2015 IL App (1st) 142378-U

SIXTH DIVISION
DATE May 22, 2015

No. 1-14-2378

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DAVID CWAJGENBERG,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	No. 14 L 50334
ILLINOIS DEPARTMENT OF EMPLOYMENT	)	
SECURITY, DIRECTOR OF ILLINOIS DEPARTMENT	)	
OF EMPLOYMENT SECURITY, BOARD OF REVIEW,	)	
and ALLIEDBARTON SECURITY SERVICES,	)	Honorable
	)	Edward S. Harmening,
Defendants-Appellees.	)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

O R D E R

¶ 1 *HELD:* The decision of the Board of Review of the Illinois Department of Employment Security that plaintiff was discharged for misconduct connected with work and is therefore ineligible for unemployment benefits was not against the manifest weight of the evidence or clearly erroneous.

¶ 2 The plaintiff, David Cwajgenberg, filed a complaint for administrative review seeking to reverse a decision by the Board of Review (Board) of the Illinois Department of Employment

Security (IDES) that he was ineligible to receive unemployment benefits because he was discharged for misconduct connected with his work. On appeal, the plaintiff challenges the Board's findings. For the reasons that follow, we affirm.

¶ 3 The plaintiff was employed by AlliedBarton Security Services as a security guard for approximately four years, until he was discharged on September 19, 2012. Following his employment termination, the plaintiff filed a claim for unemployment benefits, and AlliedBarton filed a protest. An IDES claims adjudicator granted the plaintiff's claim, finding that he had been discharged because of "complaints that *** [he] had referenced a threat," but that he had denied the accusation, and the employer had failed to provide evidence of the alleged threat.

¶ 4 AlliedBarton appealed, and a telephone hearing was held before an administrative law judge (ALJ). During the telephone hearing, the ALJ indicated that documents AlliedBarton had submitted with its protest had been entered into evidence. One of the documents was a copy of AlliedBarton's "Employee Conduct and Work Rules," which listed conduct that would result in disciplinary action up to and including termination. Among the listed conduct was gross verbal abuse of a client or employee, as well as inappropriate, abusive, offensive, or aggressive language to clients, the public, or fellow employees. Another document submitted by AlliedBarton was a form signed by the plaintiff in 2010 acknowledging that he had received a copy of the company's code of ethics and business conduct guidelines and understood both the rules and the potential consequences for their violation.

¶ 5 Also during the telephone hearing, AlliedBarton's District Manager, Mark Schumer, testified that he discharged the plaintiff because the plaintiff had left two voice messages for a client, one of which Schumer and the client interpreted as a threat to another employee, and the other of which included obscenity. Transcripts of the messages were entered into evidence. In

the first message, the plaintiff said, "Uh hey dude uh hey I figured you might know but somebody slashed Susan's tires and uh I'm also calling to make sure you tell Mario that I'm back I want to see what he says, oh well catch you later dude." In the second message, the plaintiff stated, "Uh, hey Russ it's Dave just letting you know Susan's being a cunt so uh don't mind what she's saying I'll try to save paper, so probably her time of the month, oh well later dude."

¶ 6 Schumer also testified that, prior to the messages being left, some work hours had been taken from the plaintiff and given to Mario, and the client felt that there was an "issue" between the two men. Schumer explained that there was "some speculation" that the plaintiff had been involved in slashing Susan's tires, and therefore his comment about Mario in the second message was a threat that Mario should "watch out." Schumer testified that he met with the plaintiff, who denied slashing the tires, but did not deny leaving the messages.

¶ 7 Next, Robert Goals, AlliedBarton's Operations Manager, testified that he listened to the recordings with Schumer, and that they were both certain that the plaintiff was the person who left the messages because he has a very distinct voice. Goals admitted that he and Schumer did not play the messages for the plaintiff when they subsequently met with him.

¶ 8 When the ALJ asked the plaintiff whether he had left these messages, the plaintiff answered, "[N]ot at work I didn't." He went on to testify that although he left the messages, they were not connected with work and were not threatening. He explained as follows:

> "Well, the first one with Mario is, I was actually friends with him. So, I actually said, tell him I'm back because I actually wanted to talk to him and just be friends, I didn't mean to take [it] like that ***. And with the tires, I never slashed anybody's tires. I was actually letting [the client] know … I figured he already knew about it, so you know … it's our job to let them know … you know

> what I mean … that uh … something happened there. And then uh … about uh … let me see … the thing with Susan, is (inaudible) I called him just to you know … it's a stupid word to say[.]"

The plaintiff further testified that the managers showed favoritism toward Susan and protected her. He said that Susan would yell and swear at him, but he denied slashing her tires or doing anything to her. In closing, the plaintiff stated that he had no work-related problems for four years, but that problems started occurring when his hours were cut. He said that he called the union and got his hours back, and then "all of a sudden" he was fired. The plaintiff suggested that he was set up, and that someone named Dave may have slashed Susan's tires just to have him fired.

¶ 9 Following the telephone hearing, the ALJ set aside the claims adjudicator's determination. The ALJ found that the plaintiff was disqualified for benefits under section 602(A) of the Illinois Unemployment Insurance Act (Act), 820 ILCS 405/602(A) (West 2010), because he was discharged for misconduct connected with his work. Specifically, the ALJ found that plaintiff was discharged because he left obscene and threatening voicemail messages for a client to whom he was assigned. The ALJ concluded that the plaintiff's actions constituted misconduct because he acted in deliberate disregard of the best interests of his employer.

¶ 10 The plaintiff appealed to the Board, which remanded to the ALJ with instructions to conduct a hearing to obtain evidence regarding the timeliness of AlliedBarton's appeal from the initial grant of benefits. Following a hearing, the ALJ issued a decision incorporating its earlier decision and finding that AlliedBarton's appeal was timely.

¶ 11 The plaintiff again appealed. This time, the Board affirmed the ALJ's decision. The Board found that the plaintiff was under a duty to conduct himself in a manner so as not to injure

the employer's interests, but that the evidence showed that he had left threatening and inappropriate messages. The Board further found that the plaintiff was discharged for leaving those threatening and inappropriate messages, that the plaintiff's actions violated a reasonable mode of conduct which the employer had a right to control (as well as the employer's policy concerning employee behavior), and that the plaintiff's actions constituted a deliberate and willful violation of the employer's policy concerning employee behavior, which caused the employer harm. Accordingly, the Board determined that the plaintiff was not eligible for benefits.

¶ 12 The plaintiff thereafter filed a complaint for administrative review, and the circuit court affirmed. The plaintiff appeals *pro se*, challenging the Board's findings.

¶ 13 As an initial matter, we note the argument of defendants – IDES, the IDES Director, the Board, and AlliedBarton – that the plaintiff's brief should be stricken for failure to comply with Supreme Court Rule 341(h) (eff. February 6, 2013). The defendants are correct that the plaintiff's brief is inadequate in that it does not contain a summary statement, an introductory paragraph, a statement of the issue or issues presented for review, a statement of jurisdiction, the pertinent parts of any relevant statute or similar authority, a statement of facts, argument that contains contentions and the reasons therefor, citation to the record and authorities upon which the appellant relies, a conclusion, and an appendix. The defendants assert that, because of these inadequacies, this court would be justified in striking the plaintiff's brief and dismissing the appeal. *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 77.

¶ 14 While the insufficiency of the plaintiff's brief hinders our review, meaningful review is not completely precluded as the merits of the case can be ascertained from the record on appeal. This court may entertain the appeal of a *pro se* plaintiff who files an insufficient brief "so long as

we understand the issue [that a] plaintiff intends to raise and especially where the court has the benefit of a cogent brief of the other party." *Twardowski v. Holiday Hospitality Franchising, Inc*., 321 Ill. App. 3d 509, 511 (2001). Here, the defendants have filed a cogent brief, and it is clear that the plaintiff is challenging the Board's ultimate determination that he is ineligible for unemployment benefits because he was discharged for misconduct connected with work. Accordingly, we choose to reach the merits of the plaintiff's appeal.

¶ 15 In an appeal involving a claim for unemployment benefits, we defer to the Board's factual findings unless they are against the manifest weight of the evidence. *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 556 (2006). An administrative agency's findings of fact are against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205 (1998). In our role as a reviewing court, we may not judge the credibility of the witnesses, resolve conflicts in testimony, or reweigh the evidence. *White v. Department of Employment Security*, 376 Ill. App. 3d 668, 671 (2007).

¶ 16 To establish misconduct under the Act, it must be proven that: (1) there was a deliberate and willful violation of a rule or policy of the employing unit; (2) the rule or policy was reasonable; and (3) the violation either harmed the employer or was repeated by the employee despite a previous warning or other explicit instruction from the employing unit. 820 ILCS 405/602(A) (West 2010); *Manning*, 365 Ill. App. 3d at 557. Whether an individual was properly terminated for misconduct in connection with his work is a question that involves a mixed question of law and fact to which we apply the clearly erroneous standard of review. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 327 (2009). An agency's decision is considered to be clearly erroneous where the entire record leaves the reviewing court with the

definite and firm conviction that a mistake has been made. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001).

¶ 17 In the instant case, the record supports the Board's determination that the plaintiff's actions constituted misconduct under section 602(A) of the Act.

¶ 18 First, AlliedBarton presented evidence that the plaintiff deliberately and willfully violated a workplace rule or policy in that he left threatening and inappropriate messages on a client's voicemail system. During the telephone hearing, Schumer testified that the plaintiff had left two voice messages for a client, one of which he and the client interpreted as a threat to an employee named Mario, and the other of which included obscenity in referring to an employee named Susan. Transcripts of the messages confirmed their content. The plaintiff admitted that he left the messages and acknowledged that he had used a "stupid word" to describe Susan, but denied that his message regarding Mario was threatening. On this factual issue, the Board determined that the plaintiff left threatening and inappropriate messages and, on administrative review, we may not judge the credibility of the witnesses or reweigh the evidence. *White*, 376 Ill. App. 3d at 671-72. Accordingly, we defer to the Board's finding.

¶ 19 Second, AlliedBarton's policies prohibiting verbal abuse of clients or employees and inappropriate, abusive, offensive, or aggressive language to clients, the public, or fellow employees are reasonable. It is a matter of common sense that the use of hostile, intimidating, or vulgar language " 'intentionally and substantially disregards an employer's interests.' " *Manning*, 365 Ill. App. 3d at 558, quoting *Greenlaw v. Department of Employment Security*, 299 Ill. App. 3d 446, 448-49 (1998). Therefore, even where an employer has no written policy concerning the use of abusive language, such policies are considered reasonable. *See Manning*, 365 Ill. App. 3d at 558.

¶ 20 Third, harm to the employer is not limited to actual harm, but can be established by potential harm. *Hurst*, 393 Ill. App. 3d at 329; *Manning*, 365 Ill. App. 3d at 557. For example, the act of leaving vulgar voicemail messages is potentially harmful to an employer because the use of hostile and intimidating language to a co-worker could adversely affect the work environment. *Manning*, 365 Ill. App. 3d at 558. In this case, the plaintiff's behavior of leaving threatening and obscene voicemail messages for a client could adversely affect AlliedBarton's business relationship with the client. Thus, the element of harm was established.

¶ 21 After reviewing the entire record, we cannot say that the Board's determination that the plaintiff was discharged for misconduct connected with work was against the manifest weight of the evidence or clearly erroneous. Accordingly, for the reasons explained above, we affirm the judgment of the circuit court.

¶ 22 Affirmed.