FOURTH DIVISION
May 26, 2016

No. 1-15-0196

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOSE A. PALMA, Plaintiff-Appellee, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; DIRECTOR OF ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; and BOARD OF REVIEW, Defendants-Appellants, and WOODLAWN COMMUNITY DEVELOPMENT CORP., Defendant.	)	Appeal from the Circuit Court of Cook County. No. 14 L 50492 Honorable Robert Lopez Cepero, Judge Presiding.

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

O R D E R

¶ 1 *Held*: Where evidence established that janitor took building materials for his own use, thus violating employer's policy barring the acceptance of items from contractors doing business with employer, Board's determination that employee committed misconduct making him ineligible for unemployment benefits was not clearly erroneous; circuit court decision reversed and Board's decision affirmed.

¶ 2 Defendant, the Board of Review (the Board) of the Illinois Department of Employment Security, appeals the order of the circuit court reversing the Board's decision to deny unemployment benefits to plaintiff Jose A. Palma, a former maintenance worker for Woodlawn Community Development Corporation (Woodlawn). On appeal, the Board contends that its determination that plaintiff committed misconduct connected with his work was not clearly erroneous. We reverse the judgment of the circuit court and affirm the decision of the Board.

¶ 3 Although Palma has not filed a brief in this appeal, we can consider the merits of this appeal under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 4 The record establishes that plaintiff worked for Woodlawn as a janitor from September 6, 2012, until his employment was terminated on September 23, 2013. A letter from Woodlawn to plaintiff on that date states that plaintiff's employment was terminated because he removed building materials from the basement of Mahalia Jackson Apartments, a Chicago Housing Authority (CHA) development at 9177 South Chicago. The letter stated that plaintiff violated a policy that prohibited employees from accepting gifts from any person or firm doing business or seeking to do business with Woodlawn. The letter further stated that plaintiff had been late or absent from work on "several occasions" and did not "call in" on one of those dates and that plaintiff had falsified his timesheets on three dates in July 2013 on which he was late or absent.

¶ 5 Plaintiff's claim for unemployment benefits was challenged by Woodlawn, who was a defendant but is not a party to this appeal. The appellants in this action are the Board and the Illinois Department of Employment Security (the Department) and its director.

¶ 6 In October 2013, the Department claims adjudicator found plaintiff ineligible for unemployment benefits because he was discharged from his work for taking the building materials and for submitting false time sheets. The adjudicator found that plaintiff violated a known and reasonable company rule. Plaintiff appealed that determination and requested a hearing before a Department referee.

¶ 7 An initial telephone hearing was conducted on November 26, 2013, before a Department referee at which only plaintiff testified. Plaintiff stated he had permission from a supervisor to take the building materials. He said that when management asked him if he took the materials, he initially denied doing so but then said he took the lumber after "they told me it was going to be garbage." Plaintiff testified: "I was being really honest with them because I didn't want to lose my job. I said what about they check the cameras and I said well I never took anything and [] then they checked the cameras." Plaintiff then testified he had asked a contractor if he could have the building materials after seeing them in the contractor's Dumpster, and the contractor told him he could take the lumber because it contained asbestos and was unusable. Plaintiff stated he was fired for filing a worker's compensation claim against Woodlawn.

¶ 8 The Department referee found in favor of plaintiff. Woodlawn requested and was granted a rehearing after asserting it had not received a phone call to join the initial hearing.

¶ 9 On January 28, 2014, a Department referee conducted a telephone hearing that involved plaintiff and three witnesses from Woodlawn: Veronica Black, vice president for human resources; Stephanie Turnbull, property manager for the CHA building in question; and Nicole Eason, executive assistant to Woodlawn president Sandra Harris.

¶ 10 Black testified that plaintiff was employed with Woodlawn as a janitor. Plaintiff's employment was terminated on September 23, 2013, for violating the company's conflict-of-interest policy and for falsifying his time sheets.

¶ 11 Black testified that Harris received an anonymous letter on September 13 stating that employees were removing items from the property. Black, Harris and Eason met with plaintiff that day and asked if he had removed items from the property. Plaintiff said he had asked a contractor if he could take the materials. According to Black, plaintiff "disclosed that he did remove between 25 and 30 2x4s that were in the basement of the building" and that plaintiff's wife had driven to the building and loaded the materials into their car.

¶ 12 Black stated the contractor was "not authorized to give away any of the materials" because the building materials were purchased with federal government funds and also because work at the site was not completed and the materials still could have been used. Black testified that the building materials belonged to Woodlawn. Black testified that plaintiff's actions violated a policy governing conflicts of interest, which bars employees from accepting gifts or favors from any company doing business with Woodlawn. Black stated that policy was listed in a handbook given to all workers at the beginning of their employment; however, she did not discuss that rule with plaintiff when he was hired. Harris informed plaintiff that he had violated that policy, and plaintiff apologized.

¶ 13 As to the time sheets, Black testified that the site supervisor submitted a list of three dates on which plaintiff did not come to work or call; those dates were July 17, July 18 and July 31, 2013. Black testified that she compared those dates with plaintiff's time sheets, which reflected that plaintiff had "just signed in and out on his time sheets [as] if he was at work, and he was

not." She said plaintiff admitted that he did not call into work on some days when he was absent. When asked about the three specific dates, plaintiff told Black that Turnbull was aware of it and that he was going to make up the lost work time.

¶ 14 Turnbull testified she did not tell plaintiff he could take the building materials. Regarding plaintiff's work absences, Turnbull testified that plaintiff told her on one occasion that he had no child care and she allowed him to work a different day. As to the three July 2013 dates, Turnbull denied that she permitted plaintiff to sign in on those days but work on different days to make up the time.

¶ 15 Plaintiff testified that he acknowledged to Black, Harris and Eason that he took the building materials. As in the initial hearing, plaintiff testified that the contractor told him he could take the materials after plaintiff saw them in the Dumpster. Plaintiff testified he told the contractor he could use the materials because he was "doing something in his back yard" and asked if he could have them. Plaintiff said the lumber was "full of nails [and] holes" but was "brand new."

¶ 16 As to his work absences and time sheets, plaintiff testified that he did not report for work or call in on one occasion because he had been arrested and jailed following an argument with his wife. He called into work on two other days to say he could not come in, and Turnbull told him to "make up for the day." Plaintiff testified that in order to save on overtime costs, he and Turnbull agreed he would work certain days to make up for prior absences. He stated, for example, that when he called to say he could not work on a Thursday, Turnbull advised him to state on his time sheet that he reported to work on Thursday but to work the following day instead. Plaintiff testified he never received warnings as to those incidents or practices.

¶ 17 On January 31, 2014, the Department referee issued a decision finding that plaintiff was disqualified from receiving unemployment benefits under section 602(A) of the Illinois Unemployment Insurance Act (the Act) (820 ILCS 405/602(A) (West 2012)). The order stated that the employer had proved by a preponderance of the evidence that it discharged plaintiff for taking property that belonged to the employer, which amounted to misconduct within the meaning of section 602(A). The order further stated, however, that the employer did not provide sufficient evidence that plaintiff falsified his time sheets.

¶ 18 Plaintiff appealed to the Board, which affirmed the referee's decision in an order dated June 9, 2014. The Board stated that it had reviewed the testimony at both the November 26, 2013, hearing and the January 28, 2014, hearing. The Board found that plaintiff's testimony was "inherently not credible" and pointed out inconsistencies in plaintiff's accounts in the two hearings. The Board noted plaintiff's initial testimony that a supervisor allowed him to take the materials, compared to his later account that the contractor gave permission. The Board found not credible plaintiff's testimony that he was allowed to take new lumber and that new lumber could contain asbestos. However, the Board agreed with the Department referee's finding that the evidence did not establish that plaintiff had falsified his time sheets, noting the testimony that plaintiff had been allowed to "make up" a missed work day.

¶ 19 Plaintiff sought administrative review of the Board's decision in the circuit court. On December 18, 2014, the circuit court entered an order reversing the Board's decision. The Board now appeals that ruling.

¶ 20 On appeal, the Board contends its determination that plaintiff was discharged from his employment for misconduct was not clearly erroneous. Misconduct under the Act involves the

deliberate and willful violation of a reasonable rule or policy governing the individual's behavior in performance of his work. Three elements of misconduct must be established: (1) a deliberate and willful violation (2) of a reasonable rule or policy of the employer governing the individual's behavior in the performance of his work that (3) either (a) harmed the employer or a fellow employee or (b) was repeated despite a warning or explicit instruction from the employer. 820 ILCS 405/602(A) (West 2012); *Petrovic v. Department of Employment Security*, 2016 IL 118562, ¶¶ 25-26.

¶ 21 The individual claiming unemployment insurance benefits has the burden of establishing his eligibility, and an employee discharged for misconduct is ineligible to receive those benefits. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 327 (2009). Still, for an employee to be disqualified from receiving benefits due to misconduct, "an employer must satisfy a higher burden than merely proving that an employee should have been rightly discharged." *Petrovic*, 2016 IL 118562, ¶ 27, quoting *Zuaznabar v. Department of Employment Security*, 257 Ill. App. 3d 354, 359 (1993). Whether an employee was properly terminated for misconduct in connection with his work involves a mixed question of law and fact, to which we apply the clearly erroneous standard of review. *Hurst*, 393 Ill. App. 3d at 327.

¶ 22 The Board is the trier of fact in cases involving claims of unemployment compensation, and we review the findings of the Board, rather than those of the Department referee or of the circuit court. *Village Discount Outlet v. Department of Employment Security*, 384 Ill. App. 3d 522, 524-25 (2008). This court does not reweigh the evidence or substitute our judgment for that of the Board. *Czajka v. Department of Employment Security*, 387 Ill. App. 3d 168, 176 (2008). An agency decision is clearly erroneous where the entire record leaves the reviewing court with

the definite and firm conviction that a mistake has been made. *L.A. McMahon Building Maintenance, Inc. v. Department of Employment Security*, 2015 IL App (1st) 133227, ¶ 39.

¶ 23 Here, the record supports the Board's determination that plaintiff's actions amounted to misconduct under section 602(A) of the Act. First, plaintiff deliberately and willfully violated a rule or policy of his employer. Deliberate and willful misconduct consists of conscious acts made in violation of the employer's rules when the employee knows his actions are against the rules. *Petrovic*, 2016 IL 118562, ¶ 29; *Eastham v. Housing Authority of Jefferson County*, 2014 IL App (5th) 130209, ¶ 14. A disqualification of benefits based on an employee's "deliberate and willful" conduct reflects the legislature's intent that "only those who intentionally act contrary to their employer's 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." *Petrovic*, 2016 IL 118562, ¶ 29, quoting *Abbott Industries, Inc., v. Department of Employment Security*, 2011 IL App (2d) 100610, ¶ 19.

¶ 24 At the January 2014 hearing, Black testified that Woodlawn had a conflict-of-interest policy that barred employees from accepting gifts or favors from companies doing business with Woodlawn and that plaintiff had violated that policy. Black testified that contractors were not allowed to give away the building materials present at the site because those materials had been purchased with federal government funds. She stated that the policy was explained in a handbook given to all new employees, including plaintiff.

¶ 25 Plaintiff admitted taking the building materials but stated at the initial hearing that a supervisor told him he could do so. At the January 2014 hearing, plaintiff testified that a

contractor told him he could take the items. Plaintiff intentionally took the building materials for his own use, admitting he needed them for a "back yard" project.

¶ 26 When plaintiff was first questioned by management, he denied taking the materials. However, after managers reviewed security camera footage and determined that he took the lumber, plaintiff admitted doing so but claimed he was told that it was "garbage." In addition, plaintiff's testimony that the lumber was asbestos-ridden and unusable but later stated the materials were full of nails and holes but "brand new."

¶ 27 Under either scenario described by plaintiff, he acted deliberately and with awareness that he was violating a policy of his employer. Even though plaintiff first testified that a supervisor told him he could take the lumber, he later said that a contractor allowed him to take the materials after he asked if he could have them. If, as plaintiff claimed in the January 2014 hearing, he had the contractor's permission to take the building materials, plaintiff violated the policy against the acceptance of gifts from those doing business with Woodlawn. If plaintiff took the materials from the dumpster without the permission of the contractor or Woodlawn, his actions arguably constituted theft. See *Petrovic*, 2016 IL 118562, ¶ 35 (evidence of a rule need not be shown where the employee's conduct would otherwise be illegal or constitute a *prima facie* intentional tort). It is the responsibility of the administrative agency to weigh the evidence, determine the credibility of the witnesses and resolve conflicting testimony. *Quezada v. Department of Employment Security*, 2014 IL App (1st) 123017, ¶ 20. Given the conflicts in plaintiff's accounts, we lack any basis to disturb the Board's express determination that plaintiff's testimony was not credible. See *Carroll v. Board of Review*, 132 Ill. App. 3d 686, 691 (1985)

(determination of administrative agency should be upheld if issue on review is one of conflicting testimony and credibility of a witness).

¶ 28 The second element of misconduct under section 602(A) is that the rule or policy of the employer must also be reasonable, meaning it must appropriately relate the workplace and concern the standards of behavior which an employer has a right to expect from its employee. *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 827 (2009). In determining whether a rule is reasonable, a reviewing court "may make a commonsense determination that certain conduct intentionally and substantially disregards an employer's interest." *Id*. Woodlawn's conflict-of-interest policy barred employees from accepting gifts or favors from contractors doing work on CHA buildings. That policy directly relates to plaintiff's workplace and concerns employer standards because it seeks to prevent employees from entering into agreements, formal or informal, with contractors that would clearly subvert Woodlawn's interest in maintaining the subject property. In the alternative, if plaintiff took the materials without permission from the contractor, he committed theft. "Implicit in the employment relationship is the understanding that employees do not steal from employers." *Ray v. Department of Employment Security*, 244 Ill. App. 3d 233, 236 (1993) (no need for an express policy that prohibits employees from stealing).

¶ 29 The final element of misconduct under section 602(A) is that the violation either caused harm to the employer or that the employee repeated an action despite a warning by the employer. 820 ILCS 405/602(A); *Sudzus*, 393 Ill. App. 3d at 827. Because there was no indication of a prior incident involving plaintiff, we address the harm element, which is "viewed in the context of potential harm, and not in the context of actual harm." *Manning v. Department of Employment*

Security, 365 Ill. App. 3d 553, 557 (2006). We find that element has been met because if the building materials were usable, plaintiff's actions caused harm to Woodlawn by depriving the company of those materials. Even if the materials were not usable, plaintiff violated his employer's trust by accepting items from a contractor as prohibited by the policy barring conflicts of interest. In addition, Woodlawn could be harmed if plaintiff's actions led other employees to believe they could also remove building materials from the premises even with the contractor's approval.

¶ 30 In conclusion, the Board's determination that plaintiff's actions constituted misconduct under section 602(A) and that he should be denied unemployment benefits was not clearly erroneous. Accordingly, the judgment of the circuit court is reversed, and the Board's decision denying unemployment benefits to plaintiff is affirmed.

¶ 31 Circuit court decision reversed; Board's decision affirmed.