

2014 IL App (1st) 123017  
No. 1-12-3017  
March 28, 2014

SIXTH DIVISION

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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VICTOR QUEZADA,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 L 50840
	)	
ILLINOIS DEPARTMENT OF	)	
EMPLOYMENT SECURITY, DIRECTOR OF	)	Honorable
ILLINOIS DEPARTMENT OF SECURITY,	)	Robert Lopez Cepero,
and BOARD OF REVIEW,	)	Judge Presiding.
	)	
Defendants-Appellants,	)	
	)	
(Home Depot USA, Inc. c/o UC Express,	)	
	)	
Defendant).	)	

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JUSTICE HALL delivered the judgment of the court.  
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

**O R D E R**

¶ 1 **HELD:** Where plaintiff's willful violation of employer's policy against soliciting business for personal gain constituted misconduct in connection with his work and disqualified him from unemployment benefits, the circuit court's judgment was reversed.

¶ 2 The Board of Review of the Illinois Department of Employment Security (Board) found plaintiff, Victor Quezada, ineligible to receive unemployment Benefits under section 602A of the Illinois Unemployment Insurance Act (Act). 820 ILCS 405/602A (West 2012). The circuit court reversed the Board's decision. On appeal, defendants (the Board and the Illinois Department of Employment Security (Department)) contend that the Board's finding that Quezada was discharged for misconduct was not clearly erroneous. We agree with defendants and uphold the Board's decision.

¶ 3 Although Quezada has not filed a brief, we will proceed under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 4 The record shows that Quezada worked as a service technician for a Home Depot store located near Elston Avenue and Leavitt Street in Chicago from September 29, 2003, until January 17, 2012, when he was discharged. Quezada's job responsibilities included servicing and repairing tools rented from Home Depot, and providing customer service. At the time he was discharged, Quezada was working from 6 a.m. to 10 p.m. and earning \$19 per hour.

¶ 5 Included in the record are two written statements. In the first statement, Quezada initialed the sections that indicated he offered to repair a customer's drill without following proper procedures, *i.e.*, he diagnosed the tool while on the clock without a customer agreement or proof of taking the tool, and gave the customer his business card for a company named "The Dr. Tools Clinic," which included his name, two phone numbers, and an address of 1611 South 51st Avenue in Cicero, IL. Quezada refused to sign or initial the sections of

the statement indicating that he understood his actions were not part of Home Depot's policy, and that he understood Home Depot had a no solicitation policy. The second statement, which was dated January 17, 2012, and signed by Quezada, indicated that a customer approached Quezada with questions about how to repair a drill, and Quezada gave the customer his personal business card. The record also included a January 18, 2012 "performance/discipline notice," signed by Quezada and a manager, stating that Quezada was terminated for violating the company's conflict of interest rule.

¶ 6 Following his discharge, Quezada applied for unemployment benefits with the Department, and the employer objected. A claims adjudicator found Quezada eligible for benefits because his attempt to arrange a side job at work was not willful or deliberate.

¶ 7 The Department appealed, and on March 20, 2012, a telephone hearing was conducted by a Department referee. At this hearing, Patricio Ramirez, the asset protection manager at the subject Home Depot, testified that an investigation into Quezada's conduct at work was initiated after a customer gave an assistant store manager Quezada's business card, which was labeled "Dr. Tools Fix-It Shop," and told the assistant manager that he was picking up a tool. Ramirez went to the area where the Home Depot tools were repaired and observed the customer's drill, which was taken apart, as well as a Home Depot display tool, which was also disassembled. Ramirez approached Quezada and asked him if he repaired tools for his own customers at work. Quezada responded negatively, but, when Ramirez presented Quezada with the business card, Quezada admitted that the business on the card belonged to him and that he was "trying to help out a customer." Quezada also admitted that he knew he was not allowed to solicit business at work.

¶ 8 Ramirez further testified that employees are not allowed to solicit customers or work for non-Home Depot customers while "on their clock," and that Quezada was made aware of this policy through "communications" and his "everyday job duties." Home Depot was harmed by Quezada's conduct because he was performing work not authorized by Home Depot during company time, and receiving pay for this work. Additionally, a customer could get hurt using a tool that was improperly repaired by Quezada.

¶ 9 Al Stermer, the manager at the subject Home Depot, testified that the customer that entered Home Depot with Quezada's business card stated that Quezada was repairing his personal tool, and that he came to pick it up and pay Quezada for the repair. Stermer discussed the incident with Quezada at the point of termination, and Quezada admitted to the allegations.

¶ 10 Quezada was disconnected twice during the telephone hearing. After the second time, the referee did not call Quezada back, and Quezada never testified at the hearing.

¶ 11 During closing statements, Stermer argued that Quezada was dismissed for soliciting customers because he was working for his own personal client while at Home Depot, and there was a liability concern because Quezada was performing this personal work at the store.

¶ 12 In setting aside the claims adjudicator's determination that Quezada was eligible for benefits, the referee found that Home Depot discharged Quezada for misconduct. In so finding, the referee held that the employer's witnesses credibly testified about the events that led to Quezada's discharge, and that Quezada's actions constituted a deliberate and willful disregard of the employer's interests.

¶ 13           Quezada appealed the referee's decision to the Board. In the written argument attached to his appeal, Quezada argued that when the subject customer approached him, he offered to troubleshoot the tool, but not repair it for him. The customer asked Quezada how to contact him, and Quezada responded by telling him to call Home Depot. However, when the customer asked for Quezada's personal number, he provided it because he was unaware this was against Home Depot policy. Quezada further stated that Home Depot wanted to discharge him because he was older and one of the higher earning customer representatives.

¶ 14           The Board affirmed the referee's decision, finding that Quezada took in tools from Home Depot's customers without following Home Depot's rules, and that it was more likely than not that Quezada was paid by the customers to repair their tools. The Board further found that the evidence was sufficient to establish that Quezada acted in deliberate violation of Home Depot's rules, and that his actions harmed Home Depot's interests.

¶ 15           Quezada filed a complaint for administrative review of the Board's decision in the circuit court. On September 11, 2012, the circuit court reversed the Board's decision, finding that a single unsupported hearsay statement was insufficient to serve as credible harm to the employer. This appeal follows.

¶ 16           We review the final decision of the administrative agency, *i.e.*, the Board, and not the decision of the circuit court. *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010). The applicable standard of review depends on the issue raised. This court reviews pure questions of law *de novo* (*Village Discount Outlet v. Department of Employment Security*, 384 Ill. App. 3d 522, 525 (2008)), but the Board's findings of fact are governed by a different standard of review, *i.e.*, they are entitled to great deference and will

be affirmed unless they are against the manifest weight of the evidence (*Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008)).

¶ 17 The question of whether an employee was disqualified from unemployment benefits for misconduct presents a mixed question of law and fact and is subject to the "clearly erroneous" standard of review. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001). An agency's decision may be deemed clearly erroneous only where the reviewing court is left with the definite and firm conviction that a mistake has been made based on the entire record. *AFM Messenger Service*, 198 Ill. 2d at 395. For the reasons which follow, we find that this is not such a case.

¶ 18 To be ineligible for unemployment benefits under section 602A of the Act, a claimant's cause of discharge must be related to work misconduct, which deliberately and willfully violates a reasonable work rule or policy governing work-related behavior. 820 ILCS 405/602A (West 2012); see *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 557 (2006) (stating that a reasonable work policy does not need to be written or otherwise formalized). Further, such violation must harm the employer or other employees, or must be repeated after a warning from the employer. 820 ILCS 405/602A (West 2012). Further, such violation must harm the employer or other employees, or must be repeated after a warning from the employer. 820 ILCS 405/602A (West 2012).

¶ 19 At the hearing, Ramirez and Stermer essentially testified that Quezada was observed at Home Depot servicing a tool for a customer for personal gain. In particular, a customer gave an assistant manager Quezada's personal business card and told the manager that he was picking up a tool. After Ramirez confronted Quezada with the business card, Quezada admitted that he was trying to help a customer and knew that he could not solicit personal

business at work. The employer was harmed by Quezada's conduct because he was performing work not authorized by Home Depot during company time, and receiving payment for that work. Additionally, Home Depot could be liable if a customer injured himself on a tool improperly repaired by Quezada. Quezada did not testify at the hearing, but his written statements indicated that he was unaware his conduct was against Home Depot policy, or that there was a no solicitation policy.

¶ 20 It is the responsibility of the administrative agency to weigh the evidence, determine the credibility of witnesses, and resolve conflicting testimony. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 329 (2009). Here, after considering the testimony of Ramirez and Stermer during the telephone hearing, the Board affirmed the decision of the referee finding in favor of the employer. In doing so, the Board specifically found that Quezada deliberately failed to follow the employer's rules when he took tools from the employer's customers, and it was more likely than not that Quezada was paid by the customers. The Board further found that Home Depot was harmed by Quezada's conduct. After reviewing the record, and deferring to the Board's assessment, we cannot say that this conclusion was against the manifest weight of the evidence. *Caterpillar, Inc. v. Doherty*, 299 Ill. App. 3d 338, 344 (1998).

¶ 21 Considering the Board's findings as *prima facie* true and correct (*Horton v. Department of Employment Security*, 335 Ill. App. 3d 537, 540 (2002)), we find that the Board's determination that Quezada was ineligible for unemployment benefits was not clearly erroneous (*AFM Messenger Service*, 198 Ill. 2d at 395). Quezada knowingly violated a company policy and harmed Home Depot by soliciting Home Depot customers for his personal business.

¶ 22 For the foregoing reasons, we reverse the circuit court's judgment and uphold the Board's decision disqualifying Quezada from receiving unemployment benefits.

¶ 23 Circuit court reversed; Board's decision confirmed.