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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

LARRY D. PRICE, JR.,)	Appeal from the Circuit Court
)	of Kane County.
Plaintiff-Appellee,)	
)	
v.)	No. 09—MR—521
)	
THE DEPARTMENT OF EMPLOYMENT)	
SECURITY BOARD OF REVIEW, J. HUNT)	
BONAN, Individ. and as chairman of the)	
Board of Review, WILLIAM J. NOLAN,)	
Indiv. and as a member of the Board of)	
Review, CONSTANTINE M.)	
ZOGRAFOPOULOS, Individ. and as a member)	
of the Board of Review, and ELWOOD)	
FLOWERS, SR., Individ. and as a member of)	
the Board of Review,)	
)	
Defendants-Appellants)	
)	Honorable
(Grane Transportation and Driver and Dock)	Michael J. Colwell,
Services (DDS), Defendants).)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Burke and Hudson concurred in the judgment.

ORDER

Held: Unemployment benefits were properly denied where employee committed misconduct.

The plaintiff, Larry Price, was terminated from his job with the defendant Driver and Dock Services (DDS) and filed a claim for unemployment benefits. The Board of Review of the Department of Employment Security (Department) denied him benefits on the basis that he had been terminated for misconduct. Price filed an administrative review action with the circuit court, which reversed the Board's decision. The Board now appeals that reversal to us, arguing that the Department's denial of benefits was not against the manifest weight of the evidence or clearly erroneous. We reverse the circuit court's judgment and affirm the Board's determination.

BACKGROUND

The following facts are taken from the sworn hearing that took place on May 21, 2009, before a Department referee. The employer presented four witnesses at the hearing: Art Mroz, the dispatch manager; Tom Greske, a warehouse manager who witnessed the conversation between Price and Mroz; Denitra Mister, a customer service representative who worked in the office; and Joe Garza, the human resources director, who worked in an office upstairs from the area where the conversation took place. Price testified on his own behalf.

Price began working for the employer as a truck driver in November 2006 and was fired on September 15, 2008. On Friday, September 12, 2008, Price was working. At approximately 2:30 p.m., he returned from one assignment and went to the dispatch office to get his next assignment. When he was at the dispatch window, the dispatch manager, Art Mroz, asked him where he had been the last two days (September 10 and 11, a Wednesday and a Thursday). Price, who had lupus, told Mroz that he had been at the hospital. Mroz said that he knew Price was at the hospital Thursday because he got a phone call on Thursday from Price's girlfriend, saying that Price had gone to the hospital Wednesday night. However, Mroz continued, one of the dispatchers (Ken Nowacki) told

Mroz that Price called in on Wednesday morning to say that he had overslept and was on his way in to work, but then Price never came in on Wednesday. Mroz then asked Price again why Price did not come to work on Wednesday. Price denied calling in on Wednesday or speaking with Nowacki, and said that “this” (meaning the questioning about his whereabouts) was bullshit. Mroz repeated that he just needed to know why Price did not come to work, and Price began to curse “explosively.” According to Mroz, Price’s voice was loud and he called Mroz a “motherfucker” and a “pussy.”

Price then turned and began walking toward the stairs leading up to the human resources office. Mroz walked in the same direction and stood in a doorway located between Price and the stairs. Mroz asked Price where he was going. Price told Mroz, “You better not touch me or I’ll beat your ass.” Price then pushed Mroz aside and began to climb the stairs. Greske and Mister testified that they heard the conversation and corroborated Mroz’s version as to the conversation, the profanity used, and the encounter in the doorway. However, on cross-examination, Greske agreed that he had been faxing a document when the encounter occurred and that the doorway was “right behind” him, but also stated that the fax machine was “next to” the doorway.

Part way up the stairs Price met Joe Garza, who had heard loud voices and had come out of his office to investigate. Price and Garza went to a separate room where they talked. Price was sent home. Later that day, Mroz called the police to report a battery by Price because the “situation seemed serious enough.” There was no evidence that Mroz was injured in any way by Price’s shove. On September 15, Price was called back to work and was fired. The employer submitted a copy of a January 4, 2008, letter from the employer’s director of operations to Price stating that on the previous day Price “used profanity and loud tones with the Safety Manager at the Laramie terminal” and warning him that similar conduct would not be tolerated and could be grounds for termination.

Price testified that Mroz had been looking for a reason to fire Price ever since Price got sick with lupus, and Mroz had recently written him up twice in one week for old infractions and permitted absences. He admitted saying that Mroz's questions were bullshit and that he may have used other expletives, although he did not recall using the terms "motherfucker" and "pussy." Price also maintained that profanity was common in the shop and that the language he used was "the same language that the dispatchers use with us [the drivers]." According to Price, he was trying to leave the confrontation with Mroz and go to human resources to report what he believed was another attempt to harass him, but Mroz continued to approach him and even put his hands on Price as Price was attempting to pass Mroz, which was when Price told Mroz to take his hands off Price or Price would beat his ass. Price denied pushing Mroz, and noted that Mroz did not decide to call the police until several hours after the incident. Price stated that he had filed a complaint under the federal Family and Medical Leave Act with the Department of Human Resources and the Equal Employment Opportunity Commission, and he believed that the employer was only challenging his right to unemployment benefits in retaliation for that complaint.

On May 22, 2009, the referee issued a decision finding that Price was disqualified from receiving benefits on the basis of misconduct, stating:

"In the instant case, the claimant may have been upset at a superior's behavior, however, the claimant was out of line in using profanity and threatening. *** The claimant's behavior was serious and it was misconduct."

Price appealed the referee's determination to the Board of Review. In filing his appeal Price submitted documents that he wished the Board to consider, including: a written argument noting discrepancies in the testimony of the employer's witnesses and other points; a written, unsworn

statement by fellow driver Dedrick Gordon that on the day of the incident Mroz told Gordon that Price had just “brushed against” Mroz when Price was trying to walk past Mroz; copies of the write-ups Price had received in July and August 2008 for no call/no show or unexcused absences, and the union grievance Price had filed relating to those write-ups; and a copy of his discharge instructions from the hospital dated September 11, 2008. Price did not sign the portion of the notice of appeal form certifying that he had served the notice and the documents on the employer, nor did he submit a statement explaining “why, for reasons not [his] fault and beyond [his] control, [he] was unable to introduce this information at the hearing.” Accordingly, in its initial decision, the Board stated that it did not consider Price’s written argument. The Board summarily affirmed the referee’s determination for “the reasons stated therein.”

Price then filed a timely complaint for administrative review in the circuit court. The circuit court remanded the case to the Board for reconsideration including Price’s written argument. On May 28, 2010, the Board issued a much more detailed supplemental decision in which it reviewed the evidence adduced at the hearing and considered Price’s written argument. The Board found that, although Price disputed calling Mroz a “motherfucker” and a “pussy,” the employer’s witnesses who said Price had used these terms were more credible. Stating that “[t]he claimant’s language [went] beyond what might otherwise be acceptable discourse between a truck driver and his dispatcher,” the Board confirmed its initial decision that Price had committed misconduct that disqualified him from receiving benefits. After briefing and oral argument, the circuit court found that the Board’s determination was against the manifest weight of the evidence and reversed the denial of benefits. The Department filed a timely appeal to this court.

ANALYSIS

The sole issue on appeal is whether the Board erred in finding that, on September 12, 2008, Price committed “misconduct” as that term is defined under section 602A of the Illinois Unemployment Insurance Act (Act) (820 ILCS 405/602A (West 2008)). “Misconduct” is defined in the Act as (1) “the deliberate and willful violation” of (2) a reasonable rule or policy of the employer that (3) harms the employer or is repeated after a warning. 802 ILCS 4/5/602A (West 2008). In reviewing a decision by an administrative agency, we review the final decision of that agency. Thus, we review the decision by the Board of Review, which was the Department’s final determination regarding Price’s claim, not the decision of the referee or the circuit court. *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 819 (2009). We apply differing standards of review depending on the type of issue for which review is sought. When we review factual findings and credibility determinations made by the Board of Review, we deem those findings *prima facie* correct and will only reverse if they are against the manifest weight of the evidence. *Id.*, citing *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205 (1998). Where, on the other hand, the issue is the correctness of the agency’s conclusions of law, our review is *de novo*. *Id.* Finally, where the determination is a mixed question of fact and law, we apply the “clearly erroneous” standard and will reverse only if our review of the record and the agency’s determination leaves us with the “definite and firm conviction” that the decision was a mistake. *Id.* at 820, citing *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 393 (2001). The question of whether an employee was terminated for misconduct in connection with his work involves a mixed question of law and fact, to which we apply the clearly erroneous standard of review. *Id.* at 826.

In reviewing the Board's supplemental decision, we note that the Board failed to include certain facts favorable to Price in its summary of the evidence. For instance, the Board stated that Price told Mroz that he would "beat his ass" but omitted that this threat was limited by the language, "if you touch me," and similarly noted that Mroz called the police regarding the incident but neglected to say that Mroz did not make the call until well after the incident was past. Nevertheless, the Board did not err in its overall determination that Price's use of abusive language toward Mroz, which occurred in a public area of the work site where other employees could see and hear it, coupled with the physical contact between Price and Mroz, constituted misconduct. Generally speaking, abusive language alone can constitute misconduct. See *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 558 (2006) (the use of "hostile, intimidating and vulgar language" toward a coworker was misconduct); *Greenlaw v. Department of Employment Security*, 299 Ill. App. 3d 446, 449 (1998) (employee's statement to a supervisor that the supervisor could "kiss my grits" was insubordinate and abusive, and amounted to misconduct). Although Price did not recall using some of the specific terms identified, he admitted using profanity during the confrontation. Moreover, the Board found the testimony of Mroz, Greske and Mister that Price used the terms "motherfucker" and "pussy" more credible than Price's denial, and we will not overturn that credibility determination on review. *Sudzus*, 393 Ill. App. 3d at 819.

Price argued that the use of profanity was common at the dispatch office, and thus he should not be penalized for using the same language that the dispatchers and supervisors themselves used. This might be a valid argument if the profanity at issue was simply an expletive used for emphasis, for example. In that case, an employer's usual practice of tolerating profanity might show that it did not, in fact, have a rule or policy against all use of profanity, and thus the use of expletives might not

violate the employer's *de facto* rules for the workplace. Here, however, Price was not simply using expletives for emphasis, he was using profanity in a derogatory fashion to demean his supervisor by calling him a "motherfucker" and a "pussy." The terms Price used were abusive, not simply vulgar. In *Carroll v. Department of Employment Security*, 132 Ill. App. 3d 686, 692-93 (1985), this court discussed the impact of abusive language and profanity as an expression of insubordination that can serve to challenge the authority of the supervisor. The disruptive effect on the workplace of such derogatory and abusive language is serious, and thus an employee's use of such language can amount to misconduct even when, as was the case in *Carroll*, the profanity itself was moderate. *Id.* at 693. Here, Price essentially called Mroz derogatory names in front of other employees. Regardless of the provocation Price felt Mroz had given him by allegedly harassing him and blocking his path, we agree with the Board of Review that Price's explosive response went "beyond what might otherwise be acceptable discourse." The Board did not err in concluding that this constituted misconduct under the Act.

CONCLUSION

For the reasons stated, we reverse the judgment of the circuit court of Kane County and affirm the Board of Review's denial of unemployment benefits to the plaintiff.

Reversed.