2018 IL App (1st) 172061-U

No. 1-17-2061

Order filed June 13, 2018

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WILLIE G. PARTEE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	No. 17 L 50381
THE DEPARTMENT OF EMPLOYMENT	)	
SECURITY; DIRECTOR OF EMPLOYMENT	)	
SECURITY; BOARD OF REVIEW; and COOK	)	
COUNTY, IL c/o EMP. BENEFITS c/o NSN,	)	The Honorable
	)	Carl Anthony Walker,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Cobbs and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: Board of Review's decision denying plaintiff unemployment benefits affirmed where the record supports the Board's finding that plaintiff's dismissal from his employment as a corrections officer with the Cook County Sherriff's Office was due to plaintiff's misconduct in violating the rules prohibiting the use of excessive force.

¶ 2 Plaintiff Willie Partee, appeals *pro se* from an order of the circuit court affirming the decision by defendant, the Board of Review (Board) of the Illinois Department of Employment Security (Department), finding that he was ineligible for unemployment benefits because he was discharged for misconduct in connection with his work pursuant to section 602(A) of the Unemployment Insurance Act (Act) (820 ILCS 405/602(A) (West 2016)). On appeal, plaintiff contends that the Board erred when it determined that he was ineligible for benefits due to misconduct. We affirm.

¶ 3 In February 2003, plaintiff began working as a full-time corrections officer for the Cook County Sheriff's Office. In October 2011, Plaintiff was assigned to Division II of the Cook County Department of Corrections. On November 17, 2014, an incident occurred between plaintiff and a detainee. As a result of the incident, on August 25, 2016, plaintiff was suspended[1] without pay for excessive use of force. Three days later, plaintiff filed for unemployment insurance benefits. On September 23, 2016, a department claims adjudicator issued a decision finding plaintiff ineligible for benefits because plaintiff had been discharged for misconduct under the Act. Plaintiff appealed this decision to a department referee.

¶ 4 On October 19, 2016, a department referee held a telephone hearing. Plaintiff's former employer was not present for the hearing. The next day**,** the referee issued a decision finding that plaintiff was eligible for unemployment benefits because the employer failed to appear and present testimony to substantiate the allegation that plaintiff was terminated for misconduct. Subsequently, the employer's representative, Heather Cichon, filed a request for a rehearing, explaining that the sequence of events leading to plaintiff's termination was captured on video and she was unable to have the video properly formatted to provide to the referee and plaintiff in

[1] The parties do not dispute that plaintiff's suspension was tantamount to discharge under the Act.

time for the first hearing. On October 24, 2016, the referee granted the employer's request for a new hearing.

¶ 5 On December 7, 2016, a second telephone hearing was held. The next day, the referee issued a decision finding that plaintiff was discharged for misconduct. Plaintiff appealed to the Board. However, because no transcript was made during the second hearing, the Board was unable to rule and remanded the matter for a new hearing.

¶ 6 On February 9, 2017, a third telephone hearing was conducted. Sharon Little, Deputy Director of Human Resources for the Cook County Sheriff's Office, testified that plaintiff's employment as a corrections officer began in February 2003. On August 25, 2016, plaintiff was suspended without pay for excessive use of force during an incident that occurred on November 17, 2014. The employer had a written policy governing use of force in the Cook County General Orders and the Sheriff's Order, which were available on the employer's intranet and are emailed to every employee. Excessive use of force was prohibited and grounds for dismissal.

¶ 7 Lawrence Weston, an investigator with the Sheriff's Office of Professional Review, testified that he was assigned to investigate a detainee's claim that plaintiff used excessive force during an incident that took place at Division Two at approximately 11:17 a.m. on November 17, 2014. Weston obtained a surveillance video of the incident that showed plaintiff tossing the detainee into a bench-style seating area.

¶ 8 Weston reviewed the surveillance video with plaintiff and questioned him about it**.** When Weston asked plaintiff why he threw the detainee on the seat, plaintiff said that the detainee was refusing his instructions to sit down. Plaintiff's use of force in response to the detainee's refusal to sit down was contrary to how officers were trained. Weston explained that the use of force policies would dictate that plaintiff attempt to gain compliance without force before considering

the use of force. Plaintiff used force as a first resort and did not attempt to employ available alternatives, such as handcuffing the detainee or calling for back up.

¶ 9 According to Weston, the video later showed the detainee sitting on a bench as plaintiff searched his bag. While searching the bag, plaintiff was throwing clothing at the detainee, who was throwing it back at plaintiff. Plaintiff then struck the detainee in the face with the back of his hand. Plaintiff and Weston reviewed this portion of the video. Plaintiff told Weston that he gave the detainee clothing to wipe water from his face, but the detainee threw the clothing back at him. Plaintiff told Weston that he did not strike the detainee.

¶ 10 Weston had worked for the Sherriff's Office for 22 years, including 11 years as a corrections officer, and was familiar with the use of force policies. Weston testified that plaintiff's actions—throwing the detainee in the seat and striking the detainee—constituted excessive uses of force.

¶ 11 The employer's representative, Evelyn Hernandez, requested that the video of the incident be introduced into the record. Plaintiff interjected, informing the referee that he never received the video of the incident, but had only received a video of a sergeant interviewing the detainee after the incident. The court inquired with Hernandez, who testified that she never sent plaintiff the video because the hearing representative during the first hearing, Cichon, had sent it to plaintiff. The referee subsequently added Cichon to the telephone hearing and Cichon testified that she had previously sent plaintiff a copy of the video. Cichon had checked the video to make sure that it played properly before sending it to plaintiff. The referee granted the employer's request that the video be entered into the record. In doing so, the referee informed the parties that, based on Cichon's testimony, it determined that the video of the incident was sent to plaintiff and that it was accessible via a computer.

¶ 12 Plaintiff testified that, on August 25, 2016, he was suspended without pay from employment as a corrections officer for using excessive force with a detainee on November 17, 2014. Plaintiff confirmed that he had seen the video of the incident. He acknowledged throwing the detainee into a seat, but testified that doing so was a permissible use of force according to the Sherriff's use of force policy because the detainee was a "moving resistor." Plaintiff also testified that he never intended to throw the detainee into a bench. He instructed the detainee to take a seat three times, but the detainee refused his instructions and began to step backward. Plaintiff placed his left hand on the detainee's right arm as a "control hold" to obtain compliance. The detainee "yanked away," which caused plaintiff to spin around to the detainee's front and, due to his momentum, toss the detainee.

¶ 13 Plaintiff denied striking the detainee in the face. He was searching the detainee's belongings and the detainee complained about water from a water bottle spilling on his face, so plaintiff tossed him sheets to dry his face. Plaintiff testified that there were six witnesses to the incident who provided statements to Weston's office that corroborated his version of events that he did not strike the detainee. The referee informed plaintiff that it would not consider the statements because plaintiff failed to provide them before the hearing.

¶ 14 On cross-examination, plaintiff acknowledged that excessive use of force is prohibited by the Cook County Sherriff's Office. He had received a copy of the use of force policy when he was hired and had received training on the proper use of force. Plaintiff acknowledged that a use of force in response to a verbal insult, without an immediate threat, constitutes an excessive use of force. Plaintiff stated that there was not a physical threat to him during the incident with the detainee.

¶ 15 On February 2, 2017, the referee issued a decision affirming the claims adjudicator's denial of unemployment benefits where the plaintiff was fired for misconduct. Specifically, the referee found that plaintiff violated the employer's policy prohibiting excessive use of force when he swung the detainee onto a bench, threw laundry in the detainee's face, and engaged in a "scuffle" with the detainee. Plaintiff appealed the referee's decision to the Board.

¶ 16 On March 13, 2017, after reviewing the record from the February 2017 telephone hearing, which included the video of the incident, the Board issued a decision affirming the referee's decision. The Board determined that plaintiff deliberately and willfully violated the employer's policies and procedures relating to the use force and the prohibition of the use of excessive force. In the decision, the Board found that the detainee's failure to comply with plaintiff's instructions to sit down did not pose a physical threat and that plaintiff did not attempt to gain compliance by using nonphysical methods, but, instead, threw the detainee onto a bench. The Board also determined that plaintiff's excessive use of force against a detainee could result in liability and/or fines and penalties for the employer**.**

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

¶ 18 On appeal, plaintiff argues that the Board erred in denying his application for unemployment benefits after it found that he was discharged for misconduct within the meaning of section 602(A) of the Act. The State responds that the Board's conclusion that plaintiff was fired for misconduct is supported by the record.

¶ 19 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. *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).

¶ 20 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 (Internal quotation marks omitted).

¶ 21 The Board's decision that an employee was terminated for "misconduct" under Section 602(A) of the Act presents a mixed question of law and fact and is reviewed for clear error. *Petrovic*, 2016 IL 118562, ¶ 21. The Board's decision is clearly erroneous only if, "based on the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Id.* (Internal quotation marks omitted.).

¶ 22 Section 602(A) of the Act provides that a person is ineligible for unemployment insurance benefits when he or she was "discharged for misconduct connected with his work." 820 ILCS 405/602(A) (West 2016). Misconduct is defined as:

> "the deliberate and willful violation of a reasonable rule or policy of the employing unit, governing the individual's behavior in performance of his work, provided such violation has harmed the employing unit or other employees or has been repeated by the individual despite a warning or other explicit instruction from the employing unit." *Id.*

¶ 23 The disqualification for misconduct is not intended to encompass all rightful terminations of employment but to exclude claimants who intentionally commit conduct that they know is likely to result in their termination, on the assumption that an employee who deliberately violates a known rule does so knowing that unemployment will likely result. *Petrovic*, 2016 IL 118562, ¶ 27. The elements of misconduct are that the (1) claimant deliberately and willfully violated a rule or policy of the employer, (2) the rule or policy was reasonable, and (3) the violation either harmed the employer or was repeated despite warnings. *Id.* ¶ 26.

¶ 24 Here, we first find that the Board could reasonably determine that plaintiff had committed a deliberate and willful violation of a rule or policy of his employer by throwing the detainee into a bench. A claimant's conduct is willful or deliberate if the claimant was aware of but consciously disregarded a rule or policy of the employer. *Id.*

¶ 25 The record shows that plaintiff testified he was aware of, and trained on, the policies governing the use of force. Plaintiff was aware that a use of force would be excessive if used in response to a verbal confrontation with a detainee where there was no physical threat present. Plaintiff acknowledged that the detainee never posed a physical threat to him and that, when the detainee did not comply with his instructions to sit down, he threw the detainee onto a bench. Furthermore, Weston testified that plaintiff had nonphysical means of obtaining the detainee's compliance available to him, including handcuffing the detainee and asking other corrections officers in the area for assistance. Instead, however, plaintiff threw the detainee onto the bench as a first resort**.** All of this is consistent with the video of the incident which was included in the record on appeal. Accordingly, 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. *Petrovic*, 2016 IL 118562, ¶ 26.

¶ 26 With respect to the second main requirement for a finding of misconduct, that "the rule or policy was reasonable," the Board could certainly conclude that the Sherriff's policies, prohibiting officers from using force where there is no physical threat and nonphysical means of obtaining compliance are available, is "reasonable" within the meaning of section 602(A) of the Act. 820 ILCS 405/602(A) (West 2016)).

¶ 27 Further, the Board could conclude that plaintiff's violation of the use of force policies caused the Sherriff's Office harm, satisfying the third main requirement to establish misconduct under section 602(A) of the Act. We note that, potential harm to the employer may underlie misconduct. *Williams v. Department of Employment Security*, 2016 IL App (1st) 142376, ¶ 64. Here, the Board found such potential harm, explaining that an employee's "[e]xcessive use of force against a detainee could result in liability and/or fines and penalties for the employer." We do not find this conclusion to be clearly erroneous. See *Woods*, 2012 IL App (1st) 101639, ¶ 19.

¶ 28 Nevertheless, plaintiff argues that the circuit court's order affirming the Board's denial of his application for unemployment benefits—and the agency's determination—were unjust because, during the proceedings, he never received a copy of the surveillance video depicting his encounter with the detainee. Plaintiff's argument regarding the alleged lack of the video are primarily focused on the circuit court's decision affirming the Board. However, as mentioned, this court only reviews the decision of the Board and, therefore, plaintiff's challenge to the circuit court's decision are misplaced. *Petrovic*, 2016 IL 118562, ¶ 22. To the extent defendant claims that the surveillance video was not provided to the Board, the referee, or to him, we find these claims belied by the record. Defendant raised this issue with the hearing referee and, after a thorough inquiry of multiple witnesses on the matter, the referee determined that plaintiff was sent a copy of the video. Further, the decisions of the referee and the Board show that they

viewed the video where they each specifically cited to the footage as evidence that plaintiff's actions constituted excessive force.

¶ 29 In sum, the Board's decision that plaintiff was terminated for misconduct under section 602(A) of the Act was not clearly erroneous.

¶ 30 We affirm the judgment of the circuit court of Cook County.

¶ 31 Affirmed.