2015 IL App (1st) 142781-U

No. 1-14-2781

Fourth Division
November 5, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

RALPH PURNELL,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 13 L 51049
	)	
ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; DIRECTOR, ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; BOARD OF REVIEW; and CHICAGO TRANSIT AUTHORITY CTA MERCHANDISE MART PLAZA c/o NSN JERRY WEINSTEIN,	)	Honorable
	)	Anthony Carl Walker,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: Circuit court's administrative review judgment affirmed where the Board's decision that plaintiff was discharged for misconduct in connection with his work, thereby disqualifying him from receiving unemployment benefits, was not clearly erroneous.

¶ 2 Plaintiff, Ralph Purnell, filed a complaint for administrative review seeking to reverse a decision by the Board of Review of the Department of Employment Security (Board) that he was ineligible for unemployment benefits because he was discharged for misconduct in connection with his work pursuant to section 602(A) of the Illinois Unemployment Insurance Act (Act). 820 ILCS 405/602(A) (West 2012). The circuit court affirmed the Board's decision and plaintiff now challenges the propriety of that order on appeal.

¶ 3 BACKGROUND

¶ 4 The record reveals that plaintiff began working as a bus operator for the Chicago Transit Authority (CTA) on April 17, 2006. The CTA had an attendance policy in place which provided that an employee would be discharged after incurring four "misses" in a 12-month period, with a "miss" meaning that the employee either reported late to work or failed to report to work. The record reveals, and the parties agree, that plaintiff incurred four such misses in a period spanning July 2012 through March 2013, was subjected to discipline following each miss, and was ultimately discharged on April 15, 2013. Plaintiff's relevant attendance and discipline history is as follows: (1) his first miss occurred on July 23, 2012, following which he was issued a written warning; (2) his second miss occurred on August 1, 2012, following which he was issued a final written warning and a one-day suspension, as well as advised that an immediate improvement must be attained; (3) his third miss occurred on November 22, 2012, following which he received a three-day suspension and was placed on a six-month probation, as well as advised that a subsequent miss would subject him to a recommendation for discharge; and (4) his fourth miss occurred on March 14, 2013, following which he was referred for a probation violation hearing, a discharge consideration meeting, and was subsequently discharged.

¶ 5 Following his discharge, plaintiff filed for unemployment benefits and the CTA protested that claim, stating that plaintiff had been discharged for violating a known and reasonable

company policy, and that the "triggering incident" occurred on March 14, 2013, when he failed to report to work as scheduled. Attached to the CTA's protest were documents memorializing plaintiff's misses and related discipline, and which reflected the following additional details: (1) plaintiff arrived to work late on July 23, 2012, and August 1, 2012, and on both dates stated that he was tardy due to accidents on the expressway; (2) plaintiff failed to report to work on November 22, 2012, and stated that he thought he had the day off that date; and (3) on March 14, 2013, plaintiff reported to work late and stated that he arrived tardy that day because the clock in his vehicle was set to the wrong time.

¶ 6 An Illinois Department of Employment Security (IDES) claims adjudicator interviewed plaintiff, and the adjudication summary from that interview reflects, *inter alia*: (1) plaintiff told the claims adjudicator that he arrived late to work on March 14, 2013, because he "looked at the schedule wrong," and (2) plaintiff told the claims adjudicator that the CTA had a zero tolerance attendance policy, of which he was aware. On May 1, 2013, the claims adjudicator determined that plaintiff was eligible for unemployment insurance benefits, finding that plaintiff had been discharged for being tardy, but that this action was not deliberate or willful, and thus did not constitute misconduct connected with his work, as required by section 602(A) of the Act.

¶ 7 The CTA appealed, and, on July 10, 2013,[1] an IDES referee conducted a telephone hearing at which plaintiff and CTA employee Keeby McMillon appeared as witnesses. Prior to commencing the hearing, the referee noted that the following documents were included in the case file and would be admitted into evidence: (1) the local office determination; (2) the CTA's protest, along with the documents that had been attached to it; (3) the CTA's appeal; and (4) the local office adjudication summary.

[1] We note that the hearing commenced on this date, and, due to technical difficulties, was continued until August 1, 2013.

¶ 8 At the telephone hearing, McMillon, a CTA transportation manager, testified that the CTA discharged plaintiff for incurring four missed assignments in a 12-month period, in violation of its attendance policy. McMillon testified that plaintiff was aware of that policy because, upon hire, all employees are provided with a guideline booklet that contains all of the CTA's rules and the consequences of not complying with those rules, and it was discussed with plaintiff after each of his misses. McMillon listed the date each of the four misses occurred, along with the discipline plaintiff received as a result of each miss. McMillon did not testify regarding the circumstances surrounding the first three misses, but stated that on March 14, 2013, the date of his fourth miss, plaintiff told his manager that he was late to work because the clock in his car was set to the wrong time.

¶ 9 McMillon further testified that as a result of plaintiff's fourth miss, which was in violation of his probation, he was removed from service and referred for a disciplinary hearing with a transportation manager. That hearing took place on April 1, 2013, the outcome of which was that plaintiff was referred for a discharge consideration meeting with the general manager. That meeting took place on April 15, 2013, at which time plaintiff was discharged by general manager Adrian Lewis, and was also given a written notice of discharge.

¶ 10 Plaintiff testified and acknowledged that McMillon's testimony regarding the dates of his four misses, and the discipline he received as a result thereof, was correct. The referee asked plaintiff why he was late to work on March 14, 2013, and he responded that it was because the clock in his car was "slow," and he had misread the time he was to report to work. The referee then asked plaintiff if there was anything else he felt that she should know. Plaintiff described the circumstances surrounding his first three misses. He testified that on both July 23, 2012, and August 1, 2012, he arrived late to work due to traffic accidents that caused traffic to back up on the highway, and that he failed to report to work on November 22, 2012, because he was under

the impression that he had the day off. Plaintiff testified that although his first two misses were not due to any fault on his part, the CTA's rule was a zero tolerance attendance policy that "they don't accept no misses no matter what the situation is."

¶ 11 On August 6, 2013, the referee set aside the claim adjudicator's determination and held that plaintiff was not eligible for unemployment insurance benefits. In doing so, the referee stated that plaintiff was aware of the CTA's policy that an employee who accumulated four "misses" in a 12-month period would be recommended for discharge, but incurred three misses between July 2012 and November 2012. The referee further stated that despite knowing that his job was in jeopardy, plaintiff was tardy on March 14, 2013, and asserted that he had misread his schedule for that day. The referee found that "a pattern of poor attendance and tardiness implies the deliberate and willful failure of the employee to prioritize those personal matters over which the employee has control and the employer has no control." The referee found that this failure constituted misconduct as contemplated under section 602(A) of the Act. The referee thus found that plaintiff was discharged for misconduct in connection with his work, and, accordingly, was disqualified from receiving benefits.

¶ 12 Plaintiff appealed to the Board, which affirmed the referee's decision. In doing so, the Board indicated that it had reviewed the record, including the transcript of the telephone hearing, and found it to be adequate and that further taking of evidence was unnecessary. The Board noted that plaintiff submitted a written argument along with his appeal, but stated that it had not considered that argument because plaintiff failed to certify in writing that he had mailed or served it upon the opposing party, as required by section 2720.315 of the Benefits Rules. 56 Ill. Adm. Code §2720.315. The Board further noted that in his notice of appeal, plaintiff sought to submit additional evidence consisting of various documents, but that it had not considered that

request due to plaintiff's failure to certify in writing that such request was served upon the employer, as required by the aforementioned rule.

¶ 13 The Board further stated that the record reflected that plaintiff was discharged due to excessive absenteeism, and that prior to his discharge he had been warned about the issue multiple times. The Board stated that plaintiff was late to work on March 14, 2013, due to misreading the start time on his schedule, and was subsequently discharged due to excessive absenteeism. The Board found that plaintiff's actions on March 14, 2013, constituted a deliberate and willful violation of the CTA's policy concerning employee behavior, thereby causing it harm, and, accordingly, that plaintiff was disqualified from receiving benefits under section 602(A) of the Act. Thereafter, plaintiff filed a complaint for administrative review and, on August 19, 2014, the circuit court affirmed the Board's decision, finding that it was not clearly erroneous.

¶ 14 ANALYSIS

¶ 15 Plaintiff now appeals, and our review of his challenge is limited to the propriety of the Board's decision; we do not review the decision of the circuit court or the referee. *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010).

¶ 16 An individual claiming unemployment insurance benefits has the burden of establishing his eligibility, and an employee discharged for misconduct is ineligible to receive those benefits. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 327 (2009). Pursuant to the Act, three elements of misconduct must be established: (1) the rule or policy must be deliberately and willfully violated; (2) the rule or policy of the employer must be reasonable; and (3) the violation must have harmed the employer or it must have been repeated by the employee despite previous warnings. 820 ILCS 405/602(A) (West 2012); *Phistry*, 405 Ill. App. 3d at 607. Here,

plaintiff solely takes issue with the first element of misconduct, arguing that his conduct did not constitute willful and intentional violations of the CTA's attendance policy.

¶ 17 Whether an employee was properly terminated for misconduct in connection with his work involves a mixed question of law and fact, to which we apply the clearly erroneous standard of review. *Hurst*, 393 Ill. App. 3d at 327. An agency decision is clearly erroneous where a review of the entire record leaves the court with the definite and firm conviction that a mistake has been committed. *Phistry*, 405 Ill. App. 3d at 607.

¶ 18 An employee deliberately and willfully violates a work rule or policy when he is aware of the policy and consciously disregards it. *Odie v. Department of Employment Security*, 377 Ill. App. 3d 710, 713 (2007). Careless, negligent, or substandard conduct on the part of an employee may justify termination, but, standing alone, is insufficient to constitute deliberate and willful conduct under the Act. *Universal Security Corp. v. Department of Employment Security*, 2015 IL App (1st) 133886, ¶ 16.

¶ 19 Misconduct may be premised on either a particular violation of an employer's policy which triggered the employee's discharge, or on cumulative violations of the employer's rules taken as a whole. *Alternative Staffing, Inc. v. Illinois Department of Employment Security*, 2012 IL App (1st) 113332, ¶ 30. Here, in its protest to plaintiff's claim for unemployment benefits, the CTA indicated that plaintiff was discharged after a "triggering incident," which occurred on March 14, 2013, when he failed to report to work as scheduled. In its written decision, the Board focused exclusively on the incident that occurred on March 14, 2013, and determined that his actions on that specific date constituted a willful and deliberate violation of the CTA's attendance policy. Accordingly, we will focus our analysis solely on plaintiff's actions on March 14, 2013, the triggering incident, and need not address plaintiff's arguments pertaining to whether his actions on the dates of his three other misses constituted misconduct.

¶ 20 The record reveals that as of March 14, 2013, plaintiff was aware of the CTA's zero tolerance attendance policy, was on probation due to his attendance history, and was aware that any subsequent tardy arrival or failure to report to work during that probationary period would subject him to a recommendation for discharge. Although plaintiff was well aware that his job was in jeopardy, he arrived late to work on March 14, 2013, and, on that date, he stated that his late arrival was due to the fact that the clock in his vehicle was set to the wrong time. The record reveals that at the telephone hearing plaintiff stated that an additional reason for his tardiness on that particular day was that he misread his work schedule. These circumstances support a finding that plaintiff willfully and deliberately violated the CTA's attendance policy in that the reasons plaintiff gave for his late arrival on the day of the triggering incident were within his ability to control. See *Woods v. Illinois Department of Employment Security*, 2012 IL App (1st), 101639, ¶ 20 (finding that plaintiff was discharged due to misconduct where she missed work due to illness, but failed to follow proper call-in procedures); see also *Alternative Staffing, Inc.*, 2012 IL App (1st) 113332, ¶ 33 (finding that plaintiffs actions on the day of the triggering incident constituted misconduct where she was late to work because she deliberately chose to wait for her son to return her car rather than seek alternative transportation). We thus find that the Board's determination that plaintiff's actions on March 14, 2013 constituted willful misconduct that made him ineligible for benefits under the Act, was not clearly erroneous.

¶ 21 Plaintiff, however, relies upon *Wrobel v. Illinois Department of Employment Security*, 344 Ill. App. 3d 533 (2003), in support of his contention that he did not consciously or intentionally violate the CTA's attendance policy on March 14, 2013. In *Wrobel*, the plaintiff had a lengthy history of violating his employer's attendance policy, and, on the day of his last attendance policy violation, was aware that any such violation could lead to the loss of his job. *Id.* at 535. At his telephone hearing, the plaintiff testified that he overslept on the day in question

because his alarm clock failed to sound due to a power outage and he had forgotten to set his back-up wind up clock. *Id.* The referee found that the plaintiff's actions constituted misconduct under the Act because the circumstances that caused his attendance violation on that day were within his ability to control. *Id.* at 536. The Board affirmed that ruling and the circuit court affirmed the Board's decision. *Id.* at 534.

¶ 22 On appeal, this court reversed the Board's decision and found that the plaintiff's conduct on the date of his last attendance policy violation did not constitute willful and intentional conduct for purposes of the Act. *Id.* at 537. In doing so, this court reasoned that the plaintiff's failure to ensure that his alarm clocks would sound was a matter of negligence, as opposed to intentional conduct, and noted that although plaintiff forgot to wind his back-up clock, forgetting is a matter of carelessness. *Id*.

¶ 23 Plaintiff argues that his actions in this case are akin to those of the plaintiff in *Wrobel*, and constitute mere carelessness and negligence, as opposed to a willful and intentional violation of the CTA's attendance policy. We disagree.

¶ 24 In *Wrobel*, the plaintiff's alarm clock was set to the correct time, but it failed to sound due to a power outage which he could not be expected to foresee and over which he exerted no control. In the case at bar, however, the clock in plaintiff's vehicle was set to the incorrect time. Not only did plaintiff exert control over whether the clock in his car was set accurately, but he could certainly foresee that if he failed to set his clock correctly, he would arrive late to any given destination, including work. Given that plaintiff was well aware that he was on probation due to prior attendance issues and that his job was in jeopardy, it was incumbent upon him to ensure that he took all measures within his control in order to arrive to work on time. Such measures included making certain that the clock in the vehicle which he drove to work displayed the accurate time.

¶ 25 Plaintiff also argues that he misread his work schedule for March 14, 2013, and that it is equivalent to the plaintiff in *Wrobel* forgetting to set his back-up clock, which this court found to constitute mere carelessness. In *Wrobel,* however, the plaintiff knew what time he should arrive to work, but failed to arrive on time because he forgot to set his back-up wind up clock on a night when he had no way of knowing that his primary clock, which was in working order and set accurately, would not sound due to a power failure. Unlike the carelessness exhibited in *Wrobel,* in the case at bar, plaintiff failed to take the steps necessary to ensure that he knew the correct time to arrive at work. We find significant that plaintiff had been employed by the CTA for almost 7 years. It would seem to us that he would, therefore, be sufficiently familiar with the work schedule format to avoid a misread. Plaintiff's actions went beyond mere carelessness. Under these circumstances, we find that *Wrobel* is factually distinguishable from this case and does not support plaintiff's position.

¶ 26 CONCLUSION

¶ 27 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County affirming the Board's determination that plaintiff is ineligible for unemployment benefits.

¶ 28 Affirmed.