2018 IL App (1st) 171397-U
No. 1-17-1397
Order filed July 16, 2018

First Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

JAMES MATLOCK, Plaintiff-Appellant, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; DIRECTOR OF ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; BOARD OF REVIEW OF ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; and CHICAGO METALLIC CORPORATION, Defendants (Illinois Department of Employment Security; Director of Illinois Department of Employment Security; Board of Review of Illinois Department of Employment Security, Defendants-Appellees).	)	Appeal from the Circuit Court of Cook County No. 16 L 50856 Honorable Daniel J. Kubasiak, Judge, presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Mikva and Griffin concurred in the judgment.

ORDER

¶ 1 *Held*: Board of Review's decision denying plaintiff unemployment benefits is affirmed where the record supports its finding that plaintiff's termination from his employment was due to his misconduct.

¶ 2 Plaintiff James Matlock appeals from the circuit court's order affirming the administrative decision of defendants the Illinois Department of Employment Security (Department), the Director of Employment Security (Director), and the Board of Review (Board), which determined that he was ineligible to receive unemployment benefits because he had been terminated for misconduct. On appeal, plaintiff argues that the Board's determination that he spoke to the plant manger despite the human resources manger's instruction that he speak only to his direct supervisor was against the manifest weight of the evidence, that its decision was based on overruled case law which labeled insubordination as misconduct, and that its determination that he was terminated for misconduct was clearly erroneous. For the reasons set forth herein, we affirm.

¶ 3 The following information comes from Chicago Metallic Corporation's (Employer) protest to plaintiff's application for unemployment payments. Plaintiff began working for the Employer in 1985. On March 3, 2015, plaintiff received a safety reprimand for failing to wear his safety glasses properly. On November 18, 2015, he received a written warning notice for following unsafe practices during a fire drill, after he was seen riding in a vehicle, instead of walking, to a designated meeting area. On May 16, 2016, plaintiff was given a written warning and a one-day suspension for leaving his work station without permission, walking to a different company building, and taking catered food which had been ordered for a company project team. On July 5, 2016, plaintiff's employment was terminated by the Employer. Plaintiff's notice of termination stated that, on June 30, 2016, he had been observed locking and closing the door of the plant manager's office. The Employer "determined that this was done with malice in retaliation for a suspension [plaintiff] received after a previous incident." The next day, plaintiff

had entered the plant manager's office, "very angrily" said "boy, you must have a hard-on for me," and attempted to engage the plant manager "in dialog that [he] was certain would become volatile." When the plant manager called for a human resources employee to witness the conversation, plaintiff walked out of the office. The notice of termination stated that plaintiff's termination was a result of "the history and trend of repeated violations of company Principles and Values," which were documented in previous written warnings from March 2015, November 2015, and May 2016.

¶ 4 On July 10, 2016, plaintiff applied for unemployment insurance payments from the Illinois Department of Employment Security. On July 15, 2016, the Employer filed a protest with the Department, claiming that plaintiff's termination was due to misconduct. The protest stated that "[plaintiff] came into supervisor's office: was upset and used [inappropriate] language. [Plaintiff] was told he needed to wait for HR to come in. [Plaintiff] got more upset and walk[ed] off the job." Attached to the protest were copies of plaintiff's written warnings from the aforementioned incidents, a copy of his notice of termination, and a portion of the Employer's code of conduct, which plaintiff had acknowledged receiving, and which expressly forbade "insubordination (refusal or failure to perform work assigned or to comply with instructions from any supervisor[])" and "[t]hreatening, intimidating, coercing, using harassing, abusive or vulgar language, or interfering with the performance of other employees or visitors." On August 1, 2016, after phone interviews with plaintiff and a representative of the Employer, a Department adjudicator determined that plaintiff was discharged due to misconduct and was, therefore, ineligible to receive unemployment payments. On August 8, 2016, plaintiff filed a request for reconsideration of the adjudicator's determination.

¶ 5 On August 24, 2016, a Department referee conducted a telephone hearing with plaintiff and various representatives of the Employer. Kathy Ketchmark, manager of the Employer's human resources department, testified that plaintiff had received three written warnings about his conduct in the past. On March 3, 2015, plaintiff received a written warning for failing to wear safety equipment. On November 18, 2015, plaintiff received a written warning for driving to a designated location during a fire drill, instead of "following the process" by walking there. On May 16, 2016, plaintiff was reprimanded for leaving his work station, going to another company building, and removing food from that location without authorization. Defendant had been suspended for a day following this incident, and his written warning stated that further policy violations could result in disciplinary action up to and including termination.

¶ 6 Plant manager Rich Manganiello testified that he did not have personal knowledge of the fire drill incident because he did not witness the incident and was not involved with the human resources investigation process. Company policy stated that employees were to walk during a fire drill. When asked about the wording of the policy, Manganiello stated that Ketchmark was walking out of the room to get a copy of the fire drill policy. The fire drill policy was not subsequently explained during the hearing and was not entered into evidence.

¶ 7 Dan Polley, plaintiff's direct supervisor, testified that he had been involved with the food moving incident. Plaintiff told Polley that it was common practice for him to take leftover food from other buildings, bring it to his building's cafeteria, and distribute it to other employees, and that he never took food unless "he was told it was ok." As a result of plaintiff's movement of the food on the date in question, some employees, for whom the food had been ordered, missed their lunch for the day. Plaintiff was also away from his work station while he was taking the food.

When asked about the specific policy against moving food from one building to another, Manganiello stated "I have never seen a policy about moving food from one building to another. I can tell you several policies that relate to it, but not that specific policy."

¶ 8 Regarding the door-locking incident, Deb Kohs testified that, on June 30, 2016, she was standing in Manganiello's office, writing him a note, when she saw an arm reach into the room, lock the door, and close it. The person who reached into the room was wearing a royal blue t-shirt. Kohs opened the door to check the outside door handle, and confirmed that the door had been locked. Plaintiff, who was wearing a royal blue t-shirt, was the only person in the area outside of the door. Kohs and plaintiff then had a conversation about his previous written warning for moving food, during which the locking of the office door "was not even brought up or mentioned in any way."

¶ 9 The next day, July 1, 2016, plaintiff approached Ketchmark and asked her if he was in trouble for the door-locking incident. She told him that the incident was under investigation, and that he should speak with his immediate supervisor, Dan Polley, about the situation. She also instructed him not to speak with anyone else regarding the incident.

¶ 10 Manganiello testified that, on July 1, 2016, plaintiff walked into his office and was "somewhat upset." Manganiello assumed that plaintiff came to talk about the door-locking incident, but "the conversation never went that far" because plaintiff said "you must really have a [hard-on] for me" in an aggressive and insulting manner. He told plaintiff that the situation seemed serious, and that they should stop the conversation until an employee from human resources was present. Plaintiff said that he did not want to wait for a human resources employee, and attempted to continue the conversation. When Manganiello picked up his phone

to call the human resources manager, plaintiff shook his head and walked out of the office. When Ketchmark answered the phone, Manganiello told her about his interaction with plaintiff. Upon questioning from plaintiff's counsel, Manganiello testified that plaintiff did not threaten him with physical injury or try to touch him any way, but that he was "extremely red [and] extremely aggressive." The conversation with plaintiff lasted about two minutes, during which time Manganiello was prevented from working. Manganiello further testified that he did not normally lock his office door, and would have had to find someone with a master key to unlock his office if the door had remained locked on June 30.

¶ 11 Ketchmark testified that, on July 1, she received a phone call from Manganiello, who wanted her to come to his office to observe a "heated discussion" he was having with plaintiff. After he left Manganiello's office, Ketchmark asked plaintiff why he was "making the situation even worse" by speaking to Manganiello. Plaintiff told Ketchmark that he had been unable to speak with Polley and that he went to talk to Manganiello "thinking he could have a *** discussion to explain himself." Plaintiff was sent home for the rest of the day with pay, and returned to work on July 5, 2016. Ketchmark testified that plaintiff had violated policies prohibiting "willful hindering and limiting of production, threatening, intimidating, coercing, using harassing, abusive and vulgar language, or interfering with the performance of other employees or visitors."

¶ 12 On July 5, 2016, plaintiff was terminated for "violating policies" with his "conduct *** regarding how he was carrying himself *** and the *** harm he had caused the company by locking the door." Plaintiff walked into the termination meeting and said "I'm done,

aren't I?" Polley, Ketchmark, and plaintiff then discussed the discharge paperwork. Plaintiff signed the notice of termination without making a written statement.

¶ 13 Plaintiff testified that the fire drill that he was written up for was the first fire drill that he had been a part of as an employee of the company. During the drill, a fellow employee pulled up next to him in a car and asked him if he wanted a ride. Plaintiff got in the car and the men drove to the designated meeting area. The men did not impede other employees from leaving the plant or relocating to the meeting location.

¶ 14 Regarding the food incident, plaintiff stated that two individuals who were tasked with cleaning told him that a lunch had been ordered and that he should arrive at a given time to pick up the leftovers, as he had done on multiple occasions. On a previous occasion, a human resources employee had told him that there was leftover food in another building. Any time he went and got leftover food, he would distribute it to other employees at their work stations. After he was suspended for taking food, he never again took food from another building. He acknowledged that the written warning that he received as a result of the food incident informed him that further disciplinary actions could result in termination.

¶ 15 Plaintiff explained that he intended the door-locking incident to be a prank. As he was leaving the building for the night, he saw Kohs standing in Manganiello's office. He had not spoken with Kohs in a month and wanted to get her attention by locking the door while she was in the office and waiting for her to open the door. When Kohs opened the door, she and plaintiff had a brief conversation about his prior write-up for moving food. The next morning, plaintiff went to Ketchmark's office and asked her if he was in trouble. Ketchmark told him to talk to Polley about the incident. After speaking with Polley, plaintiff went to speak with Manganiello

"to find out what was going on." He acknowledged that Ketchmark had not told him to speak with Manganiello, and that doing so was his own decision. He denied saying "you must really have a [hard-on] for me" and stated that he had sat down in Manganiello's office and "asked him what he had against [him]." On July 5, 2016, plaintiff read his notice of termination and signed it without making a written comment, because he "was already fired."

¶ 16 On August 25, 2016, the Department referee sent the parties a written decision setting aside the adjudicator's finding of misconduct and finding plaintiff eligible for unemployment benefits. The decision stated that the Employer bore the burden of proving misconduct by a preponderance of the evidence, and concluded that it failed to meet that burden. On September 23, 2016, the Employer sought the Board's review of the referee's decision, contending that plaintiff was terminated for "inappropriate behavior after receiving prior warnings" and disobeying Ketchmark's specific instruction to speak only with Polley about the door-locking incident. On October 21, 2016, plaintiff filed a written response to the Employer's appeal, arguing that the Employer failed to meet its burden of proof because it "failed to provide anything but hearsay evidence, brought no policies to the hearing, and was unable to impeach [his] testimony."

¶ 17 On November 28, 2016, after reviewing the transcripts of the telephone hearing and the parties' written arguments, the Board issued a decision setting aside the referee's decision and finding that plaintiff was not eligible for unemployment benefits because he was discharged for misconduct. The Board found that plaintiff had been instructed not to speak with anyone about the door-locking incident except his immediate supervisor and that plaintiff disobeyed that instruction when he spoke with Manganiello to "find out what was going on." It noted, citing

Stovall v. Department of Employment Security, 262 Ill. App. 3d 1098 (1994), that "[c]onduct that is argumentative, disrespectful, and insubordinate rises to the level of willful and deliberate misconduct under" the statute's "general definition of misconduct." It also found that plaintiff's actions constituted misconduct as defined by subsection 602(A)(5) of the Act, which "imposes a lower threshold in situations where an employee refuses to follow an employer's reasonable and lawful instruction" and does not require evidence that the refusal was willful or deliberate, that the employer was harmed as a result, or that the conduct was repeated. Accordingly, the Board found that "even if [plaintiff] did not ask the plant manager if he had a hard-on for him," plaintiff committed misconduct when he spoke with Manganiello after being told not to speak with anyone but his direct supervisor about the door-locking incident.

¶ 18 On December 27, 2016, plaintiff filed a complaint in the circuit court of Cook County seeking review of the Board's decision pursuant to the Administrative Review Law (Review Law) (735 ILCS 5/3-101 *et seq*. (West 2016)). See 735 ILCS 5/3-112 (West 2016). On April 27, 2017, the circuit court affirmed the Board's decision.

¶ 19 Plaintiff appeals, contending that: (1) the Board's finding that he spoke to Manganiello about the door-locking incident was manifestly erroneous; (2) the Board erred as a matter of law when it relied on an overruled case in determining that insubordination amounted to misconduct; and (3) the Board's determination that he was terminated for misconduct was clearly erroneous.

¶ 20 Judicial review of the Board's decision is governed by the Review Law. 820 ILCS 405/1100 (West 2016). In an appeal from an administrative review proceeding, we review the decision of the Board, rather than the decision of the Department referee or the circuit court. *Petrovic v. Department of Employment Security*, 2016 IL 118562, ¶ 22. 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 "The 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 2016)) and we will not disturb them unless we find that they are against the manifest weight of the evidence. *Woods v. Department of Employment Security*, 2012 IL App (1st) 101639, ¶ 16. " 'An administrative agency decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident.' " *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 534 (2006) (citing *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992)). We review questions of law *de novo*, and mixed questions of law and fact, which ask the legal effect of a given set of facts, under the clearly erroneous standard. *Booker v. Board of Education of the City of Chicago*, 2016 IL App (1st) 151151, ¶ 54. A decision of an administrative agency is clearly erroneous only where a reviewing court is left with a definite and firm conviction that a mistake has been committed. *Amalgamated Transit Union v. Illinois Labor Relation Board*, 2017 IL App (1st) 160999, ¶ 33. Review of the Board's decision to deny unemployment insurance benefits based on an employee's discharge for misconduct involves a mixed question of law and fact. *Petrovic*, 2016 IL 118562, ¶ 21. An employer who asserts an employee's disqualification for benefits based on misconduct has the burden of proving such conduct. *Id.* ¶ 28.

¶ 22 The purpose of the Unemployment Insurance Act (Act) is to relieve economic insecurity caused by involuntary unemployment. 820 ILCS 405/100 (West 2016); *AFM Messenger Service,*

Inc., 198 Ill. 2d at 396. Under the Act, an employee is ineligible for unemployment benefits if he was discharged for misconduct. 820 ILCS 405/602(A) (West 2016). Traditionally, misconduct was defined as a "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 2016). To show misconduct under this definition, an employer disputing eligibility for benefits had to prove: (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; (3) which either (a) harmed the employer or a fellow employee or (b) was repeated despite a warning or explicit instruction from the employer. *Petrovic*, 2016 IL 118562, ¶ 26.

¶ 23 However, effective January 3, 2016, the statute was amended to read:

> "The previous definition notwithstanding, 'misconduct' shall include any of the following work-related circumstances:
>
> * * *
>
> 5. Refusal to obey an employer's reasonable and lawful instruction, unless the refusal is due to the lack of ability, skills, or training for the individual required to obey the instruction or the instruction would result in an unsafe act." 820 ILCS 405/602(A)(5) (West 2016).

¶ 24 Plaintiff first argues that the Board's determination that he spoke to Manganiello about the door-locking incident is against the manifest weight of the evidence because Manganiello testified that he "never talked to [plaintiff] about the locked door." He argues that "[he] may

have been attempting to talk to Mangianello [*sic*] to ask about retirement." However, as noted above, an agency's findings of fact will only be reversed if they are against the manifest weight of the evidence and "[t]he mere fact that an opposite conclusion is reasonable or that the reviewing court might have ruled differently will not justify reversal of the administrative findings." *Abrahamson*, 153 Ill. 2d at 88. We find that the Board's finding was not against the manifest weight of the evidence, especially where plaintiff testified that, shortly after his conversation with Ketchmark about the door-locking incident, he went to Manganiello's office because "he was just trying to figure out what was going on."

¶ 25 Plaintiff next argues, citing *Petrovic*, that the Board erred as a matter of law when it relied on *Stovall*, an overruled case, to conclude that his insubordination subjected him to a "lower standard" for a finding of misconduct than the statute allowed. We disagree with plaintiff's characterization of the Board's decision. The Board cited *Stovall* for the proposition that "[c]onduct that is argumentative, disrespectful, and insubordinate rises to the level of willful and deliberate misconduct under the Act." *Stovall*, and a line of cases applying it, stood for the proposition that an employer did not need to prove the existence of a written or formalized rule by direct evidence, and that a court could find that such a rule existed "through a common sense realization that some behavior intentionally and substantially disregards an employer's interest." *Stovall*, 262 Ill. App. 3d. at 1102; see also *Greenlaw v. Department of Employment Security*, 299 Ill. App. 3d 446, 448 (1998)*; Caterpillar, Inc. v. Department of Employment Security*, 313 Ill. App. 3d 645, 654 (2000)*; Czajka v. Department of Employment Security*, 387 Ill. App. 3d 168, 177 (2008). *Petrovic* held that this "common-sense" approach could not be "reconciled with the plain language in section 602(A), which clearly requires evidence of a deliberate violation of a

reasonable rule or policy of the employer," with the exception that an employer need not show the existence of a rule where the employee's conduct would otherwise be illegal or constitute *a prima facie* intentional tort. *Petrovic*, 2016 IL 118562, ¶ 36. However, the effect of *Petrovic*'s partial abrogation of *Stovall* is limited in this case, as a portion of the Employer's code of conduct was attached to its initial protest of plaintiff's claim for unemployment payments. The code of conduct expressly forbade "insubordination (refusal or failure to perform work assigned or to comply with instructions from any supervisor[])" and "[t]hreatening, intimidating, coercing, using harassing, abusive or vulgar language, or interfering with the performance of other employees or visitors." Thus the employer did produce direct evidence of policies that plaintiff violated after the door-locking incident.

¶ 26 Moreover, the Board specifically stated that it found that plaintiff's conduct constituted misconduct as defined by the newly amended subsection 602(A)(5). As amended, subsection 602(A)(5) states that, "notwithstanding" the statute's previous definition of misconduct, " 'misconduct' shall include the following work related circumstances: *** 5. [r]efusal to obey an employer's reasonable and lawful instruction, unless the refusal is due to the lack of ability, skills, or training for the individual required to obey the instruction or the instruction would result in an unsafe act." 820 ILCS 405/602(A)(5) (West 2016). Thus, it is clear that the Board's decision was not based exclusively on *Stovall*, but also on the plain language of subsection 602(A)(5). We note that plaintiff's opening and reply briefs do not address, or even mention, the amended version of the statute. But see *Petrovic*, 2016 IL 118562 ¶ 37 n.3 (acknowledging the recent amendment to section 602(A) but finding that the plaintiff's behavior did not fall under any of the amendment's enumerated categories of misconduct).

¶ 27 Finally, plaintiff argues that the Board's determination that he was fired for misconduct was clearly erroneous. Here, we find that the Board's determination that plaintiff was fired for misconduct, and is therefore ineligible to receive unemployment payments, was not clearly erroneous. Ketchmark testified that, the morning after the door-locking incident, plaintiff came to her and asked if he was in trouble. She instructed plaintiff not to speak to anyone but his direct supervisor, Dan Polley, about the incident. There is no question that this was a "reasonable and lawful instruction." However, he went to talk with Rich Manganiello because he was "just trying to figure out what was going on." By speaking with Manganiello, plaintiff refused to follow Ketchmark's instruction. There is no evidence that suggests that this refusal was due to plaintiff's lack of ability, or that following Ketchmark's instruction would result in an unsafe act. After viewing the record as a whole, we are not "left with a firm conviction" that the Board committed a mistake when it found that plaintiff's refusal to obey Ketchmark's instruction constituted misconduct under subsection 602(A)(5) of the Act.

¶ 28 Plaintiff dedicates a large portion of his opening and reply briefs arguing about the Employer's failure to identify specific policies that he violated during the 2015 fire drill incident and the 2016 food incident. However, as noted above, the Board specifically found that plaintiff committed misconduct by "reporting to [Manganiello's] office rather than his work station, speaking to [Manganiello] in a disrespectful manner, and ignor[ing] the specific instructions of [Ketchmark]." It continued that, "[e]ven if [plaintiff] did not ask [Manganiello] if he had a hard-on for him, [plaintiff] did not follow the instructions to refrain from discussing the incident and went to talk to [Manganiello]." Thus, the specific details of the Employer's previous disciplinary actions against plaintiff were irrelevant to the Board's determination that he was terminated for

misconduct, and are irrelevant to our review of its decision. The ultimate question presented by this appeal is whether the Board's determination was clearly erroneous. After viewing the record as a whole, we conclude that it was not.

¶ 29 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed.