2016 IL App (1st) 151510-U

SIXTH DIVISION
March 31, 2016

No. 1-15-1510

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOEL T. WILLIAMSON, Plaintiff-Appellant, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; DIRECTOR, ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; BOARD OF REVIEW, ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; and DANIEL NELLUM YOUTH SERVICES, INC., Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 14 L 50937 Honorable Carl Anthony Walker, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 ***Held:*** The decision of the Board of Review finding plaintiff ineligible for unemployment benefits was clearly erroneous.

¶ 2 Plaintiff Joel Williamson appeals from an order of the circuit court affirming a decision by the Illinois Department of Employment Security Board of Review finding him ineligible to

receive benefits under the Unemployment Insurance Act (Act). 820 ILCS 405/100 *et seq*. (West 2014). We reverse.

¶ 3 BACKGROUND

¶ 4 Williamson was employed as a child care worker by Nellum Youth Services from December 19, 2013 until June 11, 2014. Nellum is a non-profit organization that provides residential services to teenagers in the foster care system. Williamson's job duties were, in his words, to "monitor, encourage and try to inspire the youth that's [*sic*] in the shelter *** to keep them on the right path."

¶ 5 Nellum terminated Williamson from his employment on June 11, 2014. On July 2, Williamson filed a claim for benefits under the Act. On July 10, Nellum filed a protest claiming that Williamson was terminated for "Gross Misconduct and Violating Company Policies." On July 28, a Department claims adjudicator found that Williamson was terminated for "gross misconduct" and accordingly declared him ineligible to receive benefits under the Act. The adjudicator specifically found that Williamson violated "a known and reasonable company rule" by engaging in outside contact with a Nellum client.

¶ 6 On August 5, Williamson filed a request for reconsideration and appeal to a referee. Williamson's request for reconsideration was denied in September and the matter was referred to a referee. A department referee held a hearing on Williamson's claim on September 22, 2014.

¶ 7 At the hearing, Williamson testified that one day while he was at work, he was trying to set up a new cell phone but could not figure out how to "establish a ringtone[,]" so he asked K., a Nellum client, for help. When K. saw that Williamson had a new cell phone, he asked Williamson if he could have Williamson's old phone. Williamson told K. he could have the phone, but that he could not give K. the phone while K. was still a resident. In response, K. told

Williamson that he was going to be placed in foster care soon, so Williamson gave K. his personal phone number and told K. to call him when he was placed in foster care.

¶ 8 According to Williamson, K. called back on June 3, 2014. At that point, K. was no longer a Nellum client, and had not been a client for two weeks. K. told Williamson that he was a block away from Williamson's house, but that there had been a shooting nearby. Williamson planned on meeting K. somewhere, but because of the shooting, he told K. to come to his house. K. came to Williamson's house, but Williamson had to leave shortly thereafter to take his neighbor to the doctor. Williamson left K. in his house and told him to leave for his meeting with the Department of Children and Family services (DCFS) when the shooting subsided.

¶ 9 That evening, Williamson's car was stolen. Williamson accused K. of stealing the car, but he later retracted the accusation. K., in turn, accused Williamson of serving him alcohol while he was in Williamson's house. That accusation prompted a report of abuse and neglect to DCFS, which triggered a DCFS investigation.

¶ 10 According to Linda Washington, who testified on behalf of Nellum, as a result of this incident, Nellum received phone calls from DCFS and K.'s foster parent. On June 5, Williamson was placed on unpaid leave, and on June 11, Nellum terminated Williamson. Washington explained that Williamson was terminated "because he violated DCFS and Daniel J. Nellum procedure on having contact with clients outside of his *** job."

¶ 11 The referee issued her decision on September 23, 2014. She found that Williamson worked for Nellum as a childcare worker from December 19, 2013 to June 11, 2014, and that Nellum had a policy against employees giving personal information to residents and having residents in their homes. She further found that on June 3, 2014, K. came to Williamson's home after he was no longer a resident. She concluded that the evidence failed to establish that

Williamson engaged in misconduct because Nellum "failed to show that [Williamson] violated a policy against having contact with a FORMER resident or having him in his home." (Emphasis in original.).

¶ 12 The Board of Review set aside the referee's decision on November 10, 2014, explaining:

> "The Board of Review does not concur with the distinction made by the Administrative Law Judge to the effect that because [K.] was a former resident of the employer the employer's rules did not apply. By his own admission the claimant violated two of the employer's rules while he was working at the employer's premises. The first rule the claimant violated was offering to give his old cell-phone to the resident. The second rule the claimant broke was to give his personal cell-phone number to the resident. Both of these actions were deliberate and willful violations of the employer's rules."

¶ 13 On December 9, 2014, Williamson filed a complaint for administrative review in the circuit court. On April 16, 2015, the circuit court affirmed the decision of the Board of Review. This appeal followed.

¶ 14 ANALYSIS

¶ 15 "It is well settled that in an appeal from a decision denying unemployment compensation benefits, it is the duty of this court to review the decision of the Board rather than the circuit court." *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 819 (2009). In such cases, we review the Board's decision for clear error, and thus reversal is justified "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 Service., Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

¶ 16 Under section 602(A) of the Act, individuals who are terminated for "misconduct" in connection with their work are disqualified from receiving unemployment benefits. 820 ILCS 405/602(A) (West 2014). The Act defines misconduct as:

> "the deliberate and willful violation of a reasonable rule or policy of the employing unit, governing the individual's behavior in performance of his work, 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.*

¶ 17 During the briefing of this case in this court, our supreme court issued an opinion comprehensively analyzing employee misconduct under section 602(A). See *Petrovic v. Department of Employment Security*, 2016 IL 118562. In *Petrovic*, the court explained that for an employee's conduct to constitute misconduct, the evidence must establish that the employee's conduct constituted: "(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 her 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." *Id.* ¶ 26. The elements of this test are strictly conjunctive. The court held: "[u]nless all three requirements are established by competent evidence in the record, the Board's decision to deny unemployment benefits on this basis should be reversed as clearly erroneous." *Id.*

¶ 18 The facts of *Petrovic* are closely analogous to the present case. In *Petrovic*, the employee, Zlata Petrovic, worked for American Airlines as a tower planner. 2016 IL 118562, ¶ 4. On January 1, 2012, Petrovic received a call from a friend at another airline inquiring whether Petrovic could do something for a passenger who was going to fly on American Airlines. *Id.* In response, Petrovic: (1) requested that American's catering department deliver a bottle of champagne to the passenger and (2) asked a flight attendant if the passenger's seat could be upgraded. The passenger was ultimately upgraded to first class. *Id.*

¶ 19 On January 24, American terminated Petrovic. *Id.* ¶ 5. American explained that by upgrading the passenger and requesting champagne for her without proper authorization, Petrovic had violated two policies. The first policy, referred to as " 'Rule # 16,' " stated " 'Misrepresentation of facts or falsification of records is prohibited.' " *Id.* The second policy, referred to as " 'Rule # 34,' " provided in part, " 'Dishonesty of any kind in relations [sic] to the Company, such as theft or pilferage of Company property, the property of other employees or property of others entrusted to the Company, or misrepresentation in obtaining employee benefits or privileges will be grounds for dismissal.' " *Id.*

¶ 20 The court ruled that Petrovic did not engage in misconduct because there was "no evidence in the record of a reasonable rule or policy prohibiting an American employee from requesting champagne or an upgrade for a passenger." *Id.* ¶ 31. Specifically, the court noted, "[a]lthough plaintiff's termination letter refers to American rule Nos. 16 and 34, which prohibit 'misrepresentation' and 'dishonesty,' these rules were not referenced at the hearing or introduced into evidence." *Id.* Continuing, the court explained that American's only witness merely testified that " '[p]olicies and procedures were not followed[.]' " *Id.* Critically, however, the court pointed out that the witness failed to "identify[] any express or written policy" that

American had in place that prohibited or otherwise regulated if and how American employees could request upgrades for customers. *Id*. The court found that American's "vague and conclusory statements" did not "constitute competent evidence of a reasonable rule or policy prohibiting [Petrovic's] actions" and ruled that Petrovic was entitled to receive benefits under the act. *Id*. ¶ 31, 37.

¶ 21 In the present case, the Board found that Williamson engaged in disqualifying misconduct by (1) offering to give K. his cell phone and (2) giving K. his phone number while K. was still a resident. However, the record reveals that Williamson was not terminated for either of these actions. Instead, as Washington explained at the hearing, Williamson was terminated "because he violated DCFS and Daniel J. Nellum procedure on having contact with clients outside of his *** job." In other words, Nellum never determined that either of the actions identified by the Board were "deliberate and willful violation[s]" of one of its policies.

¶ 22 Under the Act, the Board may "affirm, modify, or set aside any decision of a Referee." 820 ILCS 405/803 (West 2014). Absent from that grant of power is the right or ability of the Board to modify or set aside an employer's stated reason for terminating an employee in favor of some other rationale for terminating the employee which the Board finds more compelling based on the evidence. Defendants have provided no authority allowing the Board to substitute its own reason why it believes an employee was terminated for the actual reason the employer relied on, and we are aware of none.

¶ 23 Defendants nonetheless argue that the Board's decision was not clearly erroneous because a document from June 10, 2014, titled "Supervision Documentation Form," stated Williamson was terminated because he "had contact with a former Nellum client (presently still a minor DCFS State Ward) outside of agency services and gave client personal contact

information and had a client at his home." The existence of this document, however, does not alter our conclusion that the Board's decision was clearly erroneous. First, as Williamson points out, no one at the hearing testified to or explained this document in any way, and the Board did not even cite the document. Second, although the document states that Williamson was terminated for giving K. his phone number, that statement was contradicted by Washington's live testimony, wherein she stated that Williamson was terminated because he "violated DCFS and Daniel J. Nellum procedure on having contact with clients outside of his *** job."

¶ 24 Moreover, the record shows that when Nellum completed its initial questionnaire during the claim adjudication phase, it stated that Williamson was terminated because he "had outside contact with a client at his home." Thus, the supervision document notwithstanding, it is clear based on Nellum's responses during the "employer guided interview" during the claim adjudication phase, as well as Washington's testimony which was given under oath, that the reason underlying Williamson's termination was that he had outside contact with K.

¶ 25 Even assuming that Williamson was terminated for giving K. his phone number, the Board still committed error because Nellum did not establish that this conduct violated a clear rule or policy. Defendants argue that the confidentiality section of Nellum's employee handbook established a rule against divulging personal contact information. But that section says nothing of the sort. In relevant part, the confidentiality section states "It is also the staff's responsibility to monitor appropriate professional boundaries with residents, and avoid dual roles with residents, e.g. a supervision staff dating/socializing with a resident is deemed inappropriate." We do not believe that this text somehow establishes a comprehensive prohibition against an employee giving a client any personal contact information so as to prohibit the employee from merely giving a client his cell phone number.

¶ 26 That leaves us with Nellum's stated basis for terminating Williamson, namely that he had outside contact with K. The undisputed evidence shows that this contact took place *after* K. was no longer a Nellum client. The record contains no evidence showing that Nellum had an established, clearly articulated policy prohibiting its staff members from having contact with *former* clients. Defendants' failure to demonstrate such a policy existed requires us to reverse the decisions below. See *Petrovic*, 2016 IL 118562, ¶¶ 26, 30-32.

¶ 27 CONCLUSION

¶ 28 We reverse the Board's decision denying Williamson's claim for unemployment benefits and therefore also reverse the circuit court order affirming the Board's decision.

¶ 29 Reversed.