

No. 1-10-3273

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RAYMOND C. SMEJEK, JR.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	
)	
BOARD OF REVIEW, STATE OF ILLINOIS,)	
DEPARTMENT OF EMPLOYMENT SECURITY,)	No. 09 L 50748
MAUREEN O'DONNELL, Director of the Illinois)	
Department of Employment Security, and MILLENNIUM)	
PIPING, INC.,)	Honorable
)	Sanjay Tailor,
Defendants-Appellees.)	Judge Presiding.

JUSTICE JAMES FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice LAVIN and Justice STERBA concurred in the judgment.

ORDER

¶ 1 *Held:* Where evidence established that employee violated employer's policy that a drug test must be taken immediately after a workplace incident resulting in injury because test was taken 11 days after injury despite repeated demands by employer, Board's determination that employee committed misconduct thus making him ineligible for unemployment benefits was not clearly erroneous; the decision of the Board was affirmed.

¶ 2 Plaintiff Raymond C. Smejek Jr. appeals the order of the circuit court of Cook County affirming the decision of the Board of Review (the Board) of the Illinois Department of Employment Security (the Department) that denied him unemployment benefits. On appeal, plaintiff contends the Board's decision that he committed misconduct in the course of his job was clearly erroneous. We affirm.

¶ 3 The record establishes that plaintiff was employed by Millennium Piping (Millennium) as a sprinkler fitter from June 9, 2008, to July 16, 2008. On July 11, plaintiff injured his abdomen while lifting a heavy object during a job. Plaintiff submitted an incident report to receive workers' compensation benefits. On July 16, a representative of Millennium ordered plaintiff to take a drug test, which he took on July 22. The result of plaintiff's drug test is not ascertainable from the record on appeal.

¶ 4 In August 2008, plaintiff had surgery related to his work injury. When plaintiff's doctor cleared him to return to work in September 2008, plaintiff was told by Millennium that no work was available. Plaintiff applied for unemployment benefits, and Millennium challenged the payment of benefits to plaintiff, reporting to the Department that plaintiff left his job voluntarily after he had been directed to take a mandated drug test. On November 4, 2008, a Department representative found plaintiff ineligible for benefits because he did not return to work after being directed to complete a drug test.

¶ 5 A telephone hearing was held in this case before a Department referee on December 18, 2008, at which only plaintiff appeared, with no representatives of Millennium present. Based on plaintiff's testimony at that hearing, the Department issued a ruling that plaintiff was eligible to receive unemployment benefits. A rehearing was granted in light of evidence that unforeseen circumstances prevented Millennium's participation.

¶ 6 On February 17, 2009, the same Department referee conducted a telephone hearing that

included plaintiff, Chris Henricks, Millennium's office manager, and David Sherman, Millennium's president and owner. Henricks testified that plaintiff failed to return to work after he was ordered to submit to a drug test. Henricks stated the drug test was required by "company policy" and regulations of the Occupational Safety and Health Administration (OSHA) that mandated drug testing after the filing of an accident report, and, according to Henricks, the policy was written in a safety manual that plaintiff would have been given "upon request."

¶ 7 Henricks testified that when plaintiff submitted the incident report, he was told by Tony Holder, his superintendent, that he needed to complete a drug test. Henricks said Holder again told plaintiff on July 16 that he had to take a drug test immediately during the remainder of the workday. Holder told plaintiff on July 17 that he could not return to work without taking the drug test.

¶ 8 Sherman testified that plaintiff called him on July 18 to discuss the missed drug test and told Sherman he had not had time to complete it. Sherman reiterated the drug testing policy and told plaintiff not to return to work until he complied. Sherman and Holder, who was in Sherman's office when plaintiff called, both directed plaintiff to leave work immediately and report to a drug testing site that was six blocks away from plaintiff's work location.

¶ 9 Plaintiff testified that he submitted the incident report on July 14 and was told on July 16 that he immediately needed to take a drug test. Plaintiff said he did not take the test on July 16 as ordered by Sherman because by the time Sherman directed him to take the test, he had completed work for that day and was on his way home to relieve his ill wife in caring for their five young children. On July 17, plaintiff said his wife was ill and he had to stay home to care for the children and "get the kids off to school."

¶ 10 Plaintiff told Sherman he would take the test at the office of his personal physician on July 18; however, plaintiff testified that the company's officials would not allow him to take the

test there. At his doctor visit on July 18, plaintiff was diagnosed with a hernia and did not return to work thereafter. Plaintiff said he did not take the test on July 18 at the location near his work site because he had multiple jobs that day. The record also includes a report from a medical office noting that plaintiff was scheduled to take a drug test on July 21 but the test was not performed that day.

¶ 11 Plaintiff said he was not aware of a mandatory drug test and had never "signed any papers or read anything from Millennium" indicating such a test was required. He noted, though, that other companies for which he had worked require drug tests prior to beginning employment and "if you do get hurt, it's their policy that you have to take [a test]."

¶ 12 On February 18, 2009, the Department referee issued an order disqualifying plaintiff from receiving unemployment benefits under section 602(a) of the Illinois Unemployment Insurance Act (the Act) (820 ILCS 405/602(A) (West 2008)). The order stated that plaintiff's failure to report for a drug test on July 16 or the two following days as directed by Millennium constituted misconduct in connection with his work. Plaintiff appealed to the Board, which affirmed the denial of benefits. On September 29, 2010, the circuit court affirmed the decision of the Board.

¶ 13 On appeal, plaintiff contends the Board's decision that he committed misconduct relating to his job was clearly erroneous. The individual claiming unemployment insurance benefits has the burden of establishing his eligibility, and an employee discharged for misconduct is ineligible to receive those benefits. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 327 (2009).

¶ 14 This court reviews the decision of the Board, rather than of the circuit court or the referee. *Sudzus v. Department of Employment Security*, 292 Ill. App. 3d 814, 819 (2009). Whether an employee was properly 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. *Hurst*, 393 Ill. App. 3d at 327. An agency decision is clearly erroneous where a review of the entire record leaves the court with the definite and firm conviction that a mistake has been committed. *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010).

¶ 15 Misconduct under the Act involves the violation of a rule or policy that governs the individual's behavior in performance of his work. Three elements of misconduct must be established: (1) the rule or policy must be deliberately or willfully violated; (2) the rule or policy of the employer must be reasonable; and (3) the violation must have harmed the employer or it must have been repeated by the employee despite a warning or other explicit instructions from the employer. *Phistry*, 405 Ill. App. 3d at 607; 820 ILCS 405/602(A) (West 2008).

¶ 16 Plaintiff contends he did not engage in any misconduct under that standard. He first argues the evidence before the Board did not establish that Millennium had a mandatory drug testing policy. He points out that Henricks did not produce a copy of the manual at the administrative hearing and, according to her testimony, the manual was not routinely distributed to employees.

¶ 17 A reasonable rule or policy of an employer concerns "standards of behavior which an employer has a right to expect" from an employee. *Bandemer v. Department of Employment Security*, 204 Ill. App. 3d 192, 195 (1990); see also *Livingston v. Department of Employment Security*, 375 Ill. App. 3d 710, 716 (2007). An employer is not required to prove the existence of a reasonable rule or policy by direct evidence. *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 557 (2006). Moreover, a rule does not need to be written down or otherwise formalized. *Sudzus*, 292 Ill. App. 3d 814 at 827. This court may make a "commonsense determination that certain conduct intentionally and substantially disregards an employer's interest." *Phistry*, 405 Ill. App. 3d at 607.

¶ 18 Here, Henricks testified the company's policy was memorialized in a safety manual available to employees upon request. The Board's decision that a rule existed as to the drug testing of Millennium's employees upon the filing of an incident report, which occurred here, was supported by Henricks' testimony. We also note plaintiff's remark during the hearing that other employers in his industry followed a similar policy.

¶ 19 Next, as to whether plaintiff violated the company's policy, an employee willfully or deliberately violates a work rule or policy by being aware of, and consciously disregarding, that rule or policy. See *Hurst*, 393 Ill. App. 3d at 328-29. Conduct is deemed willful where it constitutes a conscious act made in knowing violation of company rules. *Phistry*, 405 Ill. App. 3d at 607.

¶ 20 Plaintiff points out that he eventually took the drug test on July 22, which was eight days after the incident that caused his injury and six days after he was first ordered to take the test by Holder, his superintendent. Nevertheless, the record demonstrates that plaintiff deliberately refused to comply with his employer's order to complete a drug test. When first ordered to take the test on July 16, plaintiff instead went home. The next day, plaintiff was told he could not return to work until he took a drug test, and plaintiff stated that he was "busy." On July 18, Sherman, the company's president, told plaintiff to leave his job site immediately and complete the test. Plaintiff did not do so. When plaintiff was told he could not complete the test at his own doctor's office and was directed to another facility, plaintiff did not do so.

¶ 21 Therefore, even though plaintiff eventually completed the test on July 22, he consistently ignored direct orders from Sherman, Millennium's president, and Holder, plaintiff's superintendent, to complete a drug test as early as July 16. Plaintiff disregarded the company's policy repeatedly despite several directives from his employer. The possibility of a test result that indicates the presence of drugs can be averted with the passage of time. Although the result

of the drug test is not apparent from the record, it is irrelevant to his analysis; by electing not to obey his employer's orders to complete the test promptly, plaintiff deliberately violated a company policy.

¶ 22 Plaintiff further asserts that Millennium failed to demonstrate that it or any of its employees suffered harm when he did not immediately take the drug test upon the company's request. Numerous cases have held that harm to an employer in this context can be established by potential harm and is not limited to actual harm. *Hurst*, 393 Ill. App. 3d at 329 (and cases cited therein).

¶ 23 Plaintiff's disregard for the drug testing policy of his employer, and the possible existence of drugs in his system during the workday, potentially could result in harm to plaintiff, his co-workers and the public if errors occur during the performance of his work as a result of plaintiff's condition. Although plaintiff contends no such harm could have occurred because, according to Sherman, he could not return to work until he completed a drug test, the subsequent completion of a drug test would not erase the potential for harm prior to the test if plaintiff had drugs in his system.

¶ 24 For all of the above reasons, the Board's determination that plaintiff's actions constituted misconduct under section 602(A) of the Act such that he should be denied unemployment benefits was not clearly erroneous. Accordingly, the decisions of the Board and the circuit court are affirmed.

¶ 25 Affirmed.