

No. 1-12-0678

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|--|---|--------------------------------|
| MARIO CORTEZ, |) | Appeal from |
| |) | the Circuit Court |
| Plaintiff-Appellee, |) | of Cook County |
| |) | |
| v. |) | |
| |) | |
| ILLINOIS DEPARTMENT OF EMPLOYMENT |) | |
| SECURITY; DIRECTOR, ILLINOIS DEPARTMENT OF |) | |
| EMPLOYMENT SECURITY; and BOARD OF REVIEW, |) | |
| |) | No. 11 L 50940 |
| Defendants-Appellants, |) | |
| |) | |
| and |) | |
| |) | |
| TOTAL SECURITY MANAGEMENT, |) | |
| |) | Honorable Robert Lopez Cepero, |
| Defendant. |) | Judge Presiding. |

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice McBride and Justice Taylor concurred in the judgment.

ORDER

¶ 1 **Held:** The decision of Board of Review of the Illinois Department of Employment Security that plaintiff was discharged for misconduct in connection with his work

and was therefore ineligible for unemployment benefits was not clearly erroneous. The Board of Review did not abuse its discretion by denying plaintiff's request to submit additional evidence.

¶ 2 This is an administrative review action. Plaintiff, Mario Cortez, was discharged by Total Security Management (TSM) for failing to return to work after his approved vacation time ended. Plaintiff filed for unemployment benefits under the Illinois Unemployment Insurance Act (the Act) (820 ILCS 405/602(A) (West 2010)). The Board of Review for the Illinois Department of Employment Security (the Board) determined that plaintiff had been discharged for work-related misconduct and denied his claim for unemployment benefits. Plaintiff sought administrative review of that decision and the circuit court of Cook County reversed the Board and granted plaintiff's claim for benefits. Defendants, the Illinois Department of Employment Security (IDES), its director and the Board, now appeal that decision. The issues raised on appeal are whether the Board's determination that Cortez was ineligible for unemployment benefits due to misconduct in connection with his work was clearly erroneous and whether the Board abused its discretion by denying Cortez's request to submit additional evidence at the administrative hearing.

¶ 3 Plaintiff worked as a security guard for TSM from December 4, 2006, until he was discharged on March 21, 2011. On January 4, 2011, plaintiff requested vacation time using a "Days Off Request Form." He requested vacation from March 9 through March 20, 2011, and indicated that he planned to return to work on March 22. Plaintiff allegedly requested this vacation time because he wanted to travel to Mexico to visit his grandfather, who was in the end

stage of chronic renal failure. However, on his vacation request form, plaintiff stated only that he was requesting vacation because he was "going out of town." On March 4, 2011, TSM denied part of plaintiff's vacation request. TSM specifically approved only one week of vacation and indicated that plaintiff was required to return to work on Tuesday, March 15. TSM's denial of the additional time was based on a company policy that vacations were not granted for more than one week at a time. Plaintiff did not return to work on March 15 and was deemed a "no call, no show" by TSM. Plaintiff's absence continued through March 19, 2011, and he returned to work on March 22.¹ When plaintiff returned to work on March 22, TSM gave him a written notice of termination that was effective March 21, 2011.

¶ 4 Plaintiff then applied to the IDES for unemployment benefits. TSM filed a protest to this claim, asserting that plaintiff had been discharged for misconduct and was therefore ineligible for unemployment benefits under the Act. TSM alleged that plaintiff's "shift was open" for 1.25 hours on March 15 due to his failure to return to work and that the open shift had left the client unprotected and "affected the business." In support of its protest, TSM submitted plaintiff's "Days Off Request Form," his termination notice and selected company rules which included TSM's "no call/no show" rule. That rule provided that an employee who failed to report to work for two consecutive days without notifying a supervisor would be terminated. TSM also submitted two accounts of the events leading to plaintiff's discharge which included an email from the TSM operations manager and an incident report prepared by a TSM captain. The email

¹March 20 and 21, Sunday and Monday, were plaintiff's normal weekend days that he was not required to work.

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stated that the manager had spoken with plaintiff in order to make certain that plaintiff understood that "tsm doesn't usually ok [vacations] two weeks in a row." In the incident report, the captain noted that he had informed plaintiff that part of his vacation request was denied. Both accounts state that plaintiff agreed to return to work on March 15, 2011.

¶ 5 An IDES claims adjudicator conducted a telephone interview with plaintiff on April 5, 2011. In the interview, plaintiff claimed that he did not know that he was required to return to work on March 15 because his supervisor was uncertain if his vacation request had been approved. However, plaintiff later told the adjudicator that his vacation request had been denied and that he was absent from work from March 9 to March 19. Plaintiff emphasized to the adjudicator that he needed the two weeks of vacation because one family member had passed away while another was sick, that he had given TSM two months notice for his vacation request and that TSM had other employees who could have covered his shift.

¶ 6 The claims adjudicator also conducted a phone interview with Bernadette Ramos, plaintiff's former supervisor and general manager of TSM. Ramos testified that plaintiff's two-week vacation request was partially denied because TSM employees were allowed only one week of vacation at a time and therefore TSM required plaintiff to return to work on March 15. Ramos testified that plaintiff told her that he would return to work on March 15.

¶ 7 The adjudicator denied plaintiff's claim for unemployment benefits. The adjudicator found that plaintiff was discharged for violating a known and reasonable company rule and that he was therefore discharged for misconduct connected with his work and ineligible for benefits.

¶ 8 Plaintiff administratively appealed that decision on April 15, 2011, arguing that his

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discharge was unfair and that he had proof that he had to leave the county for an emergency. A "Notice of Telephone Hearing" was sent to plaintiff and TSM on April 20, 2011. The notice advised plaintiff that "any documents to be entered as exhibits should be faxed or mailed to the Referee as soon as possible," and it provided the referee's fax number as well as the Appeals Group's mailing address.

¶ 9 An IDES referee conducted a telephone hearing on May 10, 2011. TSM did not participate in the hearing. The referee questioned plaintiff about the reason for his vacation request. Plaintiff responded that he requested vacation from March 9 to March 19, 2011, in order to go "out of state" for a family emergency. Plaintiff stated that the family emergency was his grandfather's chronic renal failure which was in its final stage. The referee asked plaintiff if he knew that he had to go back to work on March 15. Plaintiff replied that "they didn't say anything until March the 3rd, *** which is a week before." When asked by the referee how he responded when his vacation request was denied, plaintiff testified that he told TSM "I'm sorry, but I have to go." Plaintiff told TSM that it was an emergency involving a family member but he did not reveal the nature of the emergency to TSM because he did not feel he needed to disclose his "personal business." When the referee asked plaintiff why he wouldn't try to come back on March 15 because his job was in jeopardy, plaintiff answered, "I tried, I tried." Plaintiff further testified that he had requested his vacation months in advance so that TSM could get people to cover his shifts. Plaintiff also told the referee that he had a doctor's note certifying his grandfather's condition and asked if he should send the note to the IDES. The referee responded that if her decision was not in plaintiff's favor he could submit the note to the Board if he chose

to appeal.

¶ 10 The referee found that, based upon the preponderance of the evidence, plaintiff's actions were a deliberate and willful violation of TSM's policies. Therefore, the referee found that plaintiff was discharged for misconduct connected with his work and was ineligible for benefits.

¶ 11 Plaintiff appealed to the Board on May 18, 2011. He claimed that did not receive a fair hearing and that he was not allowed to explain his side of the story. He asked for an "in person" hearing to explain why he was discharged unfairly and to bring in evidence to show that he is eligible for unemployment benefits. The Board received plaintiff's appeal on May 31, 2011, and issued a notice of pending appeal to plaintiff and TSM on June 1, 2011. Several IDES regulations pertaining to the appeals process were attached to the notice. These included section 2720.315, which stated that the Board would consider requests by the appellant to submit additional evidence if the requests were submitted within 15 days after the appeal was filed. See 56 Ill. Adm. Code § 2720.315(b) (2010). The request had to include a summary of the evidence to be introduced and a showing that for reasons not its fault and outside of its control, the requesting party was unable to introduce the evidence at the hearing before the referee. 56 Ill. Adm. Code § 2720.315(b) (2010). The regulation finally stated that at the request of the party and for good cause shown, the Board would grant a reasonable extension of time within which to submit additional evidence. 56 Ill. Adm. Code § 2720.315(c) (2010).

¶ 12 On July 1, 2011, plaintiff filed a request to submit additional evidence to the Board. In his request, plaintiff stated that the additional evidence that he wanted to submit included a travel itinerary of his trip to Mexico City, Mexico, and a certified letter from his grandfather's doctor.

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Plaintiff also explained that he was unaware of the proper protocol for submitting evidence at the time of his administrative hearing as he had never previously applied for unemployment benefits. Attached to plaintiff's request was a certified letter from his grandfather's physician stating that the grandfather was in the final stage of chronic renal failure. Also was attached was plaintiff's travel itinerary indicating that plaintiff had purchased airplane tickets and was scheduled to depart for Mexico City, Mexico, on March 10, 2011, and to arrive back in Chicago on March 19, 2011. The itinerary showed that the round trip airplane tickets cost plaintiff \$1435. Plaintiff did not file a request for an extension of time to submit this additional evidence.

¶ 13 The Board affirmed the referee's denial of unemployment benefits to plaintiff. The Board denied plaintiff's request for oral argument and found that the referee's decision "was supported by the record and the law" and incorporated it as part of its decision to affirm the denial of benefits. The Board further denied plaintiff's request to submit additional evidence as plaintiff failed to timely file the request and he did not seek an extension of time to submit the evidence.

¶ 14 Plaintiff, through counsel, filed a complaint for administrative review in the circuit court of Cook County on August 24, 2011. Plaintiff claimed that he did not commit misconduct because his actions were not deliberate or willful, that no company rule was broken and that no harm was caused to TSM by plaintiff's absence from work on March 15, 2011. Plaintiff also claimed that the Board erred by denying his request to submit additional evidence and that TSM violated his rights under the Family and Medical Leave Act of 1993.

¶ 15 Following a hearing, the circuit court reversed the Board's decision denying plaintiff's unemployment benefits. The court found that the only evidence offered to counter plaintiff's

claim that he lacked the knowledge that he was required to return to work on March 15 was the internal incident report filed by TSM. The court found that the report was hearsay and insufficient to justify denying plaintiff's claim for unemployment benefits. Defendants now appeal that ruling.

¶ 16 On appeal, defendants contend that the Board's determination that plaintiff was discharged for misconduct was not clearly erroneous. Defendants also contend that the Board did not abuse its discretion by denying plaintiff's request to submit additional evidence. Plaintiff responds that he did not knowingly violate a TSM rule and that his failure to report to work did not harm TSM.

¶ 17 Our review is limited to the final determination of the Board. *Oleszczuk v. Department of Employment Sec.*, 336 Ill. App. 3d 46, 50 (2002). The Board's factual findings are considered *prima facie* true and correct and will not be reversed unless they are against the manifest weight of the evidence. *Livingston v. Department of Employment Security*, 375 Ill. App. 3d 710, 714 (2007). A finding is against the manifest weight of the evidence if the opposite conclusion is clearly evident. *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 53 (2009). The ultimate question of whether an employee was properly discharged for misconduct involves a mixed question of law and fact to which we apply the "clearly erroneous" standard of review. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001); *Oleszczuk*, 336 Ill. App. 3d at 50. An agency decision will be deemed clearly erroneous only where a review of the record leaves the court with a definite and firm conviction that a mistake has been committed. *AFM Messenger Service*, 198 Ill. 2d at 395.

¶ 18 Receipt of unemployment benefits is conditioned on eligibility under section 602(a) of the Act. *Grigoleit Co. v. Department of Employment Security*, 282 Ill. App. 3d 64, 68 (1996). Section 602(a) of the Act disqualifies a former employee from receiving unemployment benefits if his employment is terminated due to misconduct in connection with his work. 820 ILCS 405/602(A) (West 2010). Misconduct is defined as (1) a deliberate and willful violation of (2) the employer's reasonable rule or policy (3) that harms the employer or other employees or has been repeated by the former employee despite a warning or other explicit instruction from the employer. 820 ILCS 405/602(A) (West 2010). The person seeking unemployment benefits has the burden of establishing his eligibility. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 327 (2010).

¶ 19 We begin by reviewing the Board's determination that plaintiff deliberately and willfully violated TSM's order that he return to work on March 15. An employee willfully or deliberately violates a work rule or policy by being aware of, and consciously disregarding, that rule. *Odie v. Department of Employment Security*, 377 Ill. App. 3d 710, 713 (2007). In this case, the Board found that plaintiff knew he was required to return to work on March 15. This was a factual finding that was not against the manifest weight of the evidence. Although plaintiff initially told the claim adjudicator that he did not know he was required to return to work on March 15, he later told the adjudicator that his vacation request had been denied. More importantly, in the subsequent telephone hearing before an IDES referee, plaintiff was asked if he knew he was required to return to work on March 15. He replied that "they didn't say anything until March the 3rd *** which is a week before." When asked by the referee how he responded when his

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vacation request was denied, plaintiff testified that he told TSM "I'm sorry, but I have to go."

The Board could reasonably infer from these statements that plaintiff knew he was required to return to work on March 15. Additionally, when the referee asked plaintiff why he did not try to return to work on March 15 if his job was in jeopardy, plaintiff responded, "I tried, I tried."

Again, this statement demonstrated plaintiff's knowledge of TSM's directive that he return on March 15. It was the Board's responsibility to determine the credibility of the witnesses and resolve conflicts in the testimony. *Hurst*, 393 Ill. App. 3d at 329.

¶ 20 Given that plaintiff knew he was required to work on March 15, the Board could have reasonably concluded that plaintiff deliberately and willfully violated a TSM directive when he failed to report to work on March 15 that day and remained away from work through March 19. Plaintiff's failure to do so violated TSM's "no call/now show" rule and amounted to insubordination. This was sufficient to allow the Board to find that plaintiff willfully and deliberately violated a reasonable company directive. See *DeOliveira v. State Board of Education*, 158 Ill. App. 3d 111, 125 (1987) (insubordination includes a willful disregard of employer's express or implied directions); *Walshall v. Department of Labor*, 146 Ill. App. 3d 701, 703-04 (1986) (plaintiff's conduct, repeated after being warned that it violated company policy, constituted insubordination sufficient to disqualify him from benefits). Insubordinate behavior constitutes misconduct and generally disqualifies a claimant from benefits because it violates the standards of behavior an employer has a right to expect from its employees. See *Hurst*, 393 Ill. App. 3d at 329; *Greenlaw*, 299 Ill. App. 3d at 448-49; *Carroll v. Board of Review*, 132 Ill. App. 3d 686, 692 (1985). In this case, by failing to report to work, plaintiff showed a serious and

deliberate disregard for the standards of behavior that TSM had a right to expect of its employees and a substantial disregard of TSM's interests in having its employees report for their assigned duties and in maintaining an orderly workplace.

¶ 21 Plaintiff challenges the reasonableness of TSM's vacation policy, which allowed its employees only one week of vacation at a time. However, plaintiff was discharged for failing to report to work when he was directed to by TSM. Regardless of the reasonableness of the vacation policy, it was entirely reasonable for TSM to expect its employees to report for work and to not disregard TSM's assigned work schedules. See *Sudzus v. Department of Employment Sec.*, 393 Ill. App. 3d 814, 827 (2009) (rules and policies do not necessarily need to be formal or written down and can be inferred from standards of behavior an employer has the right to expect); *Greenlaw*, 299 Ill. App. 3d at 448 (the court may determine the existence of such rules or policies by a commonsense realization that certain conduct intentionally and substantially disregards an employer's interests).

¶ 22 Finally, the Board could have reasonably concluded that plaintiff's failure to report to work harmed TSM. See 820 ILCS 405/602(A) (West 2010) (misconduct is a willful violation of an employer's rule that harms the employer or other employees or has been repeated by the former employee despite a warning or other explicit instruction from the employer). In its protest in response to plaintiff's application for unemployment benefits, TSM asserted that as a result of plaintiff's absence from work, his "shift was open for 1.25 [hours]" and the open shift "left [the] client unprotected and affected the business." Thus, by failing to report to work at his assigned time, plaintiff engaged in insubordinate behavior that caused actual harm to TSM's interest in

maintaining an orderly workplace. See *Hurst*, 393 Ill. App. 3d at 329 (insubordinate behavior by employee harms employers interest in maintaining an orderly workplace); *Livingston*, 375 Ill. App. 3d at 717 (employee's actions which deprived employer of employee's services amounted to actual harm within the meaning of the Act). Moreover, the weight of authority in Illinois misconduct cases recognizes that "harm to the employer can be established by potential harm and is not limited just to actual harm." *Hurst*, 393 Ill. App. 3d at 329 (collecting cases). Plaintiff's security shift was left unattended for 1.25 hours when he did not return to work on March 15, 2011. The potential harm to TSM caused by such conduct included potential exposure to liability resulting from any injuries caused by plaintiff's security shift remaining unattended. See *Hurst*, 393 Ill. App. 3d at 329 (potential harm to employer caused by employee's failure to report to his supervisor his arrest for driving while intoxicated included potential exposure to liability from injuries caused by plaintiff while driving without a valid license in performance of his work duties).

¶ 23 For these reasons, we find that the Board's determination that plaintiff was discharged for misconduct in connection with his work and was therefore disqualified from receiving unemployment benefits was not clearly erroneous.

¶ 24 We next consider whether the Board abused its discretion by denying plaintiff's request to submit additional evidence. We find that it did not. When plaintiff appealed to the Board, he received a copy of the IDES regulations pertaining to the appeals process. Among other things, those regulations stated that the Board may exercise its discretion and accept additional evidence in hearing appeals from a referee's decision. 820 ILCS 405/803 (West 2010). The request to

accept additional evidence must be filed 15 days after the appeal is filed. 56 Ill. Adm. Code § 2720.315(b) (2010). Finally, at the request of the party and for good cause shown, the Board may grant a reasonable extension of time within which to submit additional evidence. 56 Ill. Adm. Code § 2720.315(c) (2010).

¶ 25 In this case, Plaintiff filed his appeal on May 31, 2011, and he filed his request to submit additional evidence over 30 days later on July 1, 2011. Plaintiff did not file a request for an extension of time. Under these circumstances, the Board properly denied plaintiff's request to submit additional evidence and therefore did not abuse its discretion. See, *e.g.*, *White v. Department of Employment Security*, 376 Ill. App. 3d. 668, 672 (2007) (finding that the Board properly denied the claimant's request to submit additional evidence where that request was not timely and no request for an extension of time was filed).

¶ 26 Plaintiff raises a number of new arguments in this court. These include that unlike paid vacation, TSM does not limit the number of "regular days off" and that the extra vacation days he took off should have been counted as "regular days off." He also claims that his vacation request form contains notes from TSM indicating only that he would not be paid for the second week of vacation. Therefore, plaintiff argues, TSM "violated its own policy" when it discharged him for taking extra vacation days. However, these arguments were not raised before the administrative agency. Issues or defenses not raised before the administrative agency will not be considered for the first time on administrative review. *Carpetland U.S.A., Inc. v. Illinois Department of Employment Security*, 201 Ill. 2d 351, 396-397 (2002). Therefore we will not consider these arguments.

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¶ 27 Finally, defendants direct a number of challenges to the circuit court's decision reversing the Board's determination that plaintiff engaged in misconduct. However, as noted, our review is limited to the final determination of the Board. See *Oleszczuk*, 336 Ill. App. 3d at 50. Therefore we do not need to consider the propriety of the circuit court's decision.

¶ 28 For the reasons stated, we reverse the circuit court of Cook County's reversal of the Board's decision.

¶ 29 Circuit court decision reversed; Board decision affirmed.