

No. 1-13-1187

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

VICTOR RAMIREZ,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	Nos. 12 L 50973
)	12 L 50976
ILLINOIS DEPARTMENT OF EMPLOYMENT)	
SECURITY; DIRECTOR, ILLINOIS DEPARTMENT)	
OF EMPLOYMENT SECURITY; BOARD OF REVIEW;)	
And MENARD, INC.,)	Honorable
)	Eileen O'Neill Burke,
Defendants-Appellees.)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Where the record shows plaintiff was dismissed from his job for repeatedly violating his employer's tardiness policy, he was discharged for misconduct, and the Board of Review's final administrative decision denying him unemployment insurance benefits is affirmed.

¶ 2 Plaintiff Victor Ramirez appeals from an order of the circuit court affirming a final administrative decision by defendant, the Board of Review of the Illinois Department of Employment Security (the Board). The Board found that plaintiff was discharged for

misconduct connected with his work, and thus, ineligible for unemployment insurance benefits because he repeatedly violated his employer's tardiness policy. On appeal, plaintiff contends his tardiness was not misconduct because it was not an intentional act that was willful and deliberate, but instead, occurred because he overslept after working long hours the previous day. We affirm.

¶ 3 The record shows that plaintiff was employed as a salesman and delivery coordinator for Menards from May 21, 2008, until July 25, 2011, when he was discharged after arriving late for work. Plaintiff applied to the Illinois Department of Employment Security (IDES) for unemployment insurance benefits claiming he was late because he worked long hours the previous day. Plaintiff claimed that for over two years, he had been scheduled in this manner with early mornings following late nights, and even when his work was done, he was not allowed to leave because he had to stay and help other departments finish their work. Plaintiff acknowledged that he was aware of the company policy providing for termination after being tardy five times, and that he had been previously warned about being tardy. Plaintiff stated that he was unaware of how his tardiness affected his employer because the store did not open to the public until 6:30 a.m., and deliveries did not begin until 7 a.m.

¶ 4 Menards protested plaintiff's claim for benefits stating that plaintiff was discharged according to the store's attendance policy after being late for work five times within a 90-day period. Attached to Menards' protest was the company's written attendance policy, signed by plaintiff on his first day of employment. The policy allowed for a five-minute grace period to accommodate employees for uncontrollable circumstances such as weather, traffic, accident or a late bus. The policy stated that disciplinary action would be taken, at the manager's discretion, based upon the number of times an employee was absent or late beyond the five-minute grace

period. Menards considered unexcused absences and tardiness within a 90-day rolling calendar to determine the level of disciplinary action. The policy described the disciplinary action as follows: a verbal warning following the first and second unexcused late arrival or absence, a written warning following the third incident, suspension at the manager's discretion following the fourth incident, and termination at the manager's discretion following the fifth incident. The policy stated that it was designed to provide a uniform procedure for handling unexcused tardiness and absences.

¶ 5 Also attached to Menards' protest were five disciplinary forms documenting plaintiff's unexcused tardiness. On May 1, 2011, plaintiff was 34 minutes late for his shift which began at 7:30 a.m. and was given a verbal warning. On May 30, 2011, plaintiff was 61 minutes late for his shift which began at 6:30 a.m. and was given a written warning. On July 12, 2011, plaintiff was nine minutes late for his shift beginning at 6 a.m. and was given a three-day suspension which was served July 19-21, 2011. On July 18, 2011, the day before his suspension began, plaintiff was again nine minutes late for his shift beginning at 2 p.m. The disciplinary form indicates that termination was discussed with plaintiff. On July 25, 2011, four days after his suspension, plaintiff was 38 minutes late for his shift beginning at 6 a.m. and was terminated.

¶ 6 Plaintiff informed the IDES claims adjudicator that he was fired by the store's assistant general manager, Tim Feigerle, who told him he was not in the store's best interest. Plaintiff claimed that he was "about 4 minutes late" on July 25, 2011, and that he arrived for his 6 a.m. shift at 6:09 a.m. Plaintiff explained that he was late because he "was very tired." Plaintiff said he had been scheduled to work from 7:30 a.m. to 8 p.m. (the previous day), but was obligated to stay until 11 p.m. Plaintiff acknowledged that he was aware of the company policy, contained in the employee handbook, that called for termination after five tardy arrivals. Plaintiff further

acknowledged that he was given a written warning on July 18, 2011, from Lawrence Manetti, the human resources coordinator, and was told he could not be late.

¶ 7 Lawrence Manetti told the claims adjudicator that plaintiff was discharged on July 25, 2011, because he was 38 minutes late for work. Plaintiff provided no reason for his tardiness. Plaintiff's tardiness was a violation of the company policy, contained in the employee handbook, which allowed for five tardy arrivals or absences within a 90-day rolling period. Manetti stated that plaintiff was given two prior written warnings, and was aware he could be discharged for failing to comply with the policy.

¶ 8 The claims adjudicator found that plaintiff was discharged from his job due to tardiness. The adjudicator further found that the reason for the discharge was within plaintiff's control to avoid, and therefore, he was discharged for misconduct connected with his work. Consequently, the claims adjudicator found plaintiff ineligible for unemployment insurance benefits.

¶ 9 Plaintiff appealed that decision arguing that his excessive work hours caused his tardiness. Plaintiff argued that the only misconduct was on Menards part and that his excessive work hours constituted a constructive discharge. Plaintiff asserted that his work schedule, requiring him to work until 10 p.m. and arrive the following morning at 6 a.m., provided him with less than six hours of rest between his shifts. He claimed that his requests to leave early when he knew he had to work the early shift the following morning were denied. Plaintiff denied that he engaged in willful misconduct, and claimed he was discriminated against in regards to the disciplinary action taken because the policies were not applied equally to other employees. Plaintiff attached several copies of the store's weekly work schedule to his appeal.

¶ 10 The administrative law judge (ALJ) initially found that plaintiff's appeal was untimely filed one day after the deadline and dismissed his appeal for lack of jurisdiction. Plaintiff

appealed the dismissal noting that his appeal was postmarked within the 30-day time limit. The Board reversed the dismissal and remanded the matter to the ALJ for a telephone hearing.

¶ 11 A telephone hearing was held on January 3, 2012, but Menards failed to appear. The ALJ found that the evidence showed that plaintiff had a compelling reason for being tardy on the day he was terminated. The ALJ found that plaintiff was unable to awaken for his early morning shift after working late into the night the day before, and that plaintiff attempted to notify his employer that he was going to be late. The ALJ concluded that plaintiff's actions were not a willful and deliberate violation of Menards' policy, and that misconduct had not been proven. Consequently, the ALJ set aside the denial of benefits and found plaintiff eligible for benefits. Menards' subsequent request for a rehearing was granted.

¶ 12 A second telephone hearing was held on February 3, 2012, where both parties appeared and testified. Tim Feigerle, assistant general manager at Menards, testified that plaintiff was discharged for repeated violations of Menards' attendance policy. Plaintiff underwent a progressive disciplinary process and was issued a final warning on July 18, 2011. However, on July 25, 2011, plaintiff was 38 minutes late for his 6 a.m. shift. Plaintiff's explanation for his late arrival was that he was not allowed to get home in enough time to get a full night's sleep. On the prior evening, plaintiff was scheduled to work until 10 p.m., and stayed at work until 10:23 p.m. Feigerle testified that it was not unusual for plaintiff to work until 10 p.m. and return to work the 6 a.m. shift the following morning.

¶ 13 Plaintiff testified that Feigerle told him he was being discharged because he was not in the company's best interests. Plaintiff acknowledged that when he was suspended for tardiness, he was aware that further attendance issues would likely lead to discharge. On July 25, 2011, plaintiff overslept because he did not have enough sleep. The previous day, he worked from

7:34 a.m. to 10:23 p.m., and then came in late at 6:38 a.m. Plaintiff usually had two days off every week, but beginning July 3, 2011, management started scheduling him to work six days a week, closing the store at night and opening the store the next morning. Plaintiff frequently asked if he could leave early when he was done with his work at night, but he was not allowed to leave and was told to help the other departments.

¶ 14 The ALJ issued a written decision affirming the denial of benefits to plaintiff. The ALJ found that plaintiff had been discharged for violating Menards' attendance policy. The ALJ found plaintiff's testimony persuasive, and plaintiff did show that his work schedule had been changed. The ALJ opined that it was possible the employer was attempting to separate plaintiff, but that situation presented a labor issue, not an unemployment issue. The ALJ noted that plaintiff did not inform management that he was not willing to work the assigned schedule, nor had he gone to human resources to file a complaint. Therefore, in essence, plaintiff agreed to the schedule. Consequently, plaintiff's act of oversleeping after receiving a final warning was a willful and deliberate violation of Menards' attendance policy, rendering plaintiff not eligible for unemployment insurance benefits.

¶ 15 Plaintiff appealed the ALJ's decision to the Board. Plaintiff's written argument attached to his appeal was not served on his employer as required, and therefore, the written submission was not considered by the Board.

¶ 16 The Board reviewed the entire record, including the transcript from the telephone hearing, and found that the ALJ's decision was supported by the record and the law. The Board also found that that the further taking of evidence was unnecessary. The Board noted that an employer has the right to expect its employees to report to work as scheduled, unless prevented from doing so by a compelling reason. The Board expressly found that plaintiff had received a

final warning for being late, and therefore, "he should have taken extra precautions to be on time. (e.g. setting two alarm clocks)." The Board incorporated the ALJ's decision as part of its decision, and affirmed the denial of benefits. Plaintiff appealed the Board's ruling to the circuit court of Cook County. The circuit court held a hearing, and affirmed the Board's decision denying plaintiff benefits.

¶ 17 On appeal, plaintiff contends his tardiness was not misconduct because it was not an intentional act that was willful and deliberate, but instead, occurred because he overslept after working long hours the previous day. Plaintiff claims that the Board did not make a sufficient inquiry or determination that his four prior tardy arrivals were willful and deliberate. Plaintiff also asserts that his failure to set a second alarm clock would be considered carelessness, which does not constitute misconduct.

¶ 18 This court reviews the final decision of the Board rather than that of the circuit court. *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010). The Board's factual findings are considered *prima facie* true and correct, and will not be disturbed unless they are against the manifest weight of the evidence. *520 South Michigan Avenue Associates v. Department of Employment Security*, 404 Ill. App. 3d 304, 312 (2010). Under this standard, the Board's factual findings "must stand unless 'the opposite conclusion is clearly evident.'" *520 South Michigan Avenue*, 404 Ill. App. 3d at 313, quoting *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204 (1998). When reviewing an administrative agency decision, courts are precluded from reweighing the evidence, resolving conflicts in the testimony, or evaluating the credibility of the witnesses. *Woods v. Illinois Department of Employment Security*, 2012 IL App (1st) 101639, ¶ 16. It is the Board's responsibility to weigh the evidence, determine the credibility of the witnesses, and resolve conflicts in the testimony.

Hurst v. Department of Employment Security, 393 Ill. App. 3d 323, 329 (2009). A reviewing court is prohibited from substituting its judgment for that of the Board. *520 South Michigan Avenue*, 404 Ill. App. 3d at 317. Where the record contains any evidence that supports the Board's decision, that decision is not contrary to the manifest weight of the evidence and must be affirmed on review. *Woods*, 2012 IL App (1st) 101639, ¶ 16.

¶ 19 Whether an employee was properly terminated due to misconduct, and thus, ineligible for unemployment benefits, is a mixed question of law and fact that is reviewed under the clearly erroneous standard. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 391 (2001). The Board's decision is considered clearly erroneous where the court reviews the record and definitively concludes that a mistake has been made. *AFM Messenger*, 198 Ill. 2d at 395. Under section 602(A) of the Illinois Unemployment Insurance Act (820 ILCS 405/602(A) (West 2010)), a person who is discharged by her employer for misconduct connected with her work is not eligible to receive unemployment insurance benefits. *Phistry*, 405 Ill. App. 3d at 607.

¶ 20 Misconduct is defined as an employee's willful and deliberate violation of a reasonable policy or rule which harms the employer. *Phistry*, 405 Ill. App. 3d at 607. The court may determine that a policy or rule is reasonable by "a commonsense determination that certain conduct intentionally and substantially disregards an employer's interest." *Phistry*, 405 Ill. App. 3d at 607. In addition, IDES regulations explain that "harm" includes damage or injury to the employer's operations or goodwill. 56 Ill. Adm. Code 2840.25(b) (2012); *Woods*, 2012 IL App (1st) 101639, ¶ 21. The regulations expressly state that "[a]bsences and tardiness always cause harm to the employer, even if a worker is allowed to make up the time. This is because absences

and tardiness cause disruption to the general operations of any business." 56 Ill. Adm. Code 2840.25(b)(3) (2012); *Woods*, 2012 IL App (1st) 101639, ¶ 21.

¶ 21 Here, the record shows that the Board's determination that plaintiff willfully and deliberately violated Menards' policy regarding tardiness was not against the manifest weight of the evidence. It is undisputed that plaintiff was aware of Menards' written attendance policy, which stated that disciplinary action would be taken, at the manager's discretion, based on the employee's number of unexcused absences and tardiness within a 90-day rolling calendar. It is also undisputed that plaintiff was late for work five times during a 90-day period, and that he was subjected to Menards' progressive discipline process which included two verbal warnings, a written warning and a three-day suspension immediately prior to his termination. Plaintiff acknowledged that he was warned that he could not be late again, and that he could be discharged if he was late. Plaintiff then arrived to work 38 minutes late because he overslept.

¶ 22 We reject plaintiff's claim that his tardiness was not willful and deliberate because his act of oversleeping was not intentional. Following this rationale, tardiness would rarely, if ever, constitute misconduct. Tardiness is often unintentional and caused by other circumstances such as traffic and inclement weather. However, an employer's expectation that its employees arrive to work on time, regardless of other circumstances, is reasonable. As the regulations state, tardiness always causes harm to the employer because it disrupts the general operations of the business. An employer needs its employees to arrive to work promptly in order to conduct its business. Accordingly, an employee is expected to comply with an employer's absence and tardiness policy, and his failure to do so constitutes misconduct.

¶ 23 The Board reviewed all of the evidence in the record, including the testimony from the telephone hearing, and determined that plaintiff willfully and deliberately violated Menards'

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tardiness policy. Our review of the record reveals that an opposite conclusion is not clearly evident, and we will not disturb the Board's finding. Accordingly, we conclude that plaintiff willfully and deliberately violated Menards' reasonable policy against tardiness, and was discharged for misconduct connected to his work. The Board's determination that plaintiff was ineligible for unemployment insurance benefits was not clearly erroneous.

¶ 24 For these reasons, we affirm the judgment of the circuit court of Cook County affirming the Board's decision.

¶ 25 Affirmed.