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2013 IL App (3d) 120298-U

Order filed February 7, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

MARK GREPARES,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellant,)	Will County, Illinois,
)	
v.)	
)	
ILLINOIS DEPARTMENT OF)	Appeal No. 3-12-0298
EMPLOYMENT SECURITY, an)	Circuit No. 12-MR-26
administrative agency in the State of Illinois;)	
DIRECTOR OF ILLINOIS DEPARTMENT)	
OF EMPLOYMENT SECURITY; BOARD)	
OF REVIEW; and SCHNEIDER LOGISTICS)	Honorable
C/O UC EXPRESS ADP, INC.,)	Barbara Petrunaro,
)	Judge, Presiding.
Defendants-Appellees.)	

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* The finding by the Illinois Department of Employment Security that a former employee was ineligible for unemployment insurance benefits because he was discharged for misconduct was upheld on appeal because the referee's conclusion that the employee refused to take a breath alcohol test, and the refusal was a violation of a known and reasonable employer policy, was not clearly erroneous.

¶ 2 The plaintiff, Mark Grepares, appeals from a circuit court decision affirming the decision of the Board of Review of the Illinois Department of Employment Security (IDES) that Grepares was ineligible for unemployment insurance benefits because he was discharged for misconduct as defined in section 602(A) of the Unemployment Insurance Act (820 ILCS 405/602(A) (West 2010)).

¶ 3 **FACTS**

¶ 4 Grepares was an employee of the defendant, Schneider Logistics. Grepares was randomly selected for drug testing pursuant to Schneider Logistics's drug and alcohol policy. He was given a Testing Notification Form, wherein Grepares' name was filled in, as was the date, time, and location for the test. Under the "Type of Test," two boxes were checked in the "Random" row: Non-DOT Urine Drug Screen and Non-DOT Breath Alcohol. Grepares went to the clinic for the testing, but only took the urine test. Thereafter, Grepares was discharged for refusing to take the breath alcohol test.

¶ 5 Grepares filed a claim for unemployment insurance benefits with the IDES. Schneider Logistics objected on the basis that Grepares was discharged for misconduct because he refused to take the breath alcohol test. A claims adjudicator with IDES determined that Grepares was eligible for benefits because there was no evidence that he failed a drug test. Schneider Logistics administratively appealed, arguing that Grepares was discharged for refusing to take the test, not for failing it.

¶ 6 The matter was heard by an IDES referee. Mike Lempke, a Schneider Logistics operations manager, testified that a random drug testing policy was instituted at Schneider

Logistics after Greparaes was already an employee. The policy was announced several times, and a copy of the policy was posted in the main hallway where all announcements were posted. The policy provided that an employee would be discharged if he refused to take a random drug test. Lempke testified that Greparaes was randomly selected and given the Testing Notification Form. Thereafter, the clinic where Greparaes went for his drug testing notified Schneider Logistics that Greparaes refused to take the non-DOT breath alcohol test. Lempke also testified that he asked Greparaes whether he had refused the test, and Greparaes said he refused to take it because it was not marked on the Testing Notification Form. According to Lempke, the clinic also sent Schneider Logistics a breath alcohol testing form, which indicated that Greparaes refused to take the breath alcohol test. That form was admitted as Exhibit B, but it is not contained in the record on appeal, so cannot be considered by this court.

¶ 7 Greparaes confirmed that he was given the Testing Notification Form by a supervisor at Schneider Logistics, but he testified that he did not look at the contents of the form. Greparaes took the urine test as requested at the clinic, but he testified that he was never asked to take a breath alcohol test, so he never refused such a test. As for the urine test, Greparaes testified that he initialed the label on the bottle, and signed the chain of custody form. He claimed to not have seen Exhibit B, the breath alcohol testing form indicating his refusal, until after his discharge. Upon returning to Schneider Logistics, Greparaes handed the chain of custody form to a supervisor and went back to work. According to Greparaes, he told Lempke that he was never asked to take a breath alcohol test, and he never told Lempke that he refused such a test.

¶ 8 The referee determined that Greparaes was disqualified from receiving unemployment insurance benefits because he was discharged for misconduct as defined in section 602(A) of the

Unemployment Insurance Act (820 ILCS 405/602(A) (West 2010)). The referee found that Grepare's testimony was not consistent nor credible, and believed the testimony of Lempke that Grepare stated that he refused the breath alcohol test. Also, the referee did not believe that the Testing Notification Form, where the breath alcohol test was checked, was altered after the form was turned over to the clinic.

¶ 9 Grepare appealed to the IDES Board of Review. The Board of Review found that the referee's decision was supported by the record and the law. The Board incorporated the referee's decision as part of its own decision, and affirmed the denial of benefits. Grepare filed a complaint in the circuit court, seeking administrative review of the decision of the Board of Review. The circuit court heard arguments, and issued an order finding that the decision of the Board was not clearly erroneous. Thus, the circuit court affirmed the decision of the Board of Review. Grepare appealed.

¶ 10 ANALYSIS

¶ 11 Grepare argues that the circuit court erred in affirming the decision of the Board of Review. Grepare argues that the State and Schneider Logistics failed to prove beyond a reasonable doubt that any misconduct occurred, that there was any wilful misconduct, and that he was ever requested to take a breath alcohol test. The State argues that the Board's decision that Grepare was ineligible for unemployment insurance benefits because he was discharged for misconduct was neither against the manifest weight of the evidence nor clearly erroneous.

¶ 12 On administrative review, this court reviews the final decision of the administrative agency, not the decision of the circuit court. *520 South Michigan Ave. Assocs. v. Department of Employment Security*, 404 Ill. App. 3d 304 (2010). The applicable standard of review depends

upon whether the question presented is one of fact, one of law, or a mixed question of fact and law. *520 South Mich. Ave. Assocs.*, 404 Ill. App. 3d at 312. The administrative agency's factual findings are deemed to be prima facie true and correct, and review is limited to ascertaining whether such findings are against the manifest weight of the evidence. *City of Belvidere v. Illinois State Labor Relations Bd.*, 181 Ill. 2d 191 (1998). The administrative agency's findings on questions of law are not entitled to such deference, and are reviewed *de novo*. *City of Belvidere*, 181 Ill. 2d at 205. A clearly erroneous standard of review is applied to mixed questions of law and fact. *Id.*

¶ 13 The question of whether an employee was properly terminated for misconduct in connection with his work involves a mixed question of law and fact, thus we apply the clearly erroneous standard of review. *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814 (2009). Under the Unemployment Insurance Act, an employee who is discharged for misconduct connected with his work is ineligible for benefits. 820 ILCS 405/602(A) (West 2010). Misconduct under the Unemployment Insurance Act is defined as: (1) a deliberate and willful violation of a rule or policy; (2) the rule or policy was reasonable; and (3) the violation either had harmed the employer or was repeated by the employee despite previous warnings. 820 ILCS 405/602(A) (West 2010); *Sudzus*, 393 Ill. App. 3d at 826.

¶ 14 There is no real argument that Schneider Logistics' drug testing policy was anything but reasonable. The primary point of contention is whether Gre pares deliberately and willfully violated that policy. Schneider Logistics presented evidence that it instituted a random drug testing policy after Gre pares was hired. That policy provided that any employee who refused to test would be discharged. The policy was announced and posted. The referee found that

Grepares was not consistent nor credible, and he believed the testimony of Lempke that Grepares said he refused the breath alcohol test. Also, the referee concluded that the breath alcohol test was marked on the Testing Notification Form given to Grepares, and that it was not altered after the fact. The referee's conclusion, after hearing the witnesses, that Grepares's conduct in refusing the breath alcohol test was a violation of a known and reasonable employer policy was not clearly erroneous. See *Sudzus*, 393 Ill. App. 3d at 826 (an employee's misconduct is willful if he is aware of a rule and disregards it anyway).

¶ 15 With regard to the third element for finding misconduct under the Unemployment Insurance Act, Grepares argues that there was no evidence of a repeated violation or proof of harm, or potential harm, to Schneider Logistics. The State points out that the policy was instituted by Schneider Logistics to provide a drug and alcohol free environment for its workers and customers. The refusal to take a breath alcohol test, with a more immediate result than a urine test, is sufficient evidence of potential harm to Schneider Logistics' other employees and customers.

¶ 16 CONCLUSION

¶ 17 The judgment of the circuit court of Will County is affirmed.

¶ 18 Affirmed.