2015 IL App (4th) 150052-U

NO. 4-15-0052

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 12, 2015
Carla Bender
4th District Appellate
Court, IL

QUINCY COUNTRY CLUB, an Illinois Corporation, Plaintiff-Appellant, v. THE DEPARTMENT OF EMPLOYMENT SECURITY, et al., Defendants-Appellees.	)))))))))	Appeal from Circuit Court of Adams County No. 14MR61 Honorable Thomas J. Ortbal, Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The Board of Review of the Illinois Department of Employment Security's determination that plaintiff employer failed to prove the employee had engaged in misconduct so as to disqualify him from receiving unemployment benefits was not clearly erroneous.

¶ 2 Plaintiff, Quincy Country Club (QCC), filed a complaint for administrative review of the decision of the Board of Review (Board) of the Department of Employment Security (Department), which allowed QCC's former employee, the claimant, Terrell W. Bell, to receive unemployment benefits. QCC complained Bell was discharged for employment-related misconduct and should be ineligible to receive unemployment benefits. The circuit court of Adams County affirmed the Board's decision. QCC appealed. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Bell was fired from his employment at QCC after K.R., another QCC employee, told the manager, Matthew Mulherin, that Bell had sexually assaulted her in her apartment. K.R., accompanied by a sexual-abuse advocate, presented Mulherin with a copy of a no-contact order she had obtained from the circuit court a few days after the alleged incident, which ordered Bell to generally stay 1,000 feet from her and 25 feet from her at work. K.R. also presented Mulherin with a printout from the Illinois Registered Sex Offender registry, which indicated Bell had been convicted of a sexual assault in 1990, when he was 18 years old.

¶ 5 After being fired, Bell applied to the Department for unemployment benefits. QCC objected on the ground Bell had been discharged due to employment-related misconduct, rendering him ineligible for benefits under section 602(A) of the Unemployment Insurance Act (Act) (820 ILCS 405/602(A) (West 2012)). On September 25, 2013, a claims adjudicator found QCC had not presented sufficient information to support misconduct.

¶ 6 QCC appealed the claims adjudicator's decision to the Department referee, Matthew Franklin, who conducted a telephone hearing on December 30, 2013, with the following appearances: Bell, proceeding *pro se*; Mulherin; and David Penn, QCC's counsel. According to Mulherin's testimony, Bell had been employed with QCC as a bartender and server for four years. Mulherin said he fired Bell on August 16, 2013, after he had conducted his own investigation of the incident by reviewing QCC's current policies on sexual harassment and speaking with Bell. Bell denied the allegations. Mulherin said K.R. had told him she contacted the Quincy police department and filed a formal complaint, but Mulherin said he did not know "if anything came out of that." Mulherin said he had not interviewed anyone except Bell regarding the alleged incident.

¶ 7 Mulherin testified, after he fired Bell, he was served with a default plenary order of protection entered on November 12, 2013, indicating Bell was prohibited from coming within 25 feet of K.R. Mulherin said he fired Bell, relying on the fact that K.R. had submitted to the circuit court a sworn statement, made under oath, stating Bell had sexually assaulted her.

¶ 8 Next, Bell testified. He said K.R. lied about the alleged assault. He explained she had called him the night of the incident and asked him to come to her house because "somebody was coming over to hurt her." Bell agreed, but took a friend with him. When Bell arrived at her house, K.R. greeted him, saying, " 'I knew that would get you over here.' " Bell said, "[t]here was nothing wrong with her. There was nobody there." He stepped inside her apartment to find out "what was going on." According to Bell, "she just wanted [him] to come over." After 15 to 20 minutes of conversation, he said he had to leave. He said the "[n]ext thing [he] know[s], they're telling [him] that she said that [he] did something to her." He denied doing "anything to her." He said, if he would have done anything to her, he would "have been arrested and thrown in jail. There's no way they would not have arrested [him]." He said K.R. was a " 'no call/no show' " the next day at work, and she "needed an excuse to lie, and [he] was her excuse." He said he had "four good years" at QCC with no misconduct and "[t]his girl comes in and says [he] did something to her, and they—" believe her. Bell assumed K.R. got his telephone number off the employee list at QCC. Bell insisted she lied to QCC, the advocate, and "everybody about this whole situation, trying to ruin [his] life."

¶ 9 The referee asked Bell why he failed to appear at the hearing on the plenary order of protection. He said he could not afford an attorney, and he did not want to have any contact with her anyway, so she "can have her *** protective order." Bell said he was "just disgusted with the whole situation."

¶ 10 After the hearing, the referee determined Bell was eligible for unemployment benefits because the evidence did not support a finding of misconduct within the meaning of section 602(a) of the Act. The referee found as follows:

> "The employer's case was entirely hearsay. The employer discharged the claimant on the allegation of a co-worker. The co-worker did not testify. Her statement in the civil proceeding is still hearsay. The claimant denied the allegations and presented an explanation at the hearing for the alleged acts of misconduct which was logical and does not support a finding of willful and deliberate violation of the employer's rules. The subsequent entry of a default plenary order was not the basis of the decision to terminate. That came three months later. Thus, there is no competent evidence of misconduct and the case against the claimant has not been established. Therefore, the claimant is not disqualified from benefits under section 602(A) of the Act."

¶ 11 QCC appealed the referee's decision to the Board, which, on April 8, 2014, affirmed the referee's decision, finding the decision was supported by the record and the law. The Board specifically indicated it incorporated the referee's decision. The Board also noted QCC's letter of appeal contained legal arguments, which the Board considered "to be a written argument on appeal." When a party submits a written argument on appeal, it must satisfy the notice requirements by sending the argument to the opposing party, which QCC failed to do. Therefore, the Board refused to consider the legal arguments submitted by QCC.

¶ 12 On May 12, 2014, QCC filed a complaint for administrative review in the circuit court, naming the Department, its Director, the Board, the individual members of the Board in their capacities as members, the referee, and Bell as defendants. QCC argued Bell is *not* eligible for unemployment benefits because his actions constituted misconduct and the previous findings of no misconduct were against the manifest weight of the evidence. The Attorney General entered its appearance on behalf of all defendants with the exception of Bell, who did not enter an appearance or otherwise participate in the circuit court proceedings.

¶ 13 On October 6, 2014, QCC filed a brief in the circuit court, arguing the hearsay evidence that Bell sexually assaulted K.R. and thereby violated the sexual harassment policy of QCC was admissible and was sufficient to prove misconduct in these administrative proceedings. QCC claimed (1) the victim's statement, (2) the preliminary order of protection, and (3) Bell's appearance on the sex offender registry was sufficient to constitute a violation of QCC's sexual harassment policy. QCC also claimed the referee and the Board did not follow proper procedure regarding review of the record and the evidence presented, so as to afford QCC a full, fair, and impartial hearing. In response, the Board filed a brief, arguing QCC had failed to present sufficient evidence to confirm the allegations against Bell. QCC did not present "more reliable" evidence in the form of testimony of the female employee, K.R.

¶ 14 The circuit court conducted a hearing over two days, beginning on December 15, 2014, and concluding on December 18, 2014, at which counsel for QCC and counsel for the Board appeared. Bell did not appear. The court considered arguments for both sides and took the matter under advisement.

¶ 15 On December 20, 2014, the circuit court entered a written opinion and order, finding as follows. First, the court noted the referee had, in fact, admitted K.R.'s hearsay

statements into evidence. However, the referee had found her statements were not "competent," in light of Bell's live testimony at the hearing. The court stated: "That the referee chose to credit the live testimony of Bell over the hearsay statements of K.R. does not appear to violate th[e] principal [that hearsay which is admitted without objection may be considered and given its natural probative effect]." In other words, the court found the referee had weighed the probative value of all the evidence and made a credibility determination with regard to Bell's testimony. The court disagreed with QCC's position that the referee had refused to admit or consider K.R.'s sworn statement. Ultimately, the court found the Board's decision that QCC had failed to submit sufficient evidence of Bell's willful misconduct was not against the manifest weight of the evidence.

¶ 16 Second, the circuit court considered QCC's alternative argument that Bell should have been collaterally estopped from denying he committed the sexual assault when he did not contest the entry the plenary order of protection awarded to K.R. The court found QCC has forfeited this argument since it was raised for the first time during the administrative review proceedings before the court, not before the referee or the Board. Despite forfeiture, the court found collateral estoppel would not apply because "there was insufficient identity of issues" between the two proceedings. The court held, because QCC was not a party to the order-of-protection proceedings, QCC cannot assert collateral estoppel as an argument in the unemployment-benefits proceedings.

¶ 17 The circuit court concluded as follows:

> "The court is sympathetic to the predicament that the employer QCC found itself in (the accusation of a sexual assault by one employee against another and the circuit court issuance of

> the no-contact order against the accused employee). However, the question before the Board was not whether the employer had reasonable grounds to proceed as it did, based upon the circumstances it confronted. There are numerous circumstances where an employer is fully justified in discharging an employee, but the employee is nevertheless entitled to unemployment benefits absent proof of deliberate and willful misconduct. The issue before the Board was whether the claimant was in fact guilty of the willful misconduct he was accused of, which would rightly bar him from entitlement to unemployment benefits.
>
> For the reasons stated above, the decision of the Board was neither against the manifest weight of the evidence nor prohibited by the application of the doctrine of collateral estoppel."

The court affirmed the Board's decision.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, QCC poses three issues: whether (1) the referee was wrong to have discounted K.R.'s sworn statement as competent evidence, (2) it was reasonable for the referee to require K.R. to testify, and (3) the Board erred in refusing to consider K.R.'s sworn statement as evidence. In reality, the issue is whether the Board's decision to allow Bell to receive unemployment benefits was supported by the evidence and in accordance with the Act. We find it was.

¶ 21 A. Standard of Review

¶ 22 Initially, we note, in administrative-review appeals, we review the decision of the Board, not the decision of the referee or the circuit court. *Farris v. Department of Employment Security*, 2014 IL App (4th) 130391, ¶ 35. The issue of whether Bell committed misconduct in connection with his employment so as to disqualify himself from unemployment benefits presents a mixed question of law and fact, to which the clearly erroneous standard of review applies. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 392 (2001).

¶ 23 " '[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.' " *Livingston v. Department of Employment Security*, 375 Ill. App. 3d 710, 715 (2007) (quoting *Moss v. Department of Employment Security*, 357 Ill. App. 3d 980, 984 (2005)). The Board's decision is clearly erroneous where the reviewing court, based on the entirety of the record, definitely and firmly believes a mistake occurred. *Livingston*, 375 Ill. App. 3d at 715. "A court of review will not reweigh the evidence or substitute its judgment for that of the Board." *Livingston*, 375 Ill. App. 3d at 715.

¶ 24 B. Section 602(A) of the Act

¶ 25 The Act allows qualifying individuals who become involuntarily unemployed to receive economic benefits. *AFM*, 198 Ill. 2d at 396. "[T]he individual claiming unemployment insurance benefits has the burden of establishing [his] eligibility." *Manning v. Illinois Department of Employment Security*, 365 Ill. App. 3d 553, 557 (2006).

¶ 26 "Individuals who are 'discharged for misconduct' are ineligible to receive unemployment benefits under the Act." *Manning*, 365 Ill. App. 3d at 557. Three elements must be proved to establish misconduct: "(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." *Woods v. Illinois Department of Employment Security*, 2012 IL App (1st) 101639, ¶ 19 (citing 820 ILCS 405/602(A) (West 2008)).

¶ 27 Here, QCC argues Bell's conduct was sufficient to establish misconduct, given K.R.'s sworn statement that Bell sexually assaulted her. The Board found there was insufficient evidence to conclude Bell had committed misconduct so as to exclude him from benefits under section 602(A) of the Act (820 ILCS 405/602(A) (West 2012)). QCC asserts the Board's decision was in error.

¶ 28 To establish Bell was disqualified from receiving unemployment benefits, QCC had to demonstrate that Bell willfully violated a reasonable rule of QCC's which harmed QCC or another employee. On the record before us, and accepting the Board's findings of fact as true, we cannot conclude that Bell willfully and deliberately violated the QCC's rules. See *Wrobel v. Department of Employment Security*, 344 Ill. App. 3d 533, 537 (2003).

¶ 29 "Every justifiable discharge does not disqualify the discharged employee from receiving unemployment benefits." *Pesce v. Board of Review of the Department of Employment Security*, 161 Ill. App. 3d 879, 882 (1987). Whether an employer had a justifiable reason for firing an employee and whether that employee is eligible for unemployment benefits are two separate issues. The latter does not always depend on the former. The employee may do something that violates an employer's rules or policy. Such conduct may justify the termination

of the employee. However, the justification for firing an employee does not necessarily equate to misconduct sufficient to deny unemployment benefits under the Act. *Jackson v. Board of Review of the Department of Labor*, 105 Ill. 2d 501, 507 (1985). See also *Zuaznabar v. Board of Review of the Department of Employment Security*, 257 Ill. App. 3d 354, 359 (1993) (To disqualify an employee from receiving unemployment benefits, "an employer must satisfy a higher burden than merely proving that an employee should have been rightly discharged."). It is the Act and the cases interpreting it which control eligibility for benefits, not the employer's internal employment policies. *Grigoleit Company v. Department of Employment Security*, 282 Ill. App. 3d 64, 69 (1996).

¶ 30 "[A]n administrative agency's findings concerning factual questions are *prima facie* true and correct and should not be disturbed on review unless they are contrary to the manifest weight of the evidence." 735 ILCS 5/3-110 (West 2012); *Grigoleit*, 282 Ill. App. 3d at 69. QCC asserts Bell violated its sexual harassment policy by allegedly sexually assaulting K.R. at her home. QCC's policy is set forth in its employee manual. The manual states an employee who engages in sexually harassing conduct will risk termination of employment. After K.R. and her advocate informed Mulherin of the incident, Mulherin conducted his own investigation, which included speaking with Bell. Even though Bell denied all allegations, Mulherin reasonably relied on K.R.'s version of the events, her possession of a temporary restraining order against Bell, and seeing Bell's name on the Sex Offender Registry when he fired Bell.

¶ 31 While Mulherin may have been justified in firing Bell based upon what he knew about the incident from K.R., he and QCC failed to prove Bell had engaged in "misconduct" as it is defined by section 602(A) of the Act. The Board relied upon the evidence presented to the referee at the hearing. At the hearing, Mulherin testified, repeating what K.R. had told him about

the incident. K.R. did not testify at the hearing, so the referee had to rely on only the hearsay evidence. On the other hand, the referee considered Bell's testimony, wherein he provided a reasonable and logical explanation of the events as they had transpired on the night in question, as well as a reasonable and logical explanation of why Bell failed to appear at the hearing to contest the entry of a plenary order of protection against him.

¶ 32 The referee and the Board properly concluded QCC's case relied exclusively on the out-of-court statements of K.R. QCC introduced these statements by way of Mulherin's testimony, hoping to demonstrate Bell had committed misconduct by sexually assaulting K.R. There is no doubt K.R.'s statements constituted hearsay. See *People v. Banks*, 237 Ill. 2d 154, 180 (2010) (hearsay is an out-of-court statement offered to prove the truth of the matter asserted).

¶ 33 Hearsay statements are admissible, but they are given only their "natural probative value." See *Jackson*, 105 Ill. 2d at 508 ("It is well established that when hearsay evidence is admitted without an objection, it is to be considered and given its natural probative effect."). In this case, there was no objection made to the hearsay evidence because Bell acted *pro se*. However, the fact Bell did not object does not alter the rule. Contrary to QCC's position in this appeal, the record indicates the referee and the Board considered both the hearsay statements of QCC and the testimony of Bell. "The statements of both [the claimant] and the employer's representatives were before the referee. It was his prerogative to give those statements whatever weight he thought they should be given." *Jackson*, 105 Ill. 2d at 509. As a reviewing court, we defer to the fact finder on such issues because the fact finder is in a much better position to evaluate the credibility of witnesses. See *Samour, Inc. v. Board of Election Commissioners of the City of Chicago*, 224 Ill. 2d 530, 548 (2007).

¶ 34 Indeed, as QCC suggests, the Board and this court need not disregard unobjected-to hearsay evidence. The record makes clear, after considering *all* the evidence, including the hearsay evidence, the referee and the Board found Bell's testimony more persuasive. This was a determination within the administrative agency's province. As stated above, under section 3-110 of the Code of Civil Procedure (735 ILCS 5/3-110 (West 2012)), findings and conclusions of fact are *prima facie* true and correct. A reviewing court cannot reweigh the evidence. Rather, the reviewing court's function is to determine whether the administrative agency's credibility determinations and factual findings are against the manifest weight of the evidence. See *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204 (1998); *Jackson*, 105 Ill. 2d at 513. Although QCC's discharge of Bell may have been proper and justified, there was insufficient evidence in the record, when considered in light of Bell's testimony, to establish that Bell engaged in misconduct under the Act. See *Pesce*, 161 Ill. App. 3d at 883. Therefore, Bell was not disqualified under section 602(A) of the Act from receiving unemployment benefits. *Grigoleit*, 282 Ill. App. 3d at 72.

¶ 35 C. Arguments Forfeited

¶ 36 For the first time in the circuit court, QCC raised two issues regarding Bell's failure to challenge the entry of the order of protection entered in K.R.'s favor. The law is well established that a party cannot raise, for the first time on administrative review, issues that were not properly raised before the administrative agency. *Arvia v. Madigan*, 209 Ill. 2d 520, 526 (2004). Neither the circuit court nor this court may properly address QCC's issues pertaining to Bell's absence at the order-of-protection hearing, or whether his absence equates to an admission or justification for the application of collateral estoppel. The issues were not presented to the referee or the Board and therefore, are forfeited for purposes of review.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm the circuit court's judgment.

¶ 39 Affirmed.