

NOTICE

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2016 IL App (5th) 140623-U

NO. 5-14-0623

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

DERIK TATE,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Marion County.
)	
v.)	No. 12-MR-104
)	
THE DEPARTMENT OF EMPLOYMENT)	
SECURITY, THE DIRECTOR OF)	
EMPLOYMENT SECURITY, THE BOARD)	
OF REVIEW, and AMERICAN EQUIPMENT)	
AND MACHINE, INC.,)	Honorable
)	Daniel E. Hartigan,
Defendants-Appellants.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justice Chapman concurred in the judgment.
Justice Cates dissented.

ORDER

¶ 1 *Held:* The trial court's order reversing the Board of Review's decision to deny plaintiff unemployment benefits due to plaintiff being discharged from his employment for misconduct is affirmed where the finding that plaintiff committed misconduct was against the manifest weight of the evidence.

¶ 2 Plaintiff, Derik Tate, applied for unemployment insurance benefits with the Department of Employment Security (Department) after he was terminated from his employment with defendant, American Equipment and Machine, Inc. (American

Equipment). The Department's claims adjudicator denied plaintiff unemployment benefits after concluding plaintiff was ineligible for benefits pursuant to section 602(A) of the Unemployment Insurance Act (Act) (820 ILCS 405/602(A) (West 2012)) because he was discharged for misconduct.

¶ 3 Plaintiff appealed the Department's denial. Following an administrative hearing conducted by a referee of the Department, the referee concluded plaintiff was ineligible for unemployment benefits because he was terminated for misconduct and was not forthright when questioned about the incident that triggered his termination. The referee's determination was affirmed by the Board of Review (Board), which incorporated the referee's decision as its own. Plaintiff sought administrative review, and the circuit court of Marion County reversed the Board's decision after finding it was against the manifest weight of the evidence. Thus, the circuit court determined plaintiff was entitled to unemployment benefits.

¶ 4 On appeal, the Department, the Department's director, the Board, and American Equipment allege the Board's determination that plaintiff was discharged for misconduct was not against the manifest weight of the evidence or clearly erroneous. We disagree. For the following reasons, we affirm the circuit court's reversal of the Board's decision, as the Board's decision finding plaintiff ineligible for benefits was clearly erroneous.

¶ 5 BACKGROUND

¶ 6 Plaintiff was employed by American Equipment as a burn table operator at its facility in Centralia, Illinois, from May 26, 2009, until March 28, 2012. On March 28, 2012, plaintiff was terminated from his employment by Mike Yates, the general manager

for American Equipment, for willfully abusing company property and giving false information to Yates during an investigation of the incident. Specifically, plaintiff was accused of throwing pizza crusts on the floor of a work area and lying to Yates about the incident.

¶ 7 One day after his discharge, plaintiff filed a claim for unemployment benefits with the Department. On April 19, 2012, the Department claims adjudicator concluded plaintiff was ineligible to receive unemployment benefits under section 602(A) of the Act (820 ILCS 405/602(A) (West 2012)) because plaintiff was discharged for misconduct. Plaintiff then timely filed an application for reconsideration of the claims adjudicator's determination.

¶ 8 On June 4, 2012, a referee for the Department conducted an administrative hearing on plaintiff's appeal. Plaintiff was represented by counsel and testified on his own behalf. American Equipment was also represented by counsel and presented two witnesses: its general manager, Yates, and its truck department manager, Sam Africano, who was plaintiff's direct supervisor. All three witnesses testified about the events prior to plaintiff's discharge.

¶ 9 Yates testified that he fired plaintiff for "lying to [him] and for misconduct inside the shops." Specifically, Yates asserted plaintiff first told him he had dropped a couple pieces of pizza crusts on the floor, but then retracted his statement and told Yates he intentionally threw the crusts. When asked why he lied, Yates testified that plaintiff said "he didn't know and he ... he kind of shrugged his shoulders." Yates further asserted that he fired plaintiff because he was on probation for prior misconduct, and indicated the act

of crust throwing alone "would probably not have led to his termination." Yates also acknowledged he was unaware of any other instance where plaintiff had thrown food or trash on the floor without picking it up, and was unaware of any instance where plaintiff had been accused of lying.

¶ 10 Africano testified that on the day of the incident, he saw seven or eight pieces of pizza crust on the floor of a work area that was two to eight feet from a trash can and six to seven feet from a picnic table employees had been using to eat lunch while offices in the area were being remodeled. Africano asserted he had told employees on several occasions that he liked them to keep their work area clean, and it was unacceptable for employees to leave any kind of trash on the floor. After Africano was informed plaintiff had eaten pizza for lunch, Africano took plaintiff to Yates's office in a golf cart. Africano testified that in response to his questions regarding the incident, plaintiff admitted he had thrown pizza crusts at another employee. Africano further testified that plaintiff said he was "just having fun at lunch and didn't think it was a big deal."

¶ 11 Plaintiff testified that he ate pizza for lunch on the day he was terminated, and asserted he put pizza crusts in a "trash pile" near a trash can rather than throw the crusts at another employee. Specifically, plaintiff indicated the trash can was overflowing which caused the crusts to fall out of the trash can, so he kicked the crusts into a trash pile on the floor next to the trash can. Plaintiff "didn't think it was that big a deal, it was in the trash pile anyway," and testified a sweeper was used approximately every hour to pick up debris in the trash pile.

¶ 12 Plaintiff further testified that Africano approached him and questioned him about the pizza crusts on the floor on the day he was terminated. Plaintiff testified that he offered to pick the crusts up off the floor, but Africano replied, "No." Plaintiff then testified Africano took him to Yates's office where plaintiff told Yates there were two pieces of pizza crust on the floor. Plaintiff claims he then retracted his statement and told Yates there were three pieces of pizza crust on the floor, after which plaintiff testified Yates fired him because he had lied about the number of pizza crusts on the floor.

¶ 13 After hearing all testimony, the Department's referee concluded plaintiff was ineligible for unemployment benefits under the Act because he was terminated for misconduct and was not forthright with Yates when questioned about throwing pizza crusts on the floor. 820 ILCS 405/602(A) (West 2012). In relevant part, the Department's referee indicated:

"In this case, [plaintiff] was terminated for throwing crusts on the floor and being nonresponsive when questioned by [Yates]. [Plaintiff] had been counseled on several occasions about keeping his shop area clean. Despite these admonishments he intentionally threw pizza crusts on the floor. His testimony to the contrary was not credible, and is belied by his initial statements to [Africano], and his later statements to [Yates]. After being questioned by [Yates], [plaintiff] attempted to downplay the incident by stating he had merely dropped a couple pieces of crust on the floor. He then backtracked, admitting to throwing them on the floor. [Plaintiff] also attempted to minimize his actions with his testimony. First stating he threw the pizza crusts on the floor, then stating they must have

fallen out of the pizza box when he went to throw it away. The weight of the evidence showed [plaintiff] to be not credible, and established that he was not straightforward with his general manager when questioned."

¶ 14 Plaintiff timely filed a notice of appeal to the Board of the Department, asserting the Department's referee erroneously concluded he engaged in misconduct by deliberately throwing pizza crusts on the floor of a work area and that he was dishonest when questioned about the incident. The Board affirmed the referee's decision after finding it was supported by the record and the law, and incorporated the referee's decision as its own. The Board also indicated it did not consider plaintiff's written argument because his appeal violated Benefit Rule 2720.315 by not certifying the person or entity who or which was served. 56 Ill. Adm. Code § 2720.315(a) (2012).

¶ 15 Plaintiff subsequently sought administrative review, and the trial court reversed the Board's decision after determining it was against the manifest weight of the evidence because it failed to find facts that constituted misconduct under the Act. Specifically, the court concluded plaintiff did not violate American Equipment's work rules, the Board did not find that American Equipment was harmed by plaintiff's conduct, and plaintiff had not been previously reprimanded or disciplined for similar conduct. The Department, the Department's director, and the Board timely filed a notice of appeal, and American Equipment timely filed a separate notice of appeal.

¶ 16 ANALYSIS

¶ 17 Our supreme court recently addressed the very issue presented in the case at bar in *Petrovic v. Department of Employment Security*, 2016 IL 118562. Accordingly, we turn

to *Petrovic* for guidance in reviewing the Board's decision to deny plaintiff unemployment benefits based on plaintiff's discharge for misconduct.

¶ 18 A review of the Board's decision to deny unemployment benefits based on an employee's discharge for misconduct involves a mixed question of law and fact. *Petrovic*, 2016 IL 118562, ¶ 21. A mixed question of law and fact requires a court to determine the legal effect of a particular set of facts. *Petrovic*, 2016 IL 118562, ¶ 21. Mixed questions are reviewed under the "clearly erroneous" standard, which is less deferential to the administrative agency than the manifest weight of the evidence standard. *Petrovic*, 2016 IL 118562, ¶ 21. The clearly erroneous standard is satisfied when a thorough review of the record gives the reviewing court the definite and firm conviction that a mistake has been committed. *Petrovic*, 2016 IL 118562, ¶ 21.

¶ 19 We review the Board's final decision, not the decision of the referee or the circuit court. *Petrovic*, 2016 IL 118562, ¶ 22. Accordingly, we turn our attention to the Board's finding. Here, the Board incorporated the referee's decision as its own. Therefore, it is appropriate to review the referee's findings of fact and conclusions of law in determining whether the Board's decision is clearly erroneous. *Petrovic*, 2016 IL 118562, ¶ 22. Applying the clearly erroneous standard of review, we must determine whether the evidence in the record supports the Board's determination that plaintiff was discharged for misconduct within the meaning of section 602(A) of the Act. 820 ILCS 405/602(A) (West 2012); *Petrovic*, 2016 IL 118562, ¶ 22.

¶ 20 Under the Administrative Review Law, which governs judicial review of the Board's decision, our review extends to all questions of law and fact presented by the

record as a whole. 820 ILCS 405/1100 (West 2012); 735 ILCS 5/3-110 (West 2012); *Petrovic*, 2016 IL 118562, ¶ 22. Thus, the Board's denial of unemployment benefits will only be overturned if we are left with the definite and firm conviction, based on the entire record, that the Board's decision was a mistake. *Petrovic*, 2016 IL 118562, ¶ 22.

¶ 21 At issue in this appeal is whether plaintiff's conduct constituted "misconduct" as that term is defined in the Act. 820 ILCS 405/602(A) (West 2012). Defendants allege the Board's determination that plaintiff was discharged for misconduct was not against the manifest weight of the evidence or clearly erroneous. In contrast, plaintiff contends the Board's decision that plaintiff's actions constituted misconduct was against the manifest weight of the evidence and clearly erroneous. For the following reasons, we agree with plaintiff and affirm the trial court's reversal of the Board's decision.

¶ 22 The Act was enacted to benefit persons who become unemployed through no fault of their own. *Messer & Stilp, Ltd. v. Department of Employment Security*, 392 Ill. App. 3d 849, 856, 910 N.E.2d 1223, 1230 (2009). The main objective of the Act is to relieve the economic insecurity caused by involuntary unemployment. 820 ILCS 405/100 (West 2012); *Petrovic*, 2016 IL 118562, ¶ 23. 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*, 2016 IL 118562, ¶ 23. Considering this purpose, the Act must be liberally construed in favor of awarding benefits to unemployed workers. *Petrovic*, 2016 IL 118562, ¶ 23.

¶ 23 However, it is well settled that the legislation was not meant to provide benefits to employees discharged for their own misdeeds. *Messer & Stilp, Ltd.*, 392 Ill. App. 3d at

856, 910 N.E.2d at 1230. Accordingly, if an individual is discharged for misconduct, he or she is ineligible to receive unemployment benefits under the Act. *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 826, 914 N.E.2d 208, 219 (2009).

¶ 24 Section 602(A) of the Act provides a guideline for determining disqualifying misconduct:

"For purposes of this subsection, the term 'misconduct' means 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."

820 ILCS 405/602(A) (West 2012).

¶ 25 Thus, to establish statutory misconduct, the Board must determine whether: (1) there was a deliberate and willful violation of a rule or policy; (2) the rule or policy of the employing unit was reasonable; and (3) the violation either had harmed the employer or was repeated by the employee despite previous warnings. *Sudzus*, 393 Ill. App. 3d at 826, 914 N.E.2d at 219. Unless all three requirements are established by adequate evidence in the record, the Board's decision to deny unemployment benefits on this basis should be reversed as clearly erroneous. *Petrovic*, 2016 IL 118562, ¶ 26.

¶ 26 It is important to stress that the disqualification for misconduct is intended to exclude individuals who intentionally commit conduct which they know is likely to result in their termination. *Petrovic*, 2016 IL 118562, ¶ 27. It is not intended to exclude all

employees who have been fired from their jobs. *Petrovic*, 2016 IL 118562, ¶ 27. If the General Assembly's objective was to disqualify all fired employees from receiving unemployment benefits, there would be no need to define "misconduct" in the Act. *Petrovic*, 2016 IL 118562, ¶ 27.

¶ 27 Here, the Board concluded plaintiff was terminated for intentionally throwing pizza crusts on the floor and being nonresponsive to his general manager when questioned about the incident. The Board determined this conduct constituted misconduct under the Act, and, therefore, plaintiff was ineligible to receive unemployment benefits. We now address the three elements of misconduct under the Act in succession to determine whether the Board erred in finding plaintiff's actions constituted misconduct.

¶ 28 The first element's focus concerns whether plaintiff deliberately and willfully violated a rule. *Sudzus*, 393 Ill. App. 3d at 826, 914 N.E.2d at 219. An employee's act of misconduct is willful if he or she is aware of a company rule and then disregards that rule. *Sudzus*, 393 Ill. App. 3d at 826, 914 N.E.2d at 219. In contrast, an employee's conduct will not be deemed willful if he or she is discharged for incapacity, inadvertence, negligence, or the inability to perform assigned tasks. *Siler v. Department of Employment Security*, 192 Ill. App. 3d 971, 975, 549 N.E.2d 760, 763 (1989).

¶ 29 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." *Petrovic*, 2016 IL 118562, ¶ 29 (quoting *Abbott Industries, Inc. v. Department of Employment Security*, 2011 IL App (2d) 100610, ¶ 19, 954 N.E.2d 292). Considering the purpose of the misconduct disqualification, the requirement that a rule violation be "deliberate and willful" requires evidence that the employee was aware her conduct was prohibited. *Petrovic*, 2016 IL 118562, ¶ 22. "[I]n 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.

¶ 30 Defendants allege the record supports the Board's finding that plaintiff deliberately and willfully violated American Equipment's established rules. We disagree.

¶ 31 American Equipment's employee handbook contains numerous examples of misconduct which generally result in discharge for a single violation. As defendants point out, two of these examples include:

- "Willful or careless abuse, damage or destruction of Company property, materials, facilities or equipment.
 - Knowingly giving false information, which would materially affect your performance of duties, other employees or the Company's operations.
- Falsification of time records, personnel records or other Company records."

¶ 32 Since the instant case does not involve any illegal or intentionally tortious conduct, evidence of a deliberate rule violation is required. After careful review, we find no evidence which suggests plaintiff's act of throwing pizza crusts and his retraction of a statement about the incident deliberately or willfully violated a company rule. Plaintiff's

conduct did not amount to any abuse, damage, or destruction of American Equipment's property. There is simply no indication from that record that American Equipment's property, materials, facilities, or equipment were damaged by the pizza crusts thrown by plaintiff. Further, we do not find plaintiff's retracted statement about the incident materially affected American equipment's company operations. There is no evidence from the record which supports such an assertion.

¶ 33 While Africano testified he had prior conversations about professionalism in the workplace and keeping the work area clean, there is no evidence demonstrating plaintiff engaged in conduct with an awareness of any specific rule or policy prohibiting his conduct in question. Plaintiff threw pizza crusts on the floor of a work area and then retracted a statement he made regarding the incident. We fail to see how plaintiff's actions rise to the levels of violation in the two examples cited by defendants in American Equipment's employee handbook.

¶ 34 While we acknowledge plaintiff's actions were disrespectful and ill-mannered, such conduct does not meet the burden required to deny an individual unemployment benefits. Defendants have failed to introduce any evidence that plaintiff was aware his conduct was forbidden. Accordingly, we do not find plaintiff deliberately or willfully violated a rule.

¶ 35 In light of our finding no evidence in the record to support a deliberate and willful rule violation by plaintiff, it is unnecessary to address the second and third elements of misconduct under the Act. Nonetheless, because questions concerning these elements will likely arise in future matters, we deem it appropriate to speak to those issues.

¶ 36 The second element requires a showing that the employing unit's rule or policy was reasonable. A reasonable rule concerns standards of behavior which an employing unit has a right to expect from an employee. *Sudzus*, 393 Ill. App. 3d at 827, 914 N.E.2d at 220. However, a rule or policy need not be written down or formalized. *Sudzus*, 393 Ill. App. 3d at 827, 914 N.E.2d at 220. Furthermore, even without direct evidence, the reviewing court may make a "'commonsense realization that certain conduct intentionally and substantially disregards an employer's interests.'" *Sudzus*, 393 Ill. App. 3d at 827, 914 N.E.2d at 220 (quoting *Greenlaw v. Department of Employment Security*, 299 Ill. App. 3d 446, 448, 701 N.E.2d 175, 177 (1998)).

¶ 37 As previously stated, we do not find plaintiff's conduct violated an established rule. However, defendants assert that even if American Equipment did not have a formal policy against lying to the company during an investigation of possible work-rule violations, such a rule is established by a commonsense realization that such conduct disregards an employer's interests.

¶ 38 In support of its argument, defendants cite to the following three cases: *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 914 N.E.2d 208 (2009); *DeBois v. Department of Employment Security*, 274 Ill. App. 3d 660, 653 N.E.2d 1336 (1995); *Medvid v. Department of Employment Security*, 186 Ill. App. 3d 747, 542 N.E.2d 852 (1989). In each of these cases, the court determined the plaintiff's actions constituted misconduct. After careful review, we find the instant case is distinguishable.

¶ 39 In *Sudzus*, the court found the plaintiff, an electrician, had a reasonable expectation to not be on the roof and not dismantle condition units, as there was no work

to be done on the roof and such conduct was "clearly the function of a different company." *Sudzus*, 393 Ill. App. 3d at 827, 914 N.E.2d at 220. In *DeBois*, the court found the plaintiff's falsification of time sheets constituted misconduct. *DeBois*, 274 Ill. App. 3d at 665, 653 N.E.2d at 1339. In *Medvid*, the court found that the plaintiff's failure to notify her employer of her absence and calling in sick while working for another employer constituted misconduct. *Medvid*, 186 Ill. App. 3d at 751, 542 N.E.2d at 854.

¶ 40 Here, plaintiff initially told his company he dropped pizza crusts on the floor, then retracted his statement shortly thereafter and admitted he threw the pizza crusts. Such conduct does not rise to the level of misconduct committed in the above three cases. Performing the work of another company, falsifying time sheets, and lying about being sick in order to work for another employer do not correlate to plaintiff's conduct of initially disclosing he dropped pizza crusts on the floor and then admitting he threw the crusts. Further, unlike the cases cited by defendants, plaintiff retracted his initial statement in an effort to be truthful about his actions. Accordingly, we reject defendants' argument.

¶ 41 The third and final element to establish misconduct under the Act requires that either the violation caused harm to the employer or the employee repeated an action despite a prior warning by the employer. The weight of authority recognizes that harm to the employer can be established by potential harm and is not only limited to actual harm. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 329, 913 N.E.2d 1067, 1073 (2009). However, "where the potential for harm is remote or speculative, this potential will not satisfy the requirement of harm to the employer." *Wise v. Department*

of Employment Security, 2015 IL App (5th) 130306, ¶ 18, 24 N.E.3d 20. Therefore, we must consider whether there was a realistic potential for the employer to be harmed by plaintiff's conduct.

¶ 42 As previously stated, we find no evidence indicating American Equipment was harmed in any way or that company operations were affected by plaintiff's actions of throwing pizza crusts on the ground and subsequently retracting a statement made regarding the incident. Further, after a careful review of the record, we find plaintiff had never been warned by his employer or disciplined for similar behavior. Specifically, Yates testified as follows:

Referee: Uh ... had [plaintiff] ever done that before where he'd thrown food or ... or other trash on the floor and ... not picked it up?

Yates: Not to my knowledge.

Referee: Okay. Had [plaintiff] ever been accused of lying to either yourself or any other member of management at American Equipment in the past?

Yates: Not to my knowledge."

¶ 43 As the general manager for American Equipment, Yates testified that plaintiff had never committed either of the acts which resulted in his termination, namely throwing food or other trash on the floor and lying to company management. There is no evidence which indicates plaintiff was ever warned of such conduct. While plaintiff acknowledges he was told "many times" by his supervisor to make sure he kept his work area clean, we do not find this instruction amounts to a specific warning.

¶ 44 The only evidence of a specific warning that plaintiff received while working for American Equipment occurred in July 2011 after plaintiff duct taped another employee's locker. After this incident, plaintiff received a "written counseling session" which informed him of his unprofessional conduct and the need for plaintiff to remain professional in the workplace. Plaintiff never received a warning concerning trash in the workplace or a warning concerning truthfulness. Accordingly, we find the Board's determination that plaintiff's actions constituted misconduct was clearly erroneous.

¶ 45 Defendants cite to this court's decision in *Wise* in support of their contention that harm to an employer under the Act includes potential harm as well as actual harm. Defendants assert the Board's determination that plaintiff was ineligible for benefits as a result of plaintiff causing harm or potential harm to his employer was not clearly erroneous. We disagree.

¶ 46 Similar to the instant case, the issue in *Wise* was whether the plaintiff's conduct constituted "misconduct" as that term is defined in the Act. In *Wise*, the plaintiff was discharged from her employment as a cook and buffet station attendant after she ignored her supervisor's instructions. Specifically, the plaintiff disregarded her supervisor's instructions to put more ice and water under pans containing coleslaw and tuna salad after the supervisor discovered the food items had reached significantly warm temperatures.

¶ 47 The plaintiff sought unemployment benefits after her discharge, which the Department of Employment Security denied. The referee and Board of Review subsequently issued decisions upholding the denial of benefits. The Board noted that the plaintiff's failure to comply with her supervisor's request "constituted a deliberate and

willful violation of the employer's policy concerning employee behavior which caused the employer harm.' " *Wise*, 2015 IL App (5th) 130306, ¶ 11, 24 N.E.3d 20.

¶ 48 The plaintiff sought review, and the circuit court reversed the Board's decision after finding there was no evidence that the plaintiff's noncompliance with her supervisor's instruction harmed her employer. In reversing the Board's decision, the circuit court relied on cases which held that "merely being argumentative is generally insufficient to amount to misconduct within the meaning of the applicable statute." *Wise*, 2015 IL App (5th) 130306, ¶ 12, 24 N.E.3d 20. The plaintiff's employer, the Department of Employment, and the Board of Review then appealed.

¶ 49 This court reversed the circuit court and reinstated the administrative decision. Specifically, this court held there was evidence to support the finding that the plaintiff engaged in conduct which constituted misconduct under the statute, and, therefore, the plaintiff was properly denied unemployment insurance benefits. As the court noted:

"The realistic potential for serious harm to result from the plaintiff's refusal to comply with an instruction to remedy this situation is readily apparent. If the food had remained at temperatures significantly above the safe range, customers could have eaten it and become ill as a result. This possibility was not remote or speculative." *Wise*, 2015 IL App (5th) 130306, ¶ 29, 24 N.E.3d 20.

¶ 50 While we recognize that courts of this state have held potential harm is sufficient to disqualify an individual from receiving unemployment benefits, we must also keep in mind that "where the potential for harm is remote or speculative, this potential will not satisfy the requirement of harm to the employer." *Wise*, 2015 IL App (5th) 130306, ¶ 18,

24 N.E.3d 20. Therefore, our focus must concern whether there was a realistic potential for the employer to be harmed by plaintiff's conduct. We reiterate that in making this inquiry, we must acknowledge that "while the claimant bears the burden of proving she is eligible for unemployment insurance benefits, the Act must be liberally construed in favor of giving benefits." *Wise*, 2015 IL App (5th) 130306, ¶ 18, 24 N.E.3d 20.

¶ 51 After careful review, we find the instant case is distinguishable from *Wise*. Unlike *Wise*, plaintiff in the instant case did not disregard direct instructions from his employer that resulted in an obvious harm to his employer. Further, plaintiff's actions did not result in an immediate, direct harm to his employer's operations. Accordingly, we reject defendants' argument concerning this court's finding in *Wise*.

¶ 52 Lastly, defendants allege plaintiff has forfeited any challenge to the Board's decision concerning the third element of misconduct under the statute because plaintiff did not raise this argument to the Board when he appealed the finding of the Department's claim adjudicator. We disagree.

¶ 53 We initially observe that issues or defenses not raised before the administrative agency will not be considered for the first time on administrative review. *Hurst*, 393 Ill. App. 3d at 328, 913 N.E.2d at 1072. After a careful review of the record, we conclude this is not a situation where plaintiff has forfeited any challenge to the Board's decision regarding the third element of misconduct under the statute. As we previously noted, the third element of misconduct under the Act which must be shown to establish statutory misconduct concerns whether plaintiff's violation either harmed the employer or was

repeated by the employee despite previous warnings. 820 ILCS 405/602(A) (West 2012); *Sudzus*, 393 Ill. App. 3d at 826, 914 N.E.2d at 219.

¶ 54 Here, the record indicates plaintiff has argued American Equipment did not sustain damages from his conduct from the time he applied for unemployment benefits. Specifically, plaintiff asserts the following in his application: "[T]here was no damage[,] just pizza crust on the floor[.] I was going to just pick them up but they said no." Thus, plaintiff asserted American Equipment did not sustain damages from his conduct in his application that commenced this entire administrative process. Further, plaintiff's application was considered by the Board in plaintiff's appeal from the decision of the Department's claim adjudicator. Accordingly, plaintiff has not forfeited any challenge to the Board's decision concerning the third element of misconduct under the statute.

¶ 55 We understand appellant's apparent reaction to appellee's behavior—this incident and prior actions. However, under the Act, we are bound to follow the law as interpreted and applied by our supreme court in *Petrovic*, and further, given the remedial nature of the Act, immature and aggravating behavior is not a sufficient basis for appellee's discharge for misconduct. In no way should our disposition be read as approval of appellee's actions.

¶ 56 CONCLUSION

¶ 57 For the reasons stated herein, we affirm the circuit court's order reversing the Board's decision and finding that plaintiff is eligible to receive unemployment benefits.

¶ 58 Affirmed.

¶ 59 JUSTICE CATES, dissenting:

¶ 60 The majority concluded that the actions giving rise to the plaintiff's termination did not constitute misconduct as defined in section 602(A) of the Unemployment Insurance Act (Act) (820 ILCS 405/602(A) (West 2010)). After reviewing the record, I cannot agree. I find that there is ample evidence to satisfy each element necessary to establish misconduct under section 602(A) of the Act, and to warrant the denial of his application for unemployment benefits. Therefore I respectfully dissent.

¶ 61 Judicial review of the Board of Review's decision to deny unemployment benefits based on an employee's termination for misconduct presents a mixed question of fact and law. *Petrovic v. Department of Employment Security*, 2016 IL 118562, ¶ 21. Mixed questions of fact and law are reviewed under a clearly erroneous standard. *Petrovic*, 2016 IL 118562, ¶ 21. Under the clearly erroneous standard, a court determines whether the evidence in the record supports the Board's determination that the plaintiff was terminated for misconduct within the meaning of section 602(A) of the Act. *Petrovic*, 2016 IL 118562, ¶ 22. A court will overturn the Board's decision to deny unemployment benefits only if it is left with the "definite and firm conviction," based on the entire record, that the Board's decision was a mistake. *Petrovic*, 2016 IL 118562, ¶ 21; *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395, 763 N.E.2d 272, 312 (2001).

¶ 62 The evidence in this case shows that Tate deliberately tossed several pieces of pizza crusts into the work area of another employee, that Tate had been counseled about and knew the importance of keeping his workplace clean, that Tate willfully and

deliberately violated a reasonable rule of the employer, that Tate knew his actions were unacceptable in the workplace, and that Tate's actions created a potential safety hazard and also caused actual dissension in the workplace. After reviewing the entire record, I am not left with a definite and firm conviction that the Board's decision was a mistake. Rather, I find that the evidence in the record supports the Board's determination that Tate's actions constituted misconduct under section 602(A) of the Act. I cannot agree that the Board's decision was clearly erroneous. Therefore, I would reverse the order of the circuit court, and affirm the Board's determination that the plaintiff is ineligible for unemployment benefits because he was discharged for misconduct. Accordingly, I respectfully dissent.