2017 IL App (1st) 161452-U

No. 1-16-1452

Order filed November 2, 2017

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ARTHUR D. SUTTON, Plaintiff-Appellant, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, BOARD OF REVIEW, ILLINOIS DEPARTMENT OF CORRECTIONS, JACK L. CALABRO, HENRY WINFIELD, RAYMOND T. NICE, and NICHOLAS E. PANOMITROS, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 16 L 50098 Honorable Kay M. Hanlon, Judge, presiding.

JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Where record shows plaintiff was dismissed from his job due to successive violations of his employer's policy regarding securing of his service weapon, plaintiff was discharged for misconduct in connection with his work, and Board of Review's decision denying him unemployment benefits is affirmed.

¶ 2 *Pro se* plaintiff Arthur D. Sutton appeals from an order of the circuit court affirming the final administrative decision of defendant, the Board of Review of the Illinois Department of

Employment Security (Board), that plaintiff was discharged for misconduct in connection with his work and was thus ineligible to receive unemployment benefits under section 602(A) of the Unemployment Insurance Act (Act) (820 ILCS 405/602(A) (West 2014)). On appeal, plaintiff contends that the Board erred when it determined that he was ineligible for benefits because "the events that resulted in his discharge were not connected to his work performance," were beyond his control, and did not harm his employer. We disagree with plaintiff's arguments and affirm.

¶ 3 Plaintiff worked as a Deputy Director of the Parole Division of the Department of Corrections (the employer) from March 1, 2013 until February 20, 2015. In that capacity, plaintiff was given a state-issued firearm and vehicle.

¶ 4 In July 2014, plaintiff's son, age 17, took the keys to plaintiff's firearm lockbox and his gun, and shot himself in the ankle. Plaintiff received a five-day suspension for failing to properly secure his firearm. Seven months later, in February 2015, plaintiff's son took the keys and firearm again; this time, the son was involved in a shooting in which a victim was shot in the leg.

¶ 5 After this second incident, the employer gave plaintiff the choice to resign or be terminated. Plaintiff chose resignation. He then applied for unemployment benefits, and the employer protested the claim.

¶ 6 A department claims adjudicator investigated the matter and interviewed plaintiff and plaintiff's son. Plaintiff's son said that the key to the gun box was on plaintiff's key ring, and that "keys were all kept in a bowl on a shelf in the house where all the keys were kept." The son also said that plaintiff "never changed where he kept his keys after the [first] incident because [the son] gave [plaintiff] his word that he would not touch the weapon again." Plaintiff, on the other hand, told the claims adjudicator that "since the [first] incident, he never kept his keys in

the same place, and made every effort to hide his keys from [his son].” Plaintiff denied his son’s claim that the keys were kept in a “community bowl where family members kept their keys.” Plaintiff said that the last place he put the keys, before they were stolen, was “in a pocket, in a coat, in the closet.”

¶ 7 The claims adjudicator deemed plaintiff ineligible for benefits because plaintiff had been discharged for “misconduct” under the Unemployment Insurance Act. See 820 ILCS 405/602(A) (West 2014). Plaintiff appealed this decision to a department referee.

¶ 8 A telephone hearing was held on October 29, 2015. Jason Garnett, the Acting Assistant Director for the Department of Corrections, testified that he gave plaintiff the choice to resign or be terminated after his service weapon was used “in an incident” and it was “[plaintiff’s] authority to ensure his gun was . . . secured.” Garnett testified that the policy “as far as securing your weapon” was that “the weapon should be secured at all times unless on your person.” Although plaintiff secured his weapon in a lockbox, “the keys to his lockbox were gotten into and the gun was moved.” The referee then asked whether the policy indentified “circumstances” that would qualify as “being secure.”

¶ 9 Garnett replied that “[b]eing secured in a lockbox” included, at a minimum, keeping it away from children. Although plaintiff secured his gun in a lockbox, his son was able to obtain the keys to open the lockbox, so the keys were not “secure.” Garnett testified that this was the “second incident” with the weapon involving the same child. After the first incident, plaintiff was disciplined and was to receive special training from the “Special Operations Team,” and instructed to secure his keys so that they could not be “gotten by someone.”

¶ 10 During cross-examination, plaintiff asked Garnett where the policy was written and whether plaintiff was given a copy of this policy. Garnett was not sure whether plaintiff was given a copy of the policy. However, after plaintiff was qualified with his weapon, plaintiff should have received certain forms to sign "as far as the range instructions goes" and "what you should do with the weapon." Garnett was not personally aware of whether plaintiff "receiv[ed] any documentation." The training that plaintiff was supposed to receive after the first incident included a member of the Special Operations Response team informing plaintiff how to secure the weapon and "what needs to be done." Garnett could not point to a date on which plaintiff received this training.

¶ 11 Plaintiff testified, at the telephonic hearing, that he was hired on March 1, 2013, and left work on February 17, 2015. The incidents with the weapon involved plaintiff's 17-year-old son. His weapon was secured in a locked lockbox in the locked trunk of his car. On February 14, 2015—the second incident, and the one prompting plaintiff's discharge—the keys were inside his coat pocket inside a common closet. He changed the places where he kept his keys so that he did not have a routine about where he put them. He did not know whether his family members knew where he stored his service weapon, and it was "a surprise" to him that his son knew. He reported the incident to Garnett and was given the option to resign or be terminated. The instructions that plaintiff received regarding the weapon were to keep it "inside a locked car and inside a locked box in the trunk of your car," and he "followed those instructions to a T."

¶ 12 In closing, plaintiff argued that he was never given a "particular rule" that he violated with regards to the storage of his weapon and that what happened was beyond his control. He

thought he was doing the best that a reasonable person could do in securing the weapon, and that he felt forced into resigning.

¶ 13 Disagreeing with the claims adjudicator, the referee determined that plaintiff was eligible for benefits, because his actions were not "deliberate and did not disregard [the] standard of behavior expected of an employee in his position." The referee noted that the employer's policy provided that service weapons were to be secured at all times unless on one's person, and that there was not a specific manner described by the policy. Therefore, it was reasonable to believe that a weapon is secure when in a lockbox that is located in the locked trunk of a locked police vehicle. Based upon the evidence that plaintiff did not store the weapon in his home, secured his keys by hiding them in his coat pocket, and did not announce the location of either the weapon or his keys, the referee concluded that plaintiff did not "willfully and deliberately cause his son to secure his keys to gain access to a weapon."

¶ 14 The employer appealed to the Board.

¶ 15 The Board reversed the referee's determination that plaintiff was entitled to benefits. The Board noted that plaintiff possessed a revolver in his capacity of Deputy Chief of Parole, and that plaintiff "had been given special training to use the gun and how to secure [it] and instructed to either keep the gun on his person or else to keep it securely locked." The Board noted that there "was a prior incident in which his 17-year-old son had been able to locate and take the weapon." The second incident during which plaintiff's son was able to gain access to the weapon was after plaintiff locked the weapon in a gun case in a vehicle, but placed the keys to the vehicle and the lockbox in a "common container" in the home where he usually kept "all of his keys." Because

this was not the first time plaintiff "had failed to take all of the requisite steps to keep his son away from the weapon," plaintiff was given the option to resign or be discharged.

¶ 16 The Board concluded that plaintiff's actions in this case "constituted a deliberate and willful violation of the employer's policy concerning employee integrity and trust." Following the first incident during which plaintiff's son gained access to the weapon, plaintiff was "warned" that "due to such a serious incident his job would be in jeopardy," yet "in spite of the fact that he had received a strong warning and additional training filed [*sic*] to be extra diligent in securing his weapon from his son and others," plaintiff failed to do so. Accordingly, the "second occurrence constituted a deliberate and willful violation of the employer's policy concerning firearm safety, which could have caused the employer and others harm." The Board thus determined that plaintiff was discharged for misconduct and was not eligible for benefits.

¶ 17 The Board also noted that although the employer gave plaintiff the option to resign rather than be terminated, the employer was "essentially" discharging plaintiff. Accordingly, plaintiff was discharged for misconduct as defined under section 602(A) of the Act, and was therefore disqualified from receiving benefits.

¶ 18 Plaintiff then filed a *pro se* complaint for administrative review, and the circuit court affirmed the Board's decision. Plaintiff now appeals *pro se*.

¶ 19 On appeal, plaintiff contends the although he was "discharged" after his son gained access to his weapon a second time, this event was not related to his work performance, was beyond his control and did not harm the employer. He further argues that "no evidence" was offered indicating that he was provided with a warning or explicit instructions on how to secure his keys by his employer.

¶ 20 In an appeal from an administrative review proceeding, this court reviews the decision of the Board rather than that of the circuit court or the referee. *Walls v. Department of Employment Security,* 2013 IL App (5th) 130069, ¶ 14; *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010). The standard of review we employ depends on whether the question before us is a question of fact, one of law, or a mixed question of law and fact. *AFM Messenger Service, Inc. v. Department of Employment Security,* 198 Ill. 2d 380, 390 (2001).

¶ 21 Questions of fact are decided under the manifest-weight standard, in which we will affirm an agency's factual findings unless they are against the manifest weight of the evidence—that is, unless the opposite conclusion is clearly evident. *Woods v. Department of Employment Security*, 2012 IL App (1st) 101639, ¶ 16. Questions of law are subject to *de novo* review. *AFM Messenger Service*, 198 Ill. 2d at 390-91. But mixed questions of law and fact, involving "an examination of the legal effect of a given set of facts," are subject to the clearly-erroneous standard. *Id*. at 391 (quotation marks omitted).

¶ 22 This court has consistently held that the department's determination that an employee was terminated for "misconduct" under Section 602A of the Act presents a mixed question of law and fact. See *Phistry,* 405 Ill. App. 3d at 607 ("The question of whether an employee was terminated for misconduct under the Act involves a mixed question of law and fact to which we apply the 'clearly erroneous' standard of review."); *Universal Securities Corp. v. Department of Employment Security*, 2015 IL App (1st) 133886, ¶ 13; *Woods*, 2012 IL App (1st) 101639, ¶ 19; *Oleszczuk v. Department of Employment Security*, 336 Ill. App. 3d 46, 50-51 (2002). A department's final decision will be considered clearly erroneous "only where the reviewing court, on the entire record, is 'left with the definite and firm conviction that a mistake has been

made.' " *AFM Messenger Service*, 198 Ill. 2d at 395 (quoting *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

¶ 23 But the two standards need not operate exclusively of one another in a case. A particular case could present a preliminary question of fact invoking the manifest-weight standard, and then a mixed question of law and fact as to the ultimate determination of whether the employee was properly terminated for misconduct. For example, in *Woods*, 2012 IL App (1st) 101639, ¶¶ 16-18, this court first had to decide *why* the employee was terminated—for economic reasons (as the employee claimed) or because of poor attendance (as the Board found). If the reasons were economic, there could be no claim that the employee had been terminated for misconduct. The court held that the Board's finding that the termination was conduct-related was not against the manifest weight of the evidence and would be sustained. *Id*. ¶ 18. Only after settling that factual issue did the court proceed to determine whether the employee was properly deemed to have been terminated for misconduct, employing the clearly-erroneous standard. *Id*. ¶ 19.

¶ 24 We think a threshold factual question is present here, too—namely, whether plaintiff had hidden the keys to the lockbox in his coat pocket, inside a closet (as plaintiff claims) or whether he had placed them in the "community" bowl on the shelf for anyone in his family to access (as the Board found, based on the statement of plaintiff's son). Our supreme court has described a mixed question of law and fact as one "in which the historical facts are *admitted or established*," at which point the issue becomes "whether the facts satisfy the statutory standard." *AFM Messenger Service*, 198 Ill. 2d at 391 (emphasis added). Plaintiff clearly does not admit to the Board's finding as to where he put his keys, and thus we must settle that factual question before we go any further. Simply put, in determining whether plaintiff was properly deemed to have

been terminated for misconduct, it could make a difference to us whether plaintiff put the keys in the same place he did the last time his son stole them, or whether he took extra precautions after that first incident by moving the keys around and, most recently, secreting them in his coat pocket in a closet.

¶ 25 So we will review that factual dispute under the manifest-weight standard. Again, we will reverse the Board's factual determination only if the opposite conclusion is clearly evident. *City of Belvidere v. Illinois State Labor Relations Board,* 181 Ill.2d 191, 205 (1998); *Woods,* 2012 IL App (1st) 101639, ¶ 16. As a reviewing court, "we may not judge the credibility of the witnesses, resolve conflicts in testimony, or reweigh the evidence." *Woods*, 2012 IL App (1st) 101639, ¶ 16. If any evidence in the record supports the Board's decision, that decision is not contrary to the manifest weight of the evidence and must be sustained on review. *Id*.

¶ 26 Here, we find evidence in the record to support the Board's factual determination. The initial investigation included a statement by plaintiff's son that he took the keys from the same location that he took them the first time—the bowl on the shelf. The Board could have found that evidence more credible than plaintiff's self-serving testimony. In any event, we cannot say that the Board's determination was so far afield that the opposite conclusion was clearly evident.

¶ 27 With that factual predicate established, we turn to the merits of this appeal, employing the clearly-erroneous standard of review.

¶ 28 Section 602(A) of the Act provides that employees discharged for misconduct are ineligible to receive unemployment insurance benefits. *Alternative Staffing, Inc. v. Illinois Department of Employment Security,* 2012 IL App (1st) 113332, ¶ 30; 820 ILCS 405/602(A) (West 2014). Misconduct is defined as an employee's willful and deliberate violation of a

reasonable policy or rule which harms the employer. *Phistry*, 405 Ill. App. 3d at 607. 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)).

¶ 29 Here, the Board's determination that plaintiff was ineligible for benefits was not clearly erroneous. First, the Board could reasonably determine that plaintiff had committed a "deliberate and willful violation of a rule or policy" of his employer (*id*.) when plaintiff failed to ensure that his firearm was secure. Garnett testified that the policy "as far as securing your weapon" was that "the weapon should be secured at all times unless on your person." Indeed, in his *pro se* opening brief, plaintiff wrote that "I agree *** [that] the employer's policy provided that 'service weapons were to be secured at all times unless on one's person.' " And plaintiff acknowledged at the hearing that he was instructed to keep his weapon "inside a locked car and inside a locked box in the trunk of your car."

¶ 30 It is perfectly logical to view the securing of the key as an integral part of this overall security; locks are not secure if the key to the lock is readily accessible. And if the importance of the key had not been made clear to plaintiff previously, it certainly was after plaintiff's son first took the key in the first incident, in July 2014. Plaintiff was given a "strong warning" at the time of the possibility that he could lose his job if plaintiff's son were to get hold of the key again and take the gun a second time. And the fact that plaintiff took no additional steps to hide that key from his son, instead continuing to leave that key in the same place it was when his son first took

it, was sufficient evidence to show that plaintiff's actions were deliberate. We are not left with a "definite and firm conviction" that the Board erred when it ruled that plaintiff had deliberately violated a rule or policy of the employer. *AFM Messenger Service*, 198 Ill. 2d at 395.

¶ 31 With respect to the second requirement for a finding of misconduct, that "the rule or policy was reasonable," the Board could certainly conclude that the employer's requirement that a weapon be secured unless it was on the employee's person was "reasonable" within the meaning of section 602(A) of the Act. See *Woods*, 2012 IL App (1st) 101639, ¶ 19. And as we have already said, it was more than reasonable for the employer to include the securing of the key as part and parcel of securing the lockbox itself.

¶ 32 The third requirement is that "the violation either harmed the employer or was repeated by the employee despite a previous warning or other explicit instruction from the employing unit." *Id*. Here, obviously, it is undisputed that the violation was repeated despite a warning from the employer after the first incident.

¶ 33 After reviewing the entire record, we cannot say, definitively and firmly, that the Board erred when it determined that plaintiff's failure to secure his firearm constituted misconduct connected with work so as to disqualify him for unemployment benefits. See *Phistry*, 405 Ill. App. 3d at 607. Because the Board's determination was not clearly erroneous, we affirm the decision of the Board.

¶ 34 We affirm the judgment of the circuit court of Cook County affirming the Board.

¶ 35 Affirmed.