2015 IL App (2d) 140443-U
No. 2-14-0443
Order filed March 26, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ABDON MARTINEZ, Plaintiff-Appellant, v. THE BOARD OF REVIEW OF THE ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY and NEW WINCUP HOLDINGS, INC., Defendants-Appellees.	))))))))))))	Appeal from the Circuit Court of Kane County. No. 13-MR-839 Honorable David R. Akemann, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices BURKE and HUDSON concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiff's application for unemployment benefits was properly denied. The plaintiff received a fair hearing, and the evidence was sufficient to sustain the Board's determination that plaintiff committed misconduct. The trial court's order upholding the Board's determination is affirmed.

¶ 2 Plaintiff, Abdon Martinez, appeals from the trial court's order affirming the decision of the Board of Review (Board) of the Illinois Department of Employment Security (Department), denying unemployment compensation benefits due to his discharge for "misconduct" (820 ILCS 405/602(A) (West 2014)) in connection with his employment with defendant, New WinCup

Holdings, Inc. Plaintiff appeals, arguing that: (1) he was denied a fair hearing, where the referee failed to ensure a clear and complete record; and (2) the Board's determination that plaintiff committed misconduct when he used his cell phone to take photographs of the workplace in derogation of WinCup's express policy was clearly erroneous. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff began working for WinCup, which is located in West Chicago, on April 10, 2008. Prior to his termination on November 28, 2012, he worked as a full-time forklift driver, earning $11.25 per hour.

¶ 5 After WinCup terminated his employment, plaintiff applied for unemployment insurance benefits, claiming that he was discharged for "disgracing my character," that there was no company policy or rule concerning the circumstances of his discharge, and that he had not received prior warnings about his conduct. WinCup protested, submitting documentation concerning plaintiff's disciplinary record and its policies concerning cell phone use and photographs.

¶ 6 A. Disciplinary Records

¶ 7 Five of plaintiff's disciplinary records are contained in the record, all but one of which note that he refused to sign the report. On October 13, 2010, plaintiff was suspended without pay for three days after plaintiff's forklift collided with another worker's forklift at the company's "Carolina" warehouse.[1] No one was injured, but the collision resulted in property damage. WinCup determined that the accident would not have occurred but for plaintiff's failure to follow safe work practices. Also, the report notes that plaintiff was not forthcoming with

[1] In his notice of appeal to the Board of the second referee's decision, plaintiff stated that he worked at the warehouse located at 1250 Carolina Drive.

information during WinCup's investigation of the incident. The report warns that "any further safety violations or reporting false information will result in immediate termination of employment." The report's employee signature line states "see back side of form," but no such record is contained in the record on appeal.

¶ 8 On August 2, 2011, plaintiff apparently received a verbal warning after he arrived over 30 minutes late to his assigned workstation. He had claimed that he was waiting for someone to give him safety glasses. WinCup's report, however, states that plaintiff was provided with safety glasses the prior day. The report notes that "[f]uture violations will result in further disciplinary action up to and including termination."

¶ 9 Plaintiff's third disciplinary incident report is dated September 26, 2012. WinCup's employee action record reflects that plaintiff was placed on a one-week unpaid suspension on September 17, 2012. The prior day, he began to take off his seatbelt in an aggressive manner and was observed yelling " 'you are not my boss, crybaby' " to a WinCup truck driver. The driver, it was noted, had not been addressing plaintiff. On September 18, 2012, plaintiff was observed carrying a 44-inch pipe through the warehouse, which, he explained, he used to push up dock doors. An investigation revealed that no warehouse employees had previously observed the pipe and that it was not WinCup's property. Thus, the company concluded that plaintiff had brought in the pipe "as a weapon to intimidate or provoke another employee." The report further noted that, on December 17, 2010, plaintiff had an altercation with another employee and that the company's human resources manager had explained to him that he was demonstrating unacceptable aggressive behavior and that any future incidents would result in the termination of his employment. As to the September 2012, incidents, the report stated that any additional incidents of creating a hostile work environment, intimidation, provocation, aggressive behavior,

violence, or performance that reflected that he was unable to work with his peers in a professional manner would result in immediate termination of his employment.

¶ 10 The fourth disciplinary record, dated November 9, 2012, reflects that plaintiff was given a final written warning concerning the recording of accurate work times on his time sheets. It states that plaintiff:

> "[C]ontinues to demonstrate behavior which is not consistent with WinCup's policies and practices. In October 2010, he was suspended for 3 days for not following safe work practices when operating a forklift and then[,] in August 2011, he was administered a verbal warning for violation of work rule #10. Most recently, in September 2012, [plaintiff] was[] again suspended for violation of work rules #15, #21 and #27 when demonstrating aggressive behavior towards a co-worker.
>
> [Plaintiff] repeatedly failed to abide by work rules, demonstrating a disregard for WinCup's policies and practices. The continued nature of this behavior negatively affects productivity. In the event of future violations of work rules or policies, further disciplinary action will result, up to and including immediate termination of employment, regardless of the nature of the violation."

¶ 11 A WinCup November 16, 2012, memo from Christine Rosales, WinCup's human resources generalist, to Melissa Barreiro, the company's human resources manager, addresses the time sheet incident and further states that plaintiff felt he had been "picked on" and told his superiors that, if they wanted to fire him, to do so because he would not leave on his own. "He stated that there are many things that happen at the warehouse that Daryl [Schultz, WinCup's plant manager,] does not know about and he has proof; he has documents and cell phone photos, he also pulled a sheet out and show[ed] it to [Schultz]." Plaintiff showed Schultz a sheet from

December 2011, and Schultz informed him that he "was aware of that situation because a year ago when he went to the warehouse no one was placing the cones and wheel chocks to the trucks." Schultz requested copies of the photos, and plaintiff told him that he wanted to add commentary and to respond to the "write up." Plaintiff complained that workers were not being "disciplined equally." Plaintiff informed Schultz that he would email him the photos during his "two days off because it was a lot he had to send to him." No such records are contained in the record on appeal.

¶ 12 Plaintiff's fifth and final disciplinary report, dated November 28, 2012, documents the circumstances leading to his termination. It states that, during a November 16, 2012, meeting with Schultz and Rosales, plaintiff admitted violating the company's cell phone policy for the last two years. The behavior posed a significant safety hazard and compromised the company's trade secrets and confidential and proprietary information. It states: "WinCup has administered corrective action in an attempt to get you to change your behavior; however, you continue to demonstrate conduct which is not consistent with WinCup's policies and practices. Therefore your employment with WinCup is terminated effective immediately." The report notes that plaintiff refused to sign the document.

¶ 13 B. Claims Adjudication Proceeding

¶ 14 On December 14, 2012, a Department claims adjudicator interviewed plaintiff in connection with his application for unemployment benefits. Plaintiff stated that he was discharged due to his cell phone use in the company's warehouse. He explained that he had "no idea" how WinCup came to that conclusion because he always left his cell phone in his locker and only sometimes used it in the cafeteria, where it was allowed. He denied knowledge of any company policy. Plaintiff stated that he believed the allegations against him were due to the fact

that he was injured at work on two occasions. Since that time, he alleged, "I could not go drink water (even in the hot summer) and that I could not go to the washroom, or talk to the other workers. They had also shortened my lunch breaks and then denied doing it."

¶ 15 The claims adjudicator denied plaintiff's application, finding that plaintiff was discharged for insubordination. "Since the reason the claimant was discharged was within the claimant's control to avoid, the claimant was discharged for misconduct connected with the work." He was deemed ineligible for benefits.

¶ 16 Plaintiff appealed, reasserting his harassment claims and adding that he had contacted OSHA "because it wasn't a safe environment and they [*i.e.*, WinCup] found out it was me." He added: "After that they would invent things so I would leave."

¶ 17 C. Two Referee Hearings

¶ 18 Telephonic hearings occurred on February 19, 2013, and April 4, 2013, where plaintiff appeared *pro se* and testified via an interpreter. At the February 19, 2013, hearing, WinCup did not appear, as Barreiro was unavailable and the referee had denied WinCup's request for a postponement. Plaintiff testified that he was terminated because, as WinCup explained to him, he used his phone during work hours. He denied using his phone at work, asserting that it was in his locker. Plaintiff denied receiving any warnings.

¶ 19 The referee set aside the local office's determination, finding that claimant *was* eligible for benefits. "In the instant case, the unrebutted, credible evidence has not shown that the claimant violated employer's cell phone policy as claimant was credible that he kept his cell phone in his locker pursuant to policy. It is concluded that misconduct has not been shown by the preponderance, and claimant is not disqualified for benefits under section 602A."

¶ 20 WinCup sought a rehearing, and a second telephonic hearing was held on April 4, 2013, before a different referee. Barreiro testified that plaintiff, who worked as a full-time warehouse employee, was discharged from his employment on November 28, 2012, for violating the company's cell phone policy. He was discharged because, according to Barreiro, plaintiff admitted to Schultz and Rosales that, for the prior two years, he had been taking photographs of the warehouse. Plaintiff had last taken photos on November 16, 2012, but stated that he had been doing it for two years to document "what was going on and that he had proof of things that were happening in the warehouse."

¶ 21 Addressing the company's cell phone policy, Barreiro testified that WinCup had a written policy prohibiting the taking of photographs in the warehouse. When it was first issued, in late August 2010, the policy was posted and supervisors informed their direct reports about it. Plaintiff was informed of the policy by Rose Jackson, WinCup's warehouse supervisor.[2]

¶ 22 When asked if the policy stated what would happen if an employee violated it, Barreiro replied that it did not. Rather, plaintiff was discharged due to receiving progressive discipline[3]

[2] The record contains a "Wincup – West Chicago Cell Phone Policy" dated August 19, 2010. It states that it applies to, among others, all full-time and temporary employees working in the West Chicago facility. The policy prohibits the use of cell phones on the production floor and warehouse area and further prohibits "throughout the work setting including production/warehouse areas, restrooms, locker rooms and departments where trade secrets are accessible" the "use of camera-related technology available on most cell phones." Employees violating the policy "will be subject to discipline."

[3] The company's discipline levels consist of the following: verbal warning, written warning, final written warning, suspension, and termination.

throughout his employment with WinCup, the final infraction of which—the cell phone photos—resulted in his dismissal. His last disciplinary warning prior to his termination stated that he had repeatedly failed to abide by workplace rules, demonstrating a disregard for WinCup's policies and practices. The warning further stated that, in the event of future violations of workplace rules or policies, he would be immediately terminated. The warning was verbally translated to him in Spanish. Plaintiff had been told that his job was in jeopardy and that one more violation would result in his dismissal.

¶ 23 After the referee finished questioning Barreiro, he asked plaintiff if he wished to question the witness. Plaintiff did not question Barreiro.

¶ 24 Schultz testified that plaintiff admitted to him that he had been taking photographs with his cell phone of the warehouse for over two years. This violated the company's cell phone policy. Plaintiff did not question Schultz.

¶ 25 Rosales testified that she was at the meeting (as "the (inaudible) leader") where plaintiff admitted to taking the photographs over a two-year period. He admitted he had been taking photos on November 16, 2012. When asked by the referee if he wished to question Rosales, plaintiff asked her what time she fired him "because uh, she was not there." Rosales testified that she was present at the November 16, 2012, meeting, as was Schultz, and that plaintiff stated during that meeting that he had been taking photos.

¶ 26 Jackson testified that she was responsible for informing plaintiff of the "[inaudible] policy" implemented in August 2010. She held a team meeting and discussed it with the aid of a Spanish interpreter. Also, plaintiff signed off on the employee handbook. Plaintiff did not question Jackson.

¶ 27 Plaintiff testified that he worked as a forklift operator for WinCup. He denied admitting on November 16, 2012, that he had used his cell phone to photograph the warehouse. When the referee noted that Rosales had testified that he did, plaintiff replied: "No, she only interpreted what I was telling the *** (inaudible) like Store Manager. But why (inaudible) treating me like that if I was also an employee and I was the only one that was treated bad." According to plaintiff, he had sustained "two accidents, one on January 13, 2011[,] and the second on June 17, 2011[,] at the job." He denied receiving warnings about violations of any of WinCup's policies.

¶ 28 Plaintiff denied being informed on September 26, 2012, (*i.e.*, after his aggressive behavior toward a co-worker) that he had violated company policy, asserting that he was suspended for another reason. On November 9, 2012, he met with Jackson and Barreiro to discuss his failure to follow instructions on his shuttle (*i.e.*, time) sheet. He explained that he entered his time at the end of his shift (as he was told to do it when he started). Plaintiff denied receiving a written warning at this time that informed him that further violations would result in further discipline, up to and including termination.

¶ 29 The referee asked plaintiff if he had anything to add. Plaintiff related that, between November 13 and 15, "they did a test on all those that worked with forklifts." Plaintiff asked his manager if he was going to be sent to take the test; the manager did not know. Plaintiff stated that he was not tested. The referee again asked plaintiff if he had anything else to add, and plaintiff replied that he did not.

¶ 30 D. Second Referee, Board, and Circuit Court Decisions

¶ 31 On April 5, 2013, the second referee affirmed the local office's determination that plaintiff was not eligible for benefits. The referee found that claimant admitted to the plant manager on November 16, 2012, that he had been taking photos of WinCup's warehouse with

his cell phone for the past two years, in violation of WinCup's policies and procedures, of which plaintiff was made aware in August 2010. The referee further determined that plaintiff had also received prior warnings about other work-related matters "bringing him to the point of dismissal." The preponderance of the evidence showed that plaintiff willfully and deliberately violated his employer's policies and procedures, which constituted misconduct under the Act. Thus, he was ineligible for benefits.

¶ 32 Plaintiff appealed to the Board,[4] which, on August 14, 2013, affirmed the second referee's decision based on a review of the record. The Board determined that the second referee's decision was supported by the record and law, and it incorporated it as part of its decision. It also noted that it had reviewed the record and found unnecessary the further taking of evidence.

¶ 33 On April 8, 2014, the circuit court, on administrative review, affirmed the Board's decision. Plaintiff appeals.

¶ 34 II. ANALYSIS

¶ 35 A. Standards of Review

¶ 36 Under the framework established by the Unemployment Insurance Act (820 ILCS 405/100 *et seq.* (West 2014)) (Act), a claimant's application for benefits is initially decided without a full hearing by a claims adjudicator. 820 ILCS 405/700, 701 (West 2014). An appeal from a claims adjudicator's determination is considered first by the referee, while a final decision

[4] In his notice of appeal, plaintiff denied using his phone at work, denied admitting that he had taken photos with it at work, claimed he was unaware of any cell phone policy or acknowledging in writing that he received it, and asserted that the plant manager worked at a different facility than plaintiff and could not have been present at any meeting.

lies with the Board. 820 ILCS 405/800, 803 (West 2014). This court reviews the Board's decision, not that of the circuit court, the referee, or claims adjudicator. *Pesoli v. Department of Employment Security*, 2012 IL App (1st) 111835, ¶ 20.

¶ 37 The Act provides that judicial review of the Board's decision must accord with the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2014)). 820 ILCS 405/1100 (West 2014); *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141, 148 (1997). In turn, the Administrative Review Law provides that judicial review extends to all questions of law and fact presented by the entire record. 735 ILCS 5/3-110 (West 1994); *Bridgestone*, 179 Ill. 2d at 148. The statute specifically limits judicial review to the administrative record; the court may not hear new or additional evidence in support of or in opposition to the decision of the administrative agency. 735 ILCS 5/3-110 (West 2014). The statute additionally mandates that the "findings and conclusions of the administrative agency on questions of fact shall be held to be *prima facie* true and correct." 735 ILCS 5/3-110 (West 2014). Accordingly, an administrative agency's findings of fact should not be disturbed on review unless they are against the manifest weight of the evidence. *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204 (1998). When the decision involves a pure question of law, we will review it *de novo*. *Id.* at 205.

¶ 38 Under some circumstances, however, the issue presented cannot be accurately characterized as either a pure question of fact or a pure question of law and, therefore, will be treated as a mixed question, subject to an intermediate standard of review. *Id.* "[A] mixed question is one in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or whether the rule of law as applied to the established facts is or is not violated." *Moss v. Department of Employment*

Security, 357 Ill. App. 3d 980, 984 (2005). Mixed questions implicate the clearly-erroneous standard, which is less deferential to the agency than the manifest-weight-of-the-evidence standard because the agency is deciding the legal application of a factual determination. *Carpetland U.S.A., Inc. v. Illinois Department of Employment Security*, 201 Ill. 2d 351, 369 (2002). We will reverse only if, after review of the entire record, we are " 'left with the definite and firm conviction that a mistake has been committed.' " *AFM*, 198 Ill. 2d at 395 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

¶ 39 B. Fair Hearing

¶ 40 Plaintiff argues first that he was denied a fair hearing because the referee did not ensure a clear and complete record. For the following reasons, we reject this argument.

¶ 41 Although administrative hearings are governed by the fundamental principles and requirements of due process of law, due process is a flexible concept and requires only procedural protections as fundamental principles of justice and situation demand. *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 92 (1992). See also *Flores v. Board of Review*, 74 Ill. App. 3d 667, 671 (1979) ("A claimant is entitled to a full and impartial hearing ([citation]), and the conduct of the hearing must be in accordance with the fundamental rights of procedural due process.") In an administrative hearing, due process does not require a full judicial proceeding. *Id.* Rather, "[a] fair hearing *** includes the opportunity to be heard, the right to cross-examine adverse witnesses, and impartiality in ruling upon the evidence." *Id.* at 95. A claim of a due process violation can be reversed only upon a showing of prejudice in the proceeding. *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 825 (2009). We review *de novo* the question whether a plaintiff has been denied a full and fair hearing in conformance with the requirements of due process. *Id.* at 824.

¶ 42 In *Abrahamson*, the supreme court observed:

> "It is settled that an administrative hearing is not a partisan hearing with the agency on one side arrayed against the individual on the other. Rather, it is an administrative investigation instituted for the purpose of ascertaining and making findings of fact. (*Fleming v. Illinois Commerce Comm'n*, 388 Ill. 138, 147 (1944); Goranson, 92 Ill. App. 3d at 500.) *** Further, '[w]ithout a showing to the contrary, State administrators "are assumed to be men [and women] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." [Citations.]' *Scott*, 84 Ill. 2d at 55." *Abrahamson*, 153 Ill. 2d at 95.

¶ 43 The Act provides that the referee "shall afford the parties reasonable opportunity for a fair hearing." 820 ILCS 405/801A (West 2014). As part of this duty, the referee "must assure that the record in cases involving *pro se* parties is fully developed." *Meneweather v. Board of Review*, 249 Ill. App. 3d 980, 984 (1992). See also 56 Ill. Adm. Code § 2720.245(b) (2014) (referee shall question each witness, afford every party the opportunity to question and cross-examine each witness, and, if necessary, the referee may further question the witnesses "to ensure clarity and completeness of the issues and of the record"; further, the referee "shall ensure that the parties have full opportunity to present all evidence and testimony to the factual and/or legal issues on appeal"). See, *e.g.*, *Figueroa v. Doherty*, 303 Ill. App. 3d 46, 52 (1999) (referee failed to fully develop the record, where it contained "nearly indecipherable" record of the *pro se* plaintiff's argument, and where the referee asked no questions and did not attempt to clarify the testimony); *Meneweather*, 249 Ill. App. 3d at 985-86 (reversing denial of benefits and remanding for submission of additional evidence; holding that the referee had a duty to participate in additional questioning and taking of evidence regarding the claimant's alleged alcoholism and

her volitional capacity to commit the misconduct that resulted in the benefits denial after the claimant, who had been discharged for absenteeism and tardiness, testified about her drinking problem and treatment by a private physician; the referee made no findings regarding the claimant's alleged alcoholism or whether her illness caused her tardiness); *Flores* 74 Ill. App. 3d at 671-72 (the plaintiff did not receive a full and impartial hearing, where the referee did not develop a full record; he failed to ask a *pro se* claimant more than a few questions concerning her work search and child care arrangements); but see, *e.g.*, *Sudzus*, 393 Ill. App. 3d 814, 825-26 (2009) (the plaintiff was not denied due process; he was afforded full opportunity during hearing to present his testimony and to question other witnesses; although he did not fully exercise his right to cross-examination, this did not rise to a constitutional violation); *Booker v. Department of Employment Security*, 216 Ill. App. 3d 320, 322 (1991) (rejecting the plaintiff's claim that he did not receive a fair hearing because certain documents were included in the record and others were excluded and that employer did not appear at the hearing; transcript reflected that he received a fair hearing; further, the fact that portions of the hearing were inaudible, did not, on its own, establish prejudicial denial of due process); *Minfield v. Bernardi*, 122 Ill. App. 3d 97, 101 (1984) (rejecting claim that the referee denied the plaintiff a fair hearing, where the referee allowed the plaintiff the opportunity to explain her reasons for leaving her employment, where the referee's questions were non-leading and non-adversarial, and where, at the end of the hearing, the referee asked the plaintiff if there was anything additional she wished to state for the record).

¶ 44 The violation of an administrative regulation does not rise to the level of a constitutional infringement. See *Tenny v. Blagojevich*, 659 F.3d 578, 583 (7th Cir. 2011) ("[f]ailure to implement state law violates that state law; not the Constitution" (internal quotation marks

omitted)). See, *e.g.*, *Wolin v. Department of Financial & Professional Regulation*, 2012 IL App (1st) 112113, ¶ 28 (noting that, although the plaintiff was denied the opportunity to present oral statements and certain documents, this did not constitute a due process violation; he was not precluded from being heard during the course of the proceedings; rather, he refused to release certain records and failed to avail himself of the right to present and cross-examine the witnesses).

¶ 45 Here, plaintiff argues that the referee: (1) failed to clarify and develop which policy plaintiff allegedly violated; (2) failed to clarify and develop certain facts, such as what the alleged pictures depicted, when and where they were taken and by whom so as to allow a determination that plaintiff's actions violated specific terms of a reasonable policy; (3) failed to lay a proper foundation with respect to the warehouse supervisor's testimony that plaintiff was informed of the cell phone policy after its implementation in August 2010; (4) failed to adequately question plaintiff; (5) failed to address the retaliation issue; and (6) cumulatively, failed to take an active role in developing the evidence.

¶ 46 As to his first claim, plaintiff complains that WinCup submitted several pages of various policies, none of which are dated or identified to a specific document, such as an employee handbook. He also argues that the policies substantially vary from each other, in that the communication policy allows use of cell phones for job-related purposes, the mobile phone camera policy prohibits use of cameras only in areas clearly marked with a security notice and permits the taking of photos within a WinCup facility with written approval, and the August 2010 West Chicago cell phone policy prohibits at that facility the use of camera-related technology available on most cell phones. Also, plaintiff asserts that WinCup's testimony that the policy that was violated was implemented in August 2010 did not specify which policy. He

complains that only two forms were submitted that contained plaintiff's signature: one of which was in Spanish and was not translated, and both of which pre-date the policy that was allegedly violated. According to plaintiff, Jackson's testimony that she informed plaintiff of the policy did not specify the date he was informed or the policy of which he was informed. The referee, he contends, did not adequately question the witnesses about the documents and asserts that none of them were admitted into evidence.

¶ 47 We disagree that the referee failed to clarify and develop the policy that plaintiff violated. Plaintiff's suggestion that the referee did not sufficiently question the witnesses is not well-taken. The referee elicited testimony from WinCup personnel that WinCup had a policy that prohibited the taking of photos with a personal cell phone. Furthermore, the referee questioned the witnesses about how plaintiff was notified of the policy (in person) and that the policy was posted. Barreiro testified that Jackson informed plaintiff of the August 2010 cell phone policy. Further, Jackson herself testified that she informed plaintiff of a policy implemented in August 2010. She explained that she held a team meeting and, with the aid of a Spanish interpreter, discussed the policy. Plaintiff did not cross-examine Barreiro or Jackson. The record contains a WinCup West Chicago cell phone policy that prohibits the use of camera-related technology on such phones, including in the warehouse area. To the extent that plaintiff wished to challenge whether this particular policy applied to him, he had the opportunity to do so when the referee asked him if he wished to question Jackson or the other witnesses. He did not avail himself of this opportunity. This does not constitute a due process violation. In *Village Discount Outlet v. Department of Employment Security*, 384 Ill. App. 3d 522, 527 (2008), the court noted, "we do not believe that the duty of the referee to conduct a hearing that comports with due process requires him [or her] to take such an active role that all evidentiary deficiencies in *pro se*

presentations are remedied." As to plaintiff's claim that only two forms contain his signature, we reject it outright because he does not explain the import of this assertion or point to any rule requiring his signature. Similarly, his assertion that documents were not admitted as exhibits during the hearing is also not well-taken because they were previously made part of the record in these proceedings. In any event, WinCup personnel testified concerning the central issue—the cell phone policy.

¶ 48 Plaintiff's second claim is that the referee failed to clarify and develop what the photos depicted and when and by whom they were taken. We reject this argument outright because the content of the photos is irrelevant. WinCup's policy prohibits the *taking* of photos of the warehouse area (the "use of camera-related technology") with a cell phone. The content of the photos has no bearing on whether or not the policy was violated.

¶ 49 Without citation to any authority, plaintiff further contends that, if he took photos of safety or rule violations, it would have constituted the use of a phone for job-related purposes that would "likely" fall outside the scope of a reasonable company policy, as such documenting is acceptable and encouraged by OSHA regulations to ensure workplace safety. Further, he asserts that he could have taken photos of areas not marked with a security notice or with permission or at a facility other than West Chicago (he notes that there was no testimony eliciting which warehouse he worked at or took photos of); however, the record, he complains, is not fully developed and does not contain testimony on these issues. Plaintiff argues that, but for WinCup witnesses' conclusory statements that plaintiff admitted that his actions violated company policy, the record contains no details that allow a determination as to what policy he violated and how.

¶ 50 We find these arguments unavailing. Plaintiff failed to question the witnesses concerning such matters. Although we are mindful that he appeared *pro se*, during his own testimony, plaintiff denied admitting to taking *any* photos. Thus, whether he had permission to do so or whether OSHA regulations permitted it was not relevant to his position and the referee certainly had no duty to draw out testimony on this subject. Indeed, further questioning on matters such as prior permission risked impeaching plaintiff; we are reluctant to place such a duty on the referee.

¶ 51 Plaintiff's third claim is that the referee failed to lay a proper foundation concerning Jackson's—the warehouse supervisor's—testimony that plaintiff was informed of the cell phone policy in August 2010. The transcript of Jackson's testimony, he notes, refers to the "[inaudible] policy" implemented in August 2010. Plaintiff complains that neither Jackson nor the other witnesses testified concerning the details of the policy and that WinCup submitted at least three cell phone policies. Also, he asserts that the date of the team meeting is not known and that plaintiff denied being informed of any policy.

¶ 52 We reject this argument. The focus of the hearing was Wincup's cell phone policy. Plaintiff's argument that the technical issues with the hearing created confusion about which policy Jackson or any other witness was questioned fails. As to the date of the team meeting, while it would have provided a fuller record had the referee questioned Jackson about it, we cannot conclude that plaintiff was denied a fair hearing due to this omission.

¶ 53 Turning to plaintiff's fourth and fifth arguments, he asserts that the referee failed to adequately question him and instead asked broad, leading, confusing, and compound questions and did not pursue the retaliation issue. Plaintiff complains that the referee failed to ask him if he ever took any photos with his cell phone during work hours or in work areas while employed at WinCup. Rather, he notes, the referee asked instead whether plaintiff admitted on November

16, 2012, that he had used his cell phone to photograph the warehouse, to which plaintiff replied "No." Next, when the referee noted that Jackson had testified otherwise, plaintiff replied that he did not. The referee, plaintiff notes, also asked a broad and confusing question as to Wincup's policies: "were you ever warned about any violations of the Employer's policies?" to which plaintiff replied "No." He also contends that, in his appeal from the local determination, he alleged that WinCup "may be" retaliating against him for contacting OSHA concerning the company's safety violations. He also points to Barreiro's testimony that, when plaintiff admitted on November 16, 2012, that, for two years, he had been taking photos of the warehouse, he further stated that "he was documenting what was going on and that he had proof of things that were happening in the warehouse." Thus, plaintiff urges, the referee failed to ask relevant questions about plaintiff's possible retaliatory discharge, thereby rendering the record inadequate.

¶ 54 We find plaintiff's arguments unavailing. Before both the claims adjudicator and the first referee, plaintiff denied using his cell phone at work. In his appeal from the claims adjudicator's decision denying benefits, plaintiff asserted that he had contacted OSHA and that WinCup had discovered that he had done so and "would invent things so I would leave." However, he provided no documentation of such contact with the federal agency. In fact, throughout the proceedings, he has provided no such documentation; rather, his primary complaints throughout the record are that he was singled out for disciplinary action (*e.g.*, he was treated differently, picked on, or not tested (as others were) for the forklift), possibly because he was involved in or sustained—his testimony was unclear—two work-related accidents. Further, in his notice of appeal to the Board from the second referee's decision, plaintiff stated that he disagreed with the second referee's decision and that "*I never[ ] use[d] my phone because as soon as I got into*

work I always left it in my locker." He denied admitting to the plant manager that he used his phone or took pictures with it and denied knowledge of any phone policy. He also asserted that he had owned his phone for only one year. Plaintiff did not mention OSHA in his notice of appeal.

¶ 55 Finally, we reject plaintiff's sixth argument, wherein he claims that, cumulatively, he was denied a fair hearing because the referee did not take an active role in developing the evidence. Although the questioning was not ideal, we believe that the hearing provided plaintiff an opportunity to be heard and that he was not denied due process. The referee provided plaintiff with the opportunity to question the witnesses. Plaintiff did not question Barreiro, Schultz, or Jackson and asked Rosales a redundant question. See *Sudzus*, 393 Ill. App. 3d at 825 ("Due process was not denied merely because [the plaintiff] did not fully exercise his right to cross-examination.") Further, during the hearing before the second referee, plaintiff did not raise his retaliation claim or in any way refer to contacting OSHA. Indeed, throughout the proceedings, plaintiff denied that he used his cell phone at work to take photos, and, as to his OSHA claims, he provided no documentation to substantiate any communications with the federal agency. In light of the record, we find no error, and, finally, we note that plaintiff makes no claim that the referee made a biased determination on the evidence in violation of due process. *Abrahamson*, 153 Ill. 2d at 95.

¶ 56 C. Sufficiency of the Evidence

¶ 57 Plaintiff's second argument is that the Board's determination that he committed misconduct was clearly erroneous. For the following reasons, we reject this argument.

¶ 58 "When the question concerns the proper discharge for misconduct of an individual in his or her work, we are presented with a mixed question of fact and law, and we review the Board's

decision to determine if it was clearly erroneous." *Universal Security Corp. v. Department of Employment Security*, 2015 IL App (1st) 133886, ¶ 13.

¶ 59 The Act affords economic relief to employees who, through no fault of their own, become "involuntarily unemployed." *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 396 (2001). It is the employee's burden to establish his or her eligibility for unemployment insurance benefits. *White v. Illinois Department of Employment Security*, 376 Ill. App. 3d 668, 671 (2007). Courts construe the Act in an expansive fashion to avoid the forfeiture of benefits. *Czajka v. Department of Employment Security*, 387 Ill. App. 3d 168, 174 (2008) ("While unemployment insurance benefits are a conditional right and the burden of establishing eligibility rests with the claimant, the Act must be liberally interpreted to favor the awarding of benefits."). However, the Board is responsible for weighing the evidence, evaluating witness credibility, and resolving conflicts in the testimony. *Pesoli*, 2012 IL App (1st) 111835, ¶ 26.

¶ 60 A former employee may not receive benefits under the Act if his or her discharge was for misconduct connected to work. 820 ILCS 405/602A (West 2014). Misconduct is defined under the Act as "[1] the deliberate and willful violation [2] of a reasonable rule or policy of the employing unit, governing the individual's behavior in performance of his [or her] work, [3] provided such violation has harmed the employing unit or other employees or has been repeated by the individual despite a warning or other explicit instruction from the employing unit." *Id.* See also *Woods v. Illinois Department of Employment Security*, 2012 IL App (1st) 101639, ¶ 19. "Misconduct can be premised on either a particular incident of a violation of an employer's rules that triggered the employee's discharge, or the employee's 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.

¶ 61 1. Deliberate and Willful Violation

¶ 62 Plaintiff argues that, although Barreiro and Jackson testified that plaintiff was informed of the cell phone policy implemented in August 2010, various details about the alleged meeting were not provided. These include: the specifics of the policy, information concerning the interpreter, and what information was relayed during the team meeting. Further, plaintiff asserts that no proof of receipt of the policy was provided and he was not directly asked whether he was aware of the policy. He notes that he denied being aware of it.

¶ 63 An employee deliberately and willfully violates a work rule or policy when he or she is aware of and consciously disregards the rule. *Odie v. Department of Employment Security*, 377 Ill. App. 3d 710, 713 (2007); see also *Universal Security Corp. v. Department of Employment Security*, 2015 IL App (1st) 133886, ¶ 16 ("An employee's conduct may be careless or negligent or substandard, but that is not enough to constitute 'deliberate and willful' conduct under the [Act]. To be considered 'deliberate and willful,' the Act requires the conduct be intentional."). *E.g.*, *Abbott Industries, Inc. v. Department of Employment Security*, 2011 IL App (2d) 100610, ¶ 22 ("When an employee makes reasonable efforts to comply with her employer's rules but is frustrated by events beyond her control, she has not shown the type of deliberate disregard for the rules that would constitute misconduct.").

¶ 64 We conclude that the Board did not clearly err in finding that plaintiff willfully and deliberately violated WinCup's policies. The evidence was sufficient to establish that plaintiff was aware of the cell phone policy and deliberately or consciously disregarded it. As plaintiff notes, there was testimony that he was informed of the cell phone policy in August 2010, soon

after it was implemented. Jackson testified as to such, including that she was assisted by a Spanish translator. There was also evidence, specifically, Schultz's and Rosales's testimony, that, during a meeting with plaintiff, he admitted to taking photos of the warehouse for over two years. Although plaintiff denied that he was aware of any cell phone policy and denied that he had admitted to violating it, the Board found the WinCup witnesses' testimony more credible than plaintiff's testimony. We defer to these findings and cannot conclude that they were unreasonable or clearly erroneous. *520 South Michigan Avenue Associates v. Department of Employment Security*, 404 Ill. App. 3d 304, 318 (2010) (where the issue on review merely involves conflicting testimony and witness credibility, the Board's determination should be sustained).

¶ 65 As to plaintiff's disciplinary incidents prior to the cell phone photos, Barreiro testified that plaintiff had received progressive discipline. We conclude that the evidence sufficiently established that plaintiff: behaved aggressively toward co-workers, refused to follow rules concerning the recording of his hours on time sheets, failed to follow safe work practices, and arrived late to his work area. Further, due to the nature of the incidents, a finding that they were deliberate or intentional was not unreasonable or clearly erroneous. WinCup's records concerning the July 2011 incident where plaintiff arrived late, claiming that he was waiting for a pair of safety glasses, reflects that he lied about the glasses, where WinCup stated that he was given a pair of glasses the prior day. The records concerning the time sheets, reflect that, although plaintiff was recording his time, he did not do it in the manner WinCup prescribed, thus, reflecting an intentional disregard for his employer's policies. As to the September 2012 incident where he threatened a fellow employee, this event speaks for itself as a deliberate act.

In sum, plaintiff's disciplinary record did not reasonably reflect that his infractions resulted from negligent or careless conduct, but, rather, that they resulted from deliberate or intentional acts.

¶ 66 Plaintiff's argument that the evidence lacked foundation or specificity is also unavailing. The technical rules of evidence do not apply in hearings before referees. 56 Ill. Adm. Code § 2720.250 (2014). Further, the Act provides that "any document in the files of the Department of Employment Security submitted to it by any of the parties, shall be a part of the record, and shall be competent evidence bearing upon the issues." 820 ILCS 405/801A (West 2014). The witnesses were clear that the policy plaintiff violated was the August 2010 cell phone policy, which, as previously noted, is contained in the record and prohibits photos of the warehouse. As to plaintiff's complaints that he might have obtained authorization to take the photos, he did not raise such a defense at the hearing, thus, it is forfeited. See *Carpetland U.S.A., Inc. v. Illinois Department of Employment Security*, 201 Ill. 2d 351, 396-97 (2002) (issue or argument not presented at an administrative hearing is waived and cannot be raised for the first time on appeal); see also *Texaco-Cities Service Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 278-79 (1998) (reviewing court's examination is confined to the issues, arguments, and evidence that were presented before the administrative tribunal).

¶ 67 2. Reasonable Rule or Policy

¶ 68 Next, we must determine whether the Board erred in assessing whether WinCup's rule or policy was reasonable. "A reasonable rule concerns 'standards of behavior which an employer has a right to expect' from an employee." *Livingston v. Department of Employment Security*, 375 Ill. App. 3d 710, 716 (2007) (quoting *Bandemer v. Department of Employment Security*, 204 Ill. App. 3d 192, 195 (1990)). Plaintiff concedes that it would be reasonable (and we agree) for an employer to limit use of cell phones to avoid work-related injury, avoid interference with

productivity, or to protect the employee's safety or employer's trade secrets. However, plaintiff argues that WinCup's rules and policies were unreasonable *if* they prohibited the use of cell phone cameras to document safety and rule violations (by WinCup or its employees). For several reasons, this argument is forfeited. First, plaintiff cites to no authority for this proposition. Second, as noted, plaintiff did not raise this issue at the hearing; rather, he chose a defense centered on denying that he took any photos at all. Finally, he never provided supporting documentation concerning his alleged OSHA communications.

¶ 69 3. Harmful or Repeated

¶ 70 Third, we must determine whether the Board properly determined that plaintiff's conduct resulted in at least potential harm to WinCup. "Harm includes damage or injury to other employees' well-being or morale or to the employer's operations or goodwill." *Alternative Staffing*, 2012 IL App (1st) 113332, ¶ 31; see also 56 Ill. Adm. Code § 2840.25(b) (2014). "Harm to the employer is not limited to actual harm, but harm can be established by showing potential harm." *Pesoli*, 2012 IL App (1st) 111835, ¶ 32. Further, "[a]lthough potential harm is sufficient to satisfy the third element ([citation]), the possibility of harm must not be remote or speculative ([citation])." *Eastham v. Housing Authority of Jefferson County*, 2014 IL App (5th) 130209, ¶ 11.

¶ 71 We conclude that the evidence sufficiently showed that plaintiff's tardiness, aggressive behavior, and collision caused harm in that they cost WinCup money and interfered with its operations. Further, plaintiff's failure to properly document his time and his taking of the warehouse photos caused at least potential harm. The time documentation could have resulted in inaccurate records that could have cost the company money, and the photos presented the

potential for harm in that there was the possibility of revealing trade secrets. Plaintiff's OSHA allegations, which are unsupported, are too speculative to weigh in this analysis.

¶ 72 In summary, the Board did not clearly err in finding that plaintiff committed misconduct.

¶ 73 III. CONCLUSION

¶ 74 For the reasons stated, the judgment of the circuit court of Kane County, affirming the decision of the Board, is affirmed.

¶ 75 Affirmed.