2018 IL App (1st) 171596-U

No. 1-17-1596

Order filed August 13, 2018

FIRST DIVISION

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

JOHN MAUCK, 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 THREE POINTS COMMUNICATIONS CO., INC., Defendants, (Illinois Department of Employment Security, Defendant-Appellee).	)	Appeal from the Circuit Court of Cook County. No. 16 L 50858 Honorable Carl Anthony Walker, Judge, presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Pierce and Justice Mikva 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 John Mauck appeals from the circuit court's order affirming the administrative decision of the Board of Review of the Illinois Department of Employment Security (Board), which determined that he was ineligible to receive unemployment benefits because he was terminated for misconduct after he refused to obey his employer's reasonable, lawful instructions to work from the company's downtown office more frequently and to respond to his coworkers' phone calls, text messages, and emails. On appeal, plaintiff argues that the Board's determination that he committed misconduct by refusing to obey these instructions was clearly erroneous because the evidence presented was insufficient to prove that his employer gave him these instructions or that he refused to obey them. He also contends that any instructions he received were not sufficiently clear to be reasonable. For the reasons set forth herein, we affirm.

¶ 3 The evidence in the record shows that plaintiff began working for Three Points Communications Co., Inc. (Employer) in March of 2013. Plaintiff was managed by his older brother, Andrew Mauck, who was the owner of the company. On April 15, 2016, plaintiff was terminated for allegedly failing to come into the office more frequently and failing to respond to his coworkers' phone calls, emails, and text messages.

¶ 4 On May 29, 2016, plaintiff applied for unemployment benefits from the Illinois Department of Employment Security (Department). On June 17, 2016, the Employer filed a protest to plaintiff's application, alleging that plaintiff had been fired due to misconduct. On June 21, 2016, after phone interviews with plaintiff and representatives of the Employer, a Department adjudicator determined that plaintiff had been discharged due to misconduct and was, therefore, ineligible to receive unemployment benefits. On July 29, 2016, the Department's reconsideration unit filed for an appeal of the adjudicator's decision.

¶ 5 On August 12, 2016, a Department referee conducted a telephone hearing with plaintiff; Andrew Mauck, owner of the Employer and plaintiff's older brother; and Lorna Kiewert, an employee who worked with plaintiff.[1] Mauck testified that plaintiff began working for the Employer as an hourly contractor in 2013, but was made a full-time analyst in August of 2015. The Employer's workspace was an "open office," meaning that employees were "supposed to come in *** a couple times a week" but could otherwise work remotely. Mauck described that this attendance requirement was more of an "expectation" than a "policy." He told plaintiff that he needed to come into the office a certain number of days a week "at the beginning of [his] *** employment and then many, many times near the end." Mauck preferred to manage through "requests," but near the end of plaintiff's employment his requests took the form of "direction." In response to Mauck's instructions for him to come into the office, plaintiff urged the Employer to provide him an office or a cubicle, as he wanted more privacy than that afforded by the open concept of the downtown office, which consisted of desks and tables that were not partitioned from each other. Mauck told plaintiff that there was no business reason that he needed an office or a cubicle, but ordered plaintiff a "Chinese wall" in response to his request. When the partition was delivered, Mauck asked plaintiff to come into the office. He warned plaintiff that the Employer would "be forced to make changes" if he did not start coming into the office more frequently, but did not recall ever telling him that he would be fired for failing to come to the office. Despite these instructions, plaintiff did not come into the office more frequently.

¶ 6 In December of 2015, Mauck conducted an exit-interview with an employee who was leaving the company. The employee complained that plaintiff "was treated differently than everyone else," and that he had been allowed not to respond to his co-workers' phone calls,

[1] All subsequent uses of the name "Mauck" refer to Andrew Mauck and not to plaintiff.

emails, and text messages. When Mauck confronted plaintiff with these concerns, plaintiff responded with a "[s]houlder shrug." Mauck estimated that plaintiff failed to respond to his coworkers' communications "more than two dozen times." He gave plaintiff verbal warnings, and sent him two or three written warnings about not responding to his coworkers, but did not submit those warnings to the referee and could not tell the referee the dates of those warnings. Plaintiff was "really non responsive" to the warnings.

¶ 7 Mauck concluded his testimony by stating:

> "I take full responsibility for creating this awful situation. I should have been much more clear with him. I wasn't very much and I've done everything I possibly can to help him and it feels awful that he treats his former coworkers and me in this manner. He knows darn well what he did was wrong and that we should not be in this situation."

¶ 8 Lorna Kiewert testified that "it was very rare that we saw [plaintiff] in the office." On several occasions she had "reached out" to plaintiff to work together on a project but received no response. In those cases, Kiewert was forced to quickly try to figure out how to get the work done without plaintiff's assistance.

¶ 9 Plaintiff testified that he took a pay cut to work for the Employer and that part of that was in exchange for complete work flexibility regarding his ability to work remotely, which is how he worked in the three years prior to his termination. Mauck told him that the company was in financial distress and that he wanted to "strike a new bargain on the terms of [his] employment." Mauck "requested," but did not "demand," that he work from the downtown office more frequently. During this "rebargaining," plaintiff "demanded" that the Employer provide him a "modicum of personal space in the form of an office or a cubicle." Mauck initially consented to this demand "but then he never followed through." When the referee asked plaintiff about why

he still did not to come into the office after Mauck ordered him the partition, plaintiff stated "right, but that, that's not an office or a cubicle." He testified that his desire for an office or cubicle was a "function of [his] personality" and that there was no business reason that he needed the extra privacy.

¶ 10 Plaintiff rejected the allegation that he did not adequately respond to his coworkers and testified that he was "in constant contact with them" regarding work that he had been assigned. He stated that he did not work with Kiewert "very often, but the documents we worked on every week, I included her on and sent her to [*sic*] every Thursday on schedule." He testified that any warnings that he received "weren't clear," that he never received written or verbal warnings about not responding to coworkers, and that Mauck had sent him a "cryptic text message" about coming to the office every day "or else possible changes." Mauck never confronted him with the concerns that were raised in the exit-interview. When the referee asked plaintiff if he had asked Mauck to clarify his unclear warnings, plaintiff stated that "[i]n some instances we went back and forth."

¶ 11 On August 15, 2016, the Department referee sent the parties a written decision affirming the adjudicator's decision that plaintiff was ineligible for unemployment benefits. The referee found that plaintiff was terminated for misconduct because he failed to follow the Employer's directives about working in the office more frequently and returning his coworker's phone calls, emails, and text messages. It also found plaintiff's testimony that the Employer's warnings were not specific to be incredible. It found the Employer's directives to be reasonable and plaintiff's refusal to comply with those directives to be unreasonable. On September 14, 2016, plaintiff sought the Board's review of the referee's decision and, on October 27, 2016, plaintiff filed a written argument stating that the Employer failed to produce any evidence that he had received

written warnings or that he had failed to respond to his coworker's communications. In the argument, plaintiff described the flexibility to work from home as "an extremely valuable form of compensation," stated that he worked remotely 80% of the time, and explained that he came into the office for important meetings and to meet with clients.

¶ 12 On November 22, 2016, after reviewing the evidence in the record, including the transcript of the telephone hearing and plaintiff's written argument, the Board affirmed the referee's decision and found that plaintiff was ineligible to receive unemployment benefits. The Board found that the evidence showed that the Employer instructed plaintiff to work in the office more frequently and to return his coworker's phone calls, text messages, and that plaintiff refused to follow those instructions. It concluded that plaintiff's actions constituted misconduct under subsection 602(A)(5) of the Unemployment Insurance Act (Act), which defines misconduct as "[r]efusal to obey an employer's reasonable lawful instruction, unless that refusal is due to the lack of ability, skills, or training for the claimant required to obey the instruction or the instruction would result in an unsafe act." See 820 ILCS 405/602(A)(5) (West 2016).

¶ 13 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 5/3-103 (West 2016). On May 25, 2017, the trial court issued a written order affirming the Board's decision.

¶ 14 On appeal, plaintiff argues that the evidence presented to the Board was insufficient to support its finding that the Employer instructed plaintiff to work from the office and to respond to his coworkers' phone calls, text messages, and emails. He further argues that the evidence is insufficient to support the Board's findings that any instruction that he received was reasonable, and that he refused to obey either instruction.

¶ 15 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).

¶ 16 "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) (quoting *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. "[U]nder any standard of

review, a plaintiff to an administrative proceeding bears the burden of proof, and relief will be denied if he or she fails to sustain that burden." *Marconi,* 225 Ill. 2d at 532-33.

¶ 17 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.

¶ 18 However, effective January 3, 2016, the statute was amended to add a list of eight work-related circumstances under which an employee is disqualified from receiving benefits. In addition to the previous definition of misconduct, the statute now provides, in pertinent part:

> "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).

An employer who asserts an employee's disqualification for benefits based on misconduct has the burden of proving such conduct. *Petrovic,* 2016 IL 118562, ¶ 26.

¶ 19 Plaintiff first argues that the Board's determinations that the Employer instructed him to work from the office more frequently, and that he refused to obey this instruction, were against the manifest weight of the evidence because Mauck did not produce any documentary evidence of written warnings that he sent to plaintiff, and did not testify about the specifics of any verbal warning that he gave to plaintiff.

¶ 20 Here, we find that the Board's determinations were not against the manifest weight of the evidence. Mauck testified that he frequently told plaintiff that "he needed to come into the office a certain number of days a week" and that, near the end of plaintiff's employment, those requests took the form of "direction." Plaintiff acknowledged that Mauck "requested" for him to work in the office and testified that he made his attendance in the office contingent on being provided an office or a cubicle. He acknowledged that he did not start to work from the office when he was informed about the partition that the Employer purchased for him because it was 'not an office or a cubicle." Thus, even without the specifics of Mauck's instructions, such as how many days a week he wanted plaintiff to work from the office, or the specific dates that Mauck gave these instructions, the Board's determinations that Mauck instructed plaintiff to start working in the office more frequently than he was at the time, and that plaintiff did not obey those instructions, were not against the manifest weight of the evidence.

¶ 21 Plaintiff next contends that any instructions that Mauck gave to him regarding his attendance in the office were unreasonable because they were not clear and did not put him on

notice that he could be terminated for failing to comply. The question of whether an instruction is reasonable presents a mixed question of law and fact, which we review under a clearly erroneous standard. See also *Livingston v. Department of Employment Security*, 375 Ill. App. 3d 710, 718 (2007) ("It was not clearly erroneous or contrary to law for the Board to conclude that it was reasonable for a nursing home to require that its certified nursing assistants not slap or inappropriately touch the residents of the nursing home"). Plaintiff cites *Garner v. Department of Employment Security*, 269 Ill. App. 3d 370, 375-76 (1995), for the proposition that "a rule is not reasonable unless it provides guidelines that are or should be known by the employee" and that "the warnings and instructions contemplated under section 602A must be both explicit and specific to the conduct for which the employee was discharged." He argues that Mauck's testimony taking "full responsibility for creating this awful situation" and expressing that "I should have been much more clear with [plaintiff]" demonstrates that any instruction that he received was unclear and was, therefore, unreasonable.

¶ 22 Initially, we note that *Garner* was decided 20 years before the legislature amended the Act to further define misconduct as an employee's refusal to obey an employer's reasonable, lawful instruction. The issue presented in *Garner* was whether an employer's established policy was reasonable under the pre-amended version of 602(A). Here, we are tasked with determining whether the Employer's instruction was reasonable pursuant to the newly amended subsection 602 (A)(5).

¶ 23 Moreover, "[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." *Robbins v. Board of Trustees of Carbondale Police Pension Fund*, 177 Ill. 2d 533, 538 (1997).

Instead, "[i]f the record contains evidence to support the agency's decision, that decision should be affirmed." *Marconi,* 225 Ill. 2d at 534.

¶ 24 Here, Mauck told the initial Department adjudicator that "[p]ersonally, I let this go on too long because he's my brother. It really created some negative feeling towards [*sic*] other employees. Because of his lack of presence drove [*sic*] people from the business." Mauck's testimony from the hearing before the Department referee shows that he learned that employees felt this way after an exit-interview in December of 2015. It was after this interview, and "near the end" of plaintiff's employment, that the Employer's requests became directions. Although plaintiff testified that the instructions that he received were not clear, it was the Board's prerogative to accept or reject his testimony. See *Pelosi v. Department of Employment Security*, 2012 IL App (1st) 111835 ("It is the Board's responsibility to weigh the evidence, evaluate the credibility of the witnesses and resolve conflicts in testimony"). The Board concluded that the Employer's instructions were reasonable. After viewing the record as a whole, we cannot say that the Board's determination that the Employer's instructions were reasonable was clearly erroneous.

¶ 25 Finally, plaintiff argues that the Board's ultimate determination that he committed misconduct by refusing to obey the Employer's instructions to work from the downtown office more frequently, and was therefore ineligible to receive unemployment benefits, was clearly erroneous. We disagree. Subsection 602(A)(5) defines misconduct as an employee's "[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). Here, Mauck testified that he had requested that plaintiff work from the downtown office on multiple occasions, and that,

over time, these requests became directions. Plaintiff acknowledged that Mauck had spoken to him about working the office more frequently, but characterized the conversations as requests, and stated that his agreement to the requests was contingent on the Employer providing him office or cubicle space. When asked why he did not start working from the office after Mauck ordered a partition for him, plaintiff responded that the partition was "not an office or a cubicle." There is no indication in the record that his refusal was due to lack of ability skills or training, or that the instruction would result in an unsafe act. In light of this evidence, we are not "left with a definite and firm conviction that a mistake" was made when the Board determined that plaintiff was terminated for misconduct. See *Amalgamated Transit Union v. Illinois Labor Relation Board*, 2017 IL App (1st) 160999, ¶ 33.

¶ 26 Given our conclusion above, we need not address plaintiff's arguments directed at the Board's determination that he refused to obey the Employer's instruction to respond to his coworkers' communications.

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

¶ 28 Affirmed.