2016 IL App (1st) 143344-U

FOURTH DIVISION
March 17, 2016

No. 1-14-3344

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PERRY & ASSOCIATES, LLC, Plaintiff-Appellant, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, DIRECTOR OF ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, THE BOARD OF REVIEW OF THE DEPARTMENT OF EMPLOYMENT SECURITY, and CLARENCE PASSONS (claimant), Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County Nos. 13 L 050508 14 L 050281 Honorable Robert Lopez Cepero, Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

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

¶ 2 Plaintiff Perry & Associates appeals from the circuit court's order affirming the administrative decision of defendant, Board of Review (the Board), finding that claimant Clarence Passons was eligible for unemployment benefits because his termination was not due to misconduct under section 602(A) of the Illinois Unemployment Insurance Act (the Act) (820

ILCS 405/602(A) (West 2012)). On appeal, plaintiff argues that the Board erred in finding that claimant did not engage in misconduct and its interpretation of section 602(A) was incorrect, and the Board's refusal to consider evidence denied plaintiff a fair trial.

¶ 3 Plaintiff is an architectural and structural engineering firm located in Chicago, Illinois, with Christopher J. Perry as the principal. Claimant was hired in April 2009 as director of client relations and senior architect. Claimant's duties involved marketing for clients and working on architectural projects. His work was generally self-directed and did not require a daily assignment. Generally, claimant reported to Perry, but on occasion he received assignments from the officer manager, Quentin Plock.

¶ 4 On November 1, 2011, claimant returned to work following a four-day weekend. Shortly before 5:30 p.m. at the end of the work day, claimant emailed Perry, "Please discuss with Quentin a new assignment for me." Claimant received no response that day or the following day. Claimant submitted timesheets for November 1 and 2, 2011, reflecting eight hours of work each day, and stating the same note for both dates, "Requested new assignment and nothing was forthcoming this date."

¶ 5 The morning of November 3, 2011, Perry sent an email to claimant terminating his employment which stated, "Clarence, we are going to terminate your employment today. You can leave your keys, FOB and credit card in the desk. If you [would] like for us to messenger your personal items to [your home], just let me know by e-mail. Good luck on your future ventures."

¶ 6 Claimant subsequently applied for unemployment benefits, stating that he had been laid off due to lack of work. Plaintiff objected to claimant's application, indicating that claimant was ineligible under sections 602(A) discharge for misconduct and 603 refusal of offer of work.

Plaintiff submitted a statement of facts with the objection, stating that claimant was dismissed for "failing to perform work and failing to account for 40 hours of work on his timesheets." Plaintiff also stated that during "2011, [claimant] has failed to properly execute his time sheets, and failed to account for a normal work week. This has been brought to his attention."

> "On November 1, [claimant] requested an assignment by e-mail. A request he had never made before. Instead of doing what he normally would do, which would be marketing, or client follow-up, or development of marketing plans, or assisting one of the other 12 employees, or filling in for the administrative person, [claimant] did nothing and put that on his timesheet."

¶ 7 In December 2011, claimant was interviewed by a claims adjudicator. Claimant stated that no reason was given for his discharge. He said that in days and weeks prior to his discharge, he had been seeking a new assignment. Claimant noted that he had turned in some marketing material, but "they never commented on it." Claimant also stated that he had been furloughed three times in six weeks, with his third furlough in September 2011. Claimant said he did not refuse to work, but had no work to do and was not given new assignments. Perry submitted a written summary in response to the adjudicator's questions. Perry stated that claimant "was subject to various discipline with respect to his timesheet issues (and other issues) that escalated from requests to fix his timesheets, to week-long layoffs (and reinstatements), to ultimately dismissal." Perry also said that he believed claimant's failure to complete his timesheets was "most likely part of a concerted effort to force a discharge and thereby receive benefits to fund his retirement." The claims adjudicator determined that claimant was eligible for unemployment

benefits because his conduct was not deliberate or willful. Plaintiff filed an appeal from the adjudicator's finding.

¶ 8 In February 2012, a telephone hearing was conducted by a referee with claimant and Perry participating. The referee affirmed the claims adjudicator's determination that claimant was eligible for benefits. Plaintiff appealed to the Board. The Board found the record inadequate and remanded with instructions for the referee to elicit additional evidence, including what claimant did on November 1 and 2, 2011, whether plaintiff conducted an investigation before discharging claimant, and why plaintiff considered claimant's timesheets to be fraudulent.

¶ 9 A second telephone hearing was conducted in June 2012, with plaintiff now represented by counsel. Plaintiff complained that the referee was acting as an advocate for claimant. The referee again affirmed the claims adjudicator, and plaintiff appealed. The Board found that the referee failed to give both parties a fair hearing and remanded for a third hearing *de novo* before a different referee.

¶ 10 The third administrative hearing was conducted in December 2012, with both parties represented by counsel. Several documents were admitted for the hearing. Claimant submitted a timeline of the events leading up to his termination. The timeline indicated that claimant had been working on an extensive project for Chicago Public Schools (CPS) through October 2011. Claimant stated that he spoke with Plock regarding a new assignment multiple times from October 20 to 31, 2011. Perry left for Hawaii on October 20, 2011, and was out of the office through claimant's termination. Claimant also submitted emails regarding his previous furloughs. A September 2011 email written by Perry indicated that claimant had filed for unemployment benefits and Perry stated that claimant was "not unemployed. Moreover, I've been working with you for months to help you improve your performance and help you find a

sustainable role. Trying to get free money from the government is at least an extraordinary lack of candor and at worst some kind of scam on the government." In his response email, claimant stated that it was a "misunderstanding. When [he] was unexpectedly put on furlough 3 times in 6 weeks (with no salary and no concrete time for full employment) [he] was advised to report to [Illinois Department of Employment Security]." Claimaint also stated that he appreciated Perry's "support in providing [him] with direction on [his] performance ***." No further emails were presented for this exchange. Plaintiff submitted excerpts from the employee handbook, which included a section on record of hours worked.

> "All Staff Members are required to record all hours worked by submitting time sheets in accordance with the currently issued time sheet policy. Time sheets must be complete before a Staff Member leaves for the day. Time sheets must record all tasks performed, including both project and non-project time (billable and non-billable), and must include a detailed description of all tasks performed. *** Any falsification or attempt to misrepresent hours worked on a time sheet may result in disciplinary action, including discharge."

¶ 11 During the hearing, Perry testified that he did not tell claimant why he was being discharged because "he knew why he was being let go." Perry said it was because of the way claimant's timesheets were submitted and he had discussed this on prior occasions, but not this particular occasion. Perry stated that claimant "wrote in his timesheet that he asked for work and did not receive the work, and therefore, he didn't do any work." Perry admitted that claimant emailed him seeking work and that he did not respond to the email request. Perry said he gave

claimant assignments, but not on a daily basis. Perry testified that claimant had work available to him so he did not know why claimant did not do that.

¶ 12 Perry stated that they had about six months of discussions with claimant about "productivity," "accuracy," and "developing him as an employee." He said claimant had received two unpaid suspensions, one in June and one in September of 2011. Perry testified that he did not "threaten" claimant with termination.

¶ 13 On cross-examination, Perry stated that he discharged claimant "because he told me he didn't work on November 1st and November 2nd." Perry admitted that he was not in the office, but was working remotely from Hawaii on Chicago hours. He said he did not respond to claimant's request for an assignment because he "interpreted the email as requesting a project assignment, not any assignment." He stated "that was the common interpretation." Perry also testified that he did not question claimant about what we did on November 1 and 2 because "he reported it."

¶ 14 Plock testified that claimant did not ask him for a work assignment on November 1 or November 2, nor did claimant tell him that he could not do his marketing work. Plock stated that he was the one running the office while Perry was in Hawaii. Plock said that claimant was present in the office both days. Plock further stated that he did not question claimant on what he did either of those days.

¶ 15 Claimant testified that when he was discharged, he assumed it was due to lack of work since nothing had been assigned after his requests, and he did not follow up and ask the reason. He did not think Perry was "very receptive" to talking with claimant.

¶ 16 On November 1, 2011, claimant believed more work was coming on the project with CPS, which involved 46 schools. He stated that he asked Perry for an assignment because he

was not sure if more work was "authorized" on the CPS project. He had not been notified that the work on the CPS project was done. Claimant testified that he assumed he could go ahead because "it was the biggest project in the office at the time." He also said that since he did not have any other productive work to do, that it would valuable to do "some preliminary scoping for the more detail design work rather than just sitting at [his] desk doing nothing."

¶ 17 Claimant stated that his timesheets did not reflect work on the CPS project because "the continuing work had not been approved or authorized by CPS" and he did not want to jeopardize plaintiff's work with CPS if time was charged during that two-day period that was not authorized. Claimant said he did not request work from Plock because he had made multiple requests over the previous two weeks that claimant would be running low on work and needed a new assignment, but none was given.

¶ 18 When asked about marketing work, claimant testified that the server had been replaced recently and all the client contact information had been lost, which Plock had been told. Claimant said other employees were experiencing computer problems. Claimant also stated that he had submitted marketing materials to Perry previously, but had not received a response. He did not think it would be "advantageous to continue to try to *** build marketing materials without any response from Mr. Perry."

¶ 19 Claimant was asked if he was previously suspended, and he responded that he had been furloughed. He said that Perry "definitely" said furlough in an email. Claimant explained that the furloughs were mentioned briefly in passing. His records indicated that the furloughs were over several days in the second half of June 2011.

¶ 20 On cross-examination, claimant admitted that he was not involved in determining whether to bill a client. Claimant also conceded that he had been warned about his productivity, but could not recall what the warning was about.

¶ 21 In December 2012, the referee issued its decision setting aside the claims adjudicator's determination. The referee found that claimant was discharged for misconduct. "The employer's witnesses credibly testified about the events which led to the claimant's discharge. The claimant failed to offer competent and compelling evidence in order to rebut the statements of the employer's witnesses and substantiate his own allegations. His testimony was self-serving and not credible." The referee concluded that claimant's actions "constituted a deliberate and willful disregard of the employer's interests." Claimant filed an appeal with the Board.

¶ 22 In April 2013, the Board reversed and set aside the decision of the referee, finding that the "evidence adduced at the hearing does not establish that the claimant was discharged for misconduct connected with the work." In May 2013, plaintiff filed an appeal with the circuit court. In December 2013, the circuit court remanded to the Board with instructions to issue a new decision that "makes credibility determinations and states the bases for those credibility determinations with specificity regarding why [the Board] is overruling the determinations of the referee, and no further proceeding required other than making and issuing the new decision."

¶ 23 In February 2014, the Board issued its new decision, which set aside the referee's finding. The Board made additional factual findings in this decision, including that claimant testified that he did work for plaintiff on November 1 and 2, 2011, but did not report it on his timesheet because he believed the work was non-billable and unauthorized by Perry or the client, CPS. The Board also noted that claimant emailed Perry seeking work close to the end of business on November 1, but Perry never responded to claimant's email request. Further, Plock testified that

claimant was present in the office on both days and he did not question what claimant did on those days. The Board found claimant's credible testimony supported that he worked eight hours on November 1 and 2. The Board concluded that claimant's testimony was "uncontradicted, unimpeached or not inherently improbable." Further, the Board determined that "the employer did not present such testimony to refute the claimant's perceptions or rationale as to why he did not report on his timesheet the work he did" on November 1 and 2, 2011. The Board also found that claimant's "rationale for not recording the work he did on November 1, 2011, and November 2, 2011, on his timesheet and stating that the work he did to be non-billable" was not evidence of deliberate conduct or a willful disregard of the employer's interests by the claimant.

¶ 24 Plaintiff again appealed the Board's decision to the circuit court. In September 2014, the circuit court affirmed the Board's decision finding it was not clearly erroneous. This appeal followed.

¶ 25 On appeal, plaintiff argues that the Board analyzed section 602(A) of the Act incorrectly. Plaintiff contends an individual who performs unauthorized work, is required to maintain accurate time records, and when that individual submits false time records to hide that unauthorized work, he commits misconduct under section 602(A).

¶ 26 Plaintiff asserts that the Board's decision should be reviewed *de novo* because the Board erred as a matter of law when it misapplied section 602(A). We disagree, and find that the appropriate standard of review is clearly erroneous as set forth below.

¶ 27 When a party appeals the circuit court's decision on a complaint for administrative review, the appellate court's role is to review the administrative decision rather than the circuit court's decision. *Siwek v. Retirement Board of the Policemen's Annuity & Benefit Fund*, 324 Ill. App. 3d 820, 824 (2001). The Administrative Review Law provides that judicial review of an

administrative agency decision shall extend to all questions of law and fact presented by the entire record before the court. 735 ILCS 5/3-110 (West 2012). Further, "[t]he 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 2012). "The standard of review, 'which determines the degree of deference given to the agency's decision,' turns on whether the issue presented is a question of fact, a question of law, or a mixed question of law and fact." *Comprehensive Community Solutions, Inc. v. Rockford School District No. 205*, 216 Ill. 2d 455, 471 (2005) (quoting *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 390 (2001)).

¶ 28 "A mixed question of law and fact asks the legal effect of a given set of facts." *Comprehensive Community*, 216 Ill. 2d at 472. Stated another way, 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. *AFM Messenger*, 198 Ill. 2d at 391. A mixed question of law and fact is reviewed under the clearly erroneous standard. *Comprehensive Community*, 216 Ill. 2d at 472. "Whether an individual was properly terminated for misconduct in connection with her work is a question that involves a mixed question of law and fact, to which we apply the clearly erroneous standard of review." *Woods v. Illinois Department of Employment Security*, 2012 IL App (1st) 101639, ¶ 19.

¶ 29 The clearly erroneous standard of review lies between the manifest weight of the evidence standard and the *de novo* standard, and as such, it grants some deference to the agency's decision. *AFM Messenger*, 198 Ill. 2d at 392. "[W]hen the decision of an administrative agency presents a mixed question of law and fact, the agency decision will be

deemed 'clearly erroneous' only where the reviewing court, on the entire record, is 'left with the definite and firm conviction that a mistake has been committed.' " *AFM Messenger*, 198 Ill. 2d at 395 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). "If there is any evidence in the record to support the Board's decision, that decision is not contrary to the manifest weight of the evidence and must be sustained on review." *Woods*, 2012 IL App (1st) 101639, ¶ 16.

¶ 30 "The Unemployment Insurance Act (Act) (820 ILCS 405/100 *et seq.* (West 2004)) was enacted to provide economic relief to individuals who become involuntarily unemployed." *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 557 (2006). "The Act recognizes that involuntary unemployment not only burdens unemployed individuals and their families but also threatens the health, safety, morals, and welfare of all Illinois citizens." *Petrovic v. Department of Employment Security*, 2016 IL 118562, ¶ 23 (citing 820 ILCS 405/100 (West 2012)). "In light of this purpose, the Act must be liberally construed in favor of awarding benefits to unemployed workers." *Id.*

¶ 31 However, individuals who are discharged for misconduct are ineligible for benefits. *Manning*, 365 Ill. App. 3d at 557 (citing 820 ILCS 405/602(A) (West 2004)). "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.

¶ 32 Under section 602(A), three elements must be proven 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*, 2012 IL App (1st) 101639, ¶ 19 (citing 820 ILCS 405/602(A) (West 2008)). All three requirements must be established by competent evidence to support a decision to deny unemployment benefits. See *Petrovic*, 2016 IL 118562, ¶ 26.

¶ 33 "It is important to emphasize that the disqualification for misconduct is intended to exclude individuals who intentionally commit conduct which they know is likely to result in their termination." *Id.* ¶ 27. The supreme court recently observed that an employer has the right to fire an at-will employee for any reason or no reason at all, " 'the Act requires a different legal standard to be applied to the separate question of whether a terminated employee is eligible to receive unemployment benefits.' " *Id.* (quoting *Abbott Industries, Inc. v. Department of Employment Security*, 2011 IL App (2d) 100610, ¶ 25). "In order to show that an employee should be disqualified for misconduct, 'an employer must satisfy a higher burden than merely proving that an employee should have been rightly discharged.' " *Id.* (quoting *Zuaznabar v. Board of Review of the Department of Employment Security*, 257 Ill. App. 3d 354, 359 (1993)).

¶ 34 "Section 602(A) expressly limits misconduct to a deliberate and willful violation of a reasonable rule or policy of the employer." *Id.* ¶ 29 (citing 820 ILCS 405/602(A) (West 2012)). "The 'deliberate and willful' language 'reflects the General Assembly's intent that only those who intentionally act contrary to their employers' rules should be disqualified on the basis of misconduct, while those who have been discharged because of their inadvertent or negligent acts, or their incapacity or inability to perform their assigned tasks, should receive benefits.' " *Id.* (quoting *Abbott Industries, Inc.*, 2011 IL App (2d) 100610, ¶ 19). "An employee deliberately and willfully violates a work rule or policy when he or she is aware of and consciously

disregards the rule." *Universal Security Corp. v. Department of Employment Security*, 2015 IL App (1st) 133886, ¶ 9.

¶ 35 The supreme court in *Petrovic* recently held:

> "As we have explained, the purpose of a disqualification is to prevent abuse of the unemployment insurance system by those whose termination is essentially by choice. Therefore, an employee should not be disqualified unless she engages in conduct she knew was prohibited. Where an employee's behavior would constitute a crime, such as theft or assault, a civil rights violation, such as sexual harassment, or a *prima facie* intentional tort, it is fair to say that the employee knows his actions are likely to result in termination. We hold, therefore, that in the absence of evidence of an express rule violation, an employee is only disqualified for misconduct if her conduct was otherwise illegal or would constitute a *prima facie* intentional tort." *Petrovic*, 2016 IL 118562, ¶ 35.

¶ 36 Under this standard, plaintiff must show a deliberate rule violation to constitute misconduct. At issue in this case is whether claimant deliberately and willfully violated plaintiff's policy regarding timesheets, constituting an express rule violation. Plaintiff's employee handbook requires all employees to record their hours worked on timesheets, which must record all tasks performed including billable and non-billable tasks. The falsification or misrepresentation of hours worked on a timesheet may result in disciplinary action, including discharge. According to plaintiff, claimant's timesheets indicated that he did no work, or that

any work performed was unauthorized, on November 1 and 2, 2011. Claimant's later explanation that he reviewed work on a large project with CPS without express authorization amounted to falsification of his timesheets. Plaintiff also finds it improbable that an employee would email their boss in Hawaii seeking work.

¶ 37 The record shows that claimant returned from a long weekend on November 1, 2011, and Perry was working remotely from Hawaii. At the end of the day, he emailed Perry seeking a new assignment, and Perry never responded or directed Plock to assign claimant work. Claimant's timesheet entries for both November 1 and 2, 2011, stated, "Requested new assignment and nothing was forthcoming this date." Claimant's email and testimony support this statement as accurate. Plaintiff did not ask claimant what work he performed those days, but instead discharged him the next morning without explanation. During the hearing, claimant explained that without a new assignment, he reviewed the work for the CPS project, but did not believe the client, CPS, had authorized plaintiff to continue work. Claimant did not want plaintiff to bill CPS for unauthorized work, so he thought, perhaps mistakenly, to not detail his work on his timesheets. Claimant's explanation does not show a conscious disregard of plaintiff's timesheet policy, but an attempt to prevent unauthorized billing to a client.

¶ 38 We hold that the Board's decision was not clearly erroneous for the reasons that follow. The Board considered and rejected plaintiff's arguments, finding claimant's explanation credible. As previously noted, the Board concluded that claimant's testimony was "uncontradicted, unimpeached or not inherently improbable." Further, the Board determined that "the employer did not present such testimony to refute the claimant's perceptions or rationale as to why he did not report on his timesheet the work he did" on November 1 and 2, 2011. The Board also found that claimant's "rationale for not recording the work he did on November 1, 2011, and November

2, 2011, on his timesheet and stating that the work he did to be non-billable" was not evidence of deliberate conduct or a willful disregard of the employer's interests by the claimant.

¶ 39 As the Board found, plaintiff offered no evidence to contradict claimant's explanation of the work he performed on the dates in question. Moreover, the evidence does not show that claimant falsified or an attempt to misrepresent the hours he worked. It is undisputed that claimant was present at work during business hours, thus, this is not a case in which an employee submitted timesheets reflecting eight hours of work when he was present for less time or not present at all. Since plaintiff has failed to establish that claimant was discharged for a deliberate rule violation, as required under *Petrovic*, misconduct under section 602(A) has not been proven. Based on this record, we are not left with a definite and firm conviction that a mistake has been committed, and therefore, the Board's decision finding claimant eligible for unemployment benefits was not clearly erroneous. See *AFM Messenger*, 198 Ill. 2d at 395.

¶ 40 Plaintiff also asserts that the Board erred by not considering prior instances regarding claimant's productivity as showing that claimant's behavior was repeated despite a previous warning or other explicit instruction from plaintiff under section 602(A). However in light of our holding that there is no evidence in the record of a deliberate and willful rule violation by plaintiff, we need not reach this issue since all three components to misconduct must be proven. See *Petrovic*, 2016 IL 118562, ¶ 38. However, even if we reached this issue, we note that the record on appeal provides no documentary evidence to support Perry's claims that claimant was put on unpaid suspension for failure to complete timesheets to properly reflect tasks performed while at work or another productivity error by claimant. No written personnel history for claimant was submitted to establish a history of rule violations and subsequent discipline, as would normally be kept by an employer in the course of business. The only documentary

evidence submitted in the record are the emails in which claimant referred to the period out of the office as furloughs, with nothing presented to contradict claimant's description. Even the termination email written by Perry on November 3, 2011, was amicable, gave no reason for claimant's termination, and wished claimant, "Good luck on your future ventures." The termination email gave no suggestion of misconduct by claimant, which supported claimant's belief that he was discharged for lack of work.

¶ 41 Finally, plaintiff contends that it was denied a fair hearing because the Board failed to consider documentary evidence submitted, finding plaintiff failed to explain its reasons for not presenting the evidence before the hearing with the referee. Plaintiff maintains that these documents "consisted of the same evidence submitted and entered into evidence at the hearing and, thus, the critical proofs were overlooked and not considered by the Board."

¶ 42 However, plaintiff's argument assumes that the Board did not consider documents already in the record. Plaintiff offers no support for its assertion the Board failed to fully consider all documents properly in the record. As defendants note, "the fact that the Board did not consider the firm's attachments to its response does not suggest that it failed to consider the identical documents already before the Board in the form of the administrative record." Rather, the Board's decision specifically refers to "employer's exhibit 2," which demonstrates that it considered plaintiff's exhibits previously included in the administrative record. Since the record refutes plaintiff's contention, plaintiff's argument that it was denied a fair hearing lacks merit.

¶ 43 Based on the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 44 Affirmed.