2013 IL App (1st) 121149-U

FIFTH DIVISION
March 8, 2013

No. 1-12-1149

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

RONALD BATES,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	
ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; DIRECTOR OF ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; BOARD OF REVIEW; and COOK-DUPAGE TRANSPORTATION CO., INC.,	)	No. 11 L 51475
	)	Honorable
	)	Daniel T. Gillespie,
Defendants-Appellees.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Palmer concurred in the judgment.

O R D E R

¶ 1 *Held*: Plaintiff's willful violation of a reasonable company policy constituted misconduct in connection with his work and disqualified him from unemployment benefits; judgment affirmed.

¶ 2 Plaintiff Ronald Bates filed a complaint for administrative review seeking to reverse a decision by the Board of Review (Board) of the Department of Employment Security (Department) that he was ineligible for unemployment benefits because he was discharged for

misconduct in connection with his work pursuant to section 602A of the Illinois Unemployment Insurance Act (Act) (820 ILCS 405/602A (West 2008)). The circuit court affirmed the Board's decision, and Bates, *pro se*, now challenges the propriety of that order on appeal.

¶ 3 Preliminarily, we note defendants' assertion that plaintiff's brief should be stricken or his argument forfeited for failure to comply with the supreme court rules governing appellate briefs. Although it is within our discretion to strike plaintiff's brief or to dismiss this appeal based on plaintiff's failure to comply with the requirements for appellate briefs as stated in Illinois Supreme Court Rule 341(h) (July 1, 2008), we will not do so here, where we have the benefit of the record before us and defendants' cogent brief. *Budzileni v. Department of Human Rights,* 392 Ill. App. 3d 422, 440-41 (2009).

¶ 4 The record shows that Bates transported disabled persons pursuant to a contract between his employer, Cook-DuPage Transportation Company, Incorporated (CDT), and Pace, a para-transit service. Bates worked for CDT from September 22, 2008 to June 24, 2011, when he was discharged for violating CDT's alcohol policy. Because of the safety-sensitive nature of transporting disabled persons, CDT drivers are subject to the Federal Transportation Administration (FTA) drug and alcohol policies for commercial vehicles. The FTA policies require termination for blood-alcohol levels above 0.04. Bates' blood-alcohol level was 0.056 on June 24, 2011, which resulted in his discharge from CDT. Bates applied for unemployment benefits and a claims adjuster found him ineligible. Bates asked for reconsideration, and a telephone hearing was conducted by a Department referee.

¶ 5 At the hearing, Ken Pittman testified on behalf of CDT that Bates was discharged after failing a blood-alcohol test that was ordered based on a reasonable suspicion that he had alcohol in his system. Pittman explained that CDT has a zero-tolerance policy regarding alcohol use and

Bates was given a copy of that policy during training. Pittman also stated that CDT vehicles are considered commercial vehicles.

¶ 6 Myron Mathis testified on behalf of CDT that he saw Bates on the day he was discharged. He noticed that Bates' eyes were glassy and red, his face was flush, he smelled of alcohol and appeared disheveled. Although Bates denied having alcohol in his system, blood-alcohol tests showed the contrary.

¶ 7 Bates testified that he drank the last of four beers about 11 p.m., before reporting for work at 6:45 the next morning. On June 24, 2011, that morning, he was driving a company van and was instructed to return to the office after reporting that he felt ill. Upon his return, he was sent for the blood-alcohol test that resulted in his discharge.

¶ 8 The Department referee subsequently affirmed the denial of unemployment benefits under section 602A of the Act (820 ILCS 405/602A (West 2008)). The referee found that plaintiff's drinking the night before he knew he had to work at 6:45 a.m. showed a willful and deliberate violation of a known and reasonable company policy, which amounted to misconduct in connection with his work. The referee further found that plaintiff's misconduct harmed his employer in several ways, *i.e.,* CDT would have been liable for any passenger injuries if Bates had an accident and CDT's contract with Pace would have been jeopardized.

¶ 9 In this challenge to that ruling, we observe that our review is limited to the propriety of the Board's decision. *Oleszczuk v. Department of Employment Security,* 336 Ill. App. 3d 46, 50 (2002). The question of whether an employee was properly terminated 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, 385 (2001); *Oleszczuk,* 336 Ill. App. 3d at 50. An agency decision may be deemed clearly erroneous only where a review of the record leaves the reviewing court with a definite and firm conviction

that a mistake has been committed. *AFM Messenger, Inc.,* 198 Ill. 2d at 395. For the reasons that follow, we find this is not such a case.

¶ 10 Under the Act, misconduct is defined as a deliberate and willful violation of a reasonable rule or policy that harms the employer or has been repeated by the employee despite previous warnings. 820 ILCS 405/602A (West 2008); *Hurst v. Department of Employment Security,* 393 Ill. App. 3d 323, 327 (2009). Standards of behavior that an employer has a right to expect from its employees constitute reasonable rules and policies. *Pesoli v. Department of Employment Security,* 2012 IL App (1st) 111835, ¶ 31.

¶ 11 Applying these principles, we find that the Board's decision that Bates was disqualified from receiving benefits under section 602A of the Act was not clearly erroneous. The evidence adduced at the telephone hearing established that Bates was aware of CDT's zero-tolerance drug and alcohol policy and, nonetheless, reported for work with alcohol in his system. Both CDT representatives testified to the existence of this policy (*Hurst,* 393 Ill. App. 3d at 329), and Bates does not challenge its reasonableness. Although Bates argues that the zero-tolerance policy does not apply to him because he was not driving a commercial vehicle, but a company van, and that he should have been sent home rather than tested for alcohol, he presents no relevant evidence to support his assertion, and the record evidence shows otherwise. Bates' willful violation of the reasonable drug and alcohol policy placed his disabled passengers at risk of injury and exposed CDT to liability, which amounted to misconduct disqualifying him from receiving unemployment benefits. *Robinson v. Department of Employment Security,* 264 Ill. App. 3d 659, 661-62 (1994). Accordingly, we affirm the circuit court's affirmance of the Board's determination to that effect.

¶ 12 Affirmed.