DIVISION
March 31, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ANTONIO WILLIAMS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	
)	
ILLINOIS DEPARTMENT OF EMPLOYMENT)	
SECURITY, an administrative agency)	No. 10 L 50402
in the State of Illinois; DIRECTOR,)	
THE ILLINOIS DEPARTMENT OF)	
EMPLOYMENT SECURITY; BOARD OF REVIEW,)	
an administrative agency in the)	
State of Illinois; and MR. BULT'S)	
INC.,)	Honorable
)	Elmer James Tolmaire, III,
Defendants-Appellees.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Joseph Gordon
concurred in the judgment.

O R D E R

HELD: When an employee admitted a violation of his employer's zero tolerance drug policy, he was properly deemed ineligible for unemployment benefits based upon work related misconduct.

Plaintiff Antonio Williams was terminated from his position as a truck driver for Mr. Bult's, Inc. (Mr. Bult's), after his random drug test was positive for marijuana and cocaine. The Department of Employment Security's Board of Review (Board) subsequently deemed him ineligible for unemployment benefits under Section 602(A) of the Unemployment Insurance Act (Act) (820 ILCS 405/602(A) (West 2008)), because he was terminated for work related misconduct, *i.e.*, a violation of Mr. Bult's "zero tolerance" drug policy. Williams then filed a *pro se* complaint for administrative review in the circuit court. The circuit court affirmed the Board's decision. Williams now appeals *pro se* contending that he was let go because "work was very slow." He also contests the reliability of the drug test results. We affirm.

The record reveals that Williams was employed as a truck driver for Mr. Bult's from July 2006 to September 2009. He was terminated for a violation of the company's zero tolerance drug policy after his urine sample, submitted as part of a random drug test, was positive for marijuana and cocaine. Williams then applied for unemployment benefits. After he was deemed

1-10-1622

ineligible for benefits, Williams filed an administrative appeal. A Department referee then conducted a telephone hearing during which both Williams and Jeremy Eylander, Safety Manager for Mr. Bult's, testified.

Eylander testified that Williams was terminated after he failed a random drug screening. After Williams provided a sample, it was sealed in a box with his initials and signature. The box was then sent via Federal Express to DFI Medical Services in Pennsylvania. Williams's sample subsequently tested positive for cocaine and marijuana.

Williams testified that he did not "see how" the sample could have tested positive for drugs. He also indicated that he was suffering from severe back pain, was under a doctor's care, and had a prescription for Naproxen. After he ran out of his medication, he initially took two of the Tylenol 3 prescribed to his wife instead. He then took the Tylenol 3 "constantly." Although Williams initially testified that the Tylenol 3 pills contained codeine, he later indicated he did not know how he knew that the pills contained codeine. With regard to the positive result for marijuana, he explained that he ate "a lot" of hot dogs with poppy seeds.

The referee found that Williams had conceded that he took pills containing codeine prescribed for another family member in order to relieve severe back pain and then failed to inform his

employer that he was taking these pills. The referee further found that Williams committed misconduct when he continued to drive for Mr. Bult's while taking the Tylenol 3 pills. Accordingly, Williams's actions constituted misconduct connected with work and he was subject to the disqualification provisions of section 602(A) of the Act. See 820 ILCS 405/602(A) (West 2008).

Williams appealed to the Board. The Board determined that the referee's decision was supported by the record and law, incorporated it as part of the Board's decision, and affirmed the denial of benefits. Williams then filed a *pro se* complaint for administrative review in the circuit court. The court affirmed the Board.

Williams now appeals *pro se* contending that he was terminated because business was slow. He also questions the reliability of the drug test results.

This court reviews the decision of the Board, rather than that of the circuit court. *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 819 (2009). Whether an employee was terminated for misconduct under the Act is a mixed question of law and fact (*Sudzus*, 393 Ill. App. 3d at 826), to which a reviewing court applies a clearly erroneous standard of review (*AFM Messenger Service, Inc., v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001)). An agency's decision is

clearly erroneous when this court's review of the record leaves us with the definite and firm conviction that a mistake has been made. *AFM Messenger Service, Inc.*, 198 Ill. 2d at 395; see also *Randolph Street Gallery v. Zehnder*, 315 Ill. App. 3d 1060, 1064 (2000) (reviewing court should reverse only when "firmly convinced the agency has made a mistake").

"Standards of behavior that an employer has a right to expect constitute reasonable rules and policies." *Caterpillar, Inc., v. Department of Employment Security*, 313 Ill. App. 3d 645, 654 (2000); see also *McAllister v. Board of Review of the Department of Employment Security*, 263 Ill. App. 3d 207, 212 (1994) (rules forbidding transit authority employees from having drugs in their systems during working hours were a reasonable effort by the employer to ensure passenger safety and a driver's violation of the rule harmed the employer). Conduct is willful when it is a conscious act that knowingly disregards an employer's rules. *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010).

Pursuant to section 602(A) of the Act (820 ILCS 405/602(A) (West 2008)), an employee who was discharged for misconduct connected to his work cannot receive unemployment benefits. An employee commits misconduct when he (1) deliberately and willfully violates, (2) an employer's reasonable rule or policy, and (3) the violation harms the employer, or other employees, or

has been repeated by the former employee despite a warning or other explicit instructions from the employer. See 820 ILCS 405/602(A) (West 2008). This court has recognized that harm to an employer can be established by potential harm and is not limited to actual harm. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 329 (2009).

Here, the record contains Williams's signed acknowledgment that he received a copy of Mr. Bult's drug policy and that the ability to take and "pass" urine drug tests was a condition of his employment. Mr. Bult's company "Code of Conduct" also stated that reporting to work after consuming drugs was not acceptable and may lead to immediate dismissal.

The record indicates that Williams's conduct was willful in that he took prescription medication containing codeine in violation of the company's zero tolerance drug policy. *Sudzus*, 393 Ill. App. 3d at 826. Before the referee, Williams admitted that he took his wife's medication in order to address severe back pain and then went to work. The potential harm caused by such conduct included Mr. Bult's potential exposure to liability resulting from any injuries caused by Williams while he was driving his truck under the influence of prescription medication containing codeine. *Hurst*, 393 Ill. App. 3d at 329.

Although Williams argues that he was let go because business was slow, he admitted to taking the Tylenol 3 and his urine

sample tested positive for marijuana and cocaine in violation of Mr. Bult's zero tolerance drug policy. Williams also highlights the referee's questions regarding the procedures for testing his sample, and characterizes the decision to send his sample to Pennsylvania for testing as "very strange" when employees are generally sent to a local site for drug screens. However, Williams did not contest the reliability of the drug test results or the urine sample's chain of custody before the referee, and the Board did not consider the written materials Williams submitted in support of his appeal because they were not served upon Mr. Bult's. Any issue not raised before an administrative agency will not be considered for the first time on administrative review. See *Hurst*, 393 Ill. App. 3d at 328. Accordingly, as Williams failed to contest the reliability of the drug test results before the administrative agency, this court is precluded from considering the issue.

This court's review of the record has not left us with the conviction that the Board made a mistake when it deemed Williams ineligible for benefits based upon work related misconduct. *Randolph Street Gallery*, 315 Ill. App. 3d at 1064. As the Board's decision was not clearly erroneous (*AFM Messenger Service, Inc.*, 198 Ill. 2d at 395), we affirm the Board's decision.

1-10-1622

For the reasons stated above, we affirm the judgment of the Board finding Williams ineligible for unemployment benefits.

Affirmed.