

No. 1-18-0660

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IN THE APPELLATE  
COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

DAVID A. HYBICKI,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 17 L 50809
	)	
ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY;	)	
DIRECTOR OF ILLINOIS DEPARTMENT OF EMPLOYMENT	)	
SECURITY; and BOARD OF REVIEW,	)	
	)	
Defendants-Appellants	)	
	)	
(Securitas Security Services, USA,	)	The Honorable
	)	Daniel J. Kubasiak,
Defendant).	)	Judge Presiding.

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PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Justices Howse and Cobbs concurred in the judgment.

**ORDER**

*HELD:* Judgment of trial court reversed and decision of Board declaring plaintiff ineligible for unemployment benefits reinstated where Board's determination that plaintiff committed misconduct in relation to his work was fully supported by the evidence; Board's decision was not clearly erroneous and, thus, trial court should not have disturbed its determination.

¶ 1 Plaintiff-appellee David A. Hybicki (plaintiff) sought administrative review of a decision issued by defendants-appellants Illinois Department of Employment Security (IDES), the Director of Illinois Department of Employment Security, and the Board of Review (Board) declaring him ineligible for unemployment benefits. The trial court reversed the Board's determination. IDES appeals, contending that the Board's determination that plaintiff committed misconduct connected to his work was not clearly erroneous. It asks that we reverse and vacate the trial court's judgment and thereby affirm the Board's decision in its entirety. For the record, plaintiff has not filed a brief in this matter. Accordingly, we consider this appeal on appellants' brief only, pursuant to *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). For the following reasons, we reverse the judgment of the trial court and reinstate the decision of the Board.

¶ 2

## BACKGROUND

¶ 3 Plaintiff began working as a security guard for defendant Securitas Security Services, USA (Securitas)<sup>1</sup> in March 2005. Securitas provided monitoring and onsite security services for various clients.

¶ 4 In February 2017, someone informed a Securitas field supervisor about a cot and pillow that had been set up in an office of one of Securitas' clients, an auto leasing company.<sup>2</sup> Following an investigation, plaintiff, who had been assigned by Securitas to work at this client's site, admitted the cot and pillow were his and that he used them to sleep onsite after his shift ended. Securitas discharged plaintiff for misconduct, specifically, because he had violated its policy, as listed in its

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<sup>1</sup> Securitas is not a party to this appeal.

<sup>2</sup> The client's site was not manned by any of its employees; rather, the client leased the location (for which it was responsible) and housed vehicles there. The client hired Securitas to provide onsite security services for the location, which included a building and surrounding property.

employee handbook, against "[m]isuse, excessive or inappropriate use of Company or client property" and "[s]howing up or socializing at a client site when not scheduled to work."

¶ 5 In March 2017, plaintiff filed for unemployment benefits with IDES. Securitas filed a protest to plaintiff's claim, stating that plaintiff had violated "a reasonable and known policy," that he had been made aware of this policy verbally and in writing, and that he admitted to violating the policy by bringing the cot and pillow to the client site to sleep while not scheduled to work and without authorization. Securitas attached several documents to its protest, including an incident report, photographs of the cot and pillow's location, a personnel action form, relevant portions of its employee handbook, plaintiff's signed acknowledgment of his receipt of the handbook, an employee statement and various internal emails.

¶ 6 The incident report, as completed by Securitas field supervisor Shawn Avery, stated that, upon his arrival at the client site, a Securitas employee on duty at the time informed him that a cot and pillow had been set up in another room on the premises. The personnel action form, as completed by Securitas branch manager Leonardo Jimenez, stated that, upon investigation, plaintiff admitted to him that the cot and pillow were his, that he used them to sleep in an office at the client's site when his shift ended and another Securitas officer took over, and that he never informed or received authorization to do so from either the client or Securitas. The employee statement, as given by the employee on duty at the time field supervisor Avery arrived, indicated that he knew plaintiff had set up the cot and pillow and had slept onsite. This employee averred that he was unaware it was impermissible for plaintiff to do so, and indicated that plaintiff's sleeping was not out in the open, that no one could see him or the cot, and that his sleeping did not interfere with the employee's work. The internal emails indicated that an employee informed Jimenez that plaintiff slept on the cot and that, in the year previous, he would sleep in his car

onsite; that plaintiff told Jimenez a Securitas supervisor named Robert Smith had given him permission to sleep in his car onsite; and that Jimenez spoke with Smith, who denied giving plaintiff authorization to sleep anywhere onsite, in his car or otherwise. The portions of the Securitas employee handbook provided to IDES, accompanied by plaintiff's signed and dated receipt of it, stated that misuse of Securitas or client property warranted "involuntary termination [of employment] on the first occurrence."

¶ 7 Plaintiff's petition for unemployment benefits and Securitas' protest were then forwarded to an IDES claims adjudicator. Upon consideration, the adjudicator determined that Securitas "did not submit evidence to prove" that plaintiff had set up the cot to sleep while off duty without authorization. The adjudicator further commented that plaintiff's actions "did not harm the employer or other employees." Accordingly, the adjudicator determined that plaintiff was eligible to receive unemployment benefits.

¶ 8 Securitas appealed the claims adjudicator's determination. In June 2017, the matter was referred to an Administrative Law Judge (ALJ) and a telephone hearing was held. During this hearing, Jimenez testified that plaintiff had been discharged for misuse of client property due to his utilization of the client's offices to sleep and remain on the premises after his shift ended. Jimenez described the investigation that took place and explained that he confronted plaintiff following it, whereupon plaintiff admitted the cot and pillow were his and that he used them to sleep on the client's premises. Jimenez related that plaintiff told him that long before this, he had asked and received authorization from one of his supervisors to sleep outside the client's offices in his car parked on the client's premises. Jimenez noted, however, that this supervisor had not supervised this particular client's account for almost two years. Jimenez further testified that Securitas was harmed by plaintiff's actions. He stated that not only did they give a "bad \*\*\*

view from the client's perspective that we [Securitas] allow our officers to do such things," but that he had spoken directly to the client, which expressed that it was "not happy" over the incident because it was responsible for the building and its surrounding property until its lease ended and wanted to ensure no misuse or damage occurred. Jimenez stated that Securitas chose to terminate plaintiff's employment rather than issuing a warning or suspension because it found that his actions amounted to serious misconduct.

¶ 9 Plaintiff testified that he knew about Securitas' prohibition with respect to misuse of client property; he stated that he had read it in the employee handbook. He explained that, in spite of this, he had been sleeping on various clients' premises for several years while working for Securitas, after obtaining permission to do so from those clients. When he began working for the instant client, however, the site to which he was assigned was vacant and no client personnel was present. He recounted that he therefore asked his immediate supervisor at Securitas, Robert Smith, who, plaintiff alleged, gave him permission to park his car in the back of the client's building and sleep there. Plaintiff explained that he obtained this authorization about two years ago. He further testified that he eventually set up the cot and pillow inside the building in an empty office and used these items to sleep there. Plaintiff admitted he never obtained or received permission to do so from the client or from anyone at Securitas. He stated that, in his opinion, "it was just a simple transition" from sleeping in his car outside to sleeping in the office inside and that he did not think it was an issue because "[t]here's nobody there, the place is empty." He called this "carryover behavior" and reiterated that there was no "difference if I'm sleeping in my car or if I'm sleeping in an empty office." He further stated that, if he had received a warning not to do so (rather than termination), he would have stopped immediately.

¶ 10 Following this hearing, the ALJ issued a decision setting aside the claims adjudicator's decision.

The ALJ found that plaintiff misused client property by setting up the cot and pillow to sleep onsite without authorization, and that Securitas "was harmed by a detrimental affect on client relations and employee morale." He explained that "[m]isuse of client property constitutes a deliberate and willful violation of the employer's rules and policies inherent in governing the individual's behavior in the performance of his work," and that "competent evidence of record shows" that plaintiff misused client property here "without authorization" and Securitas "was thereby harmed." The ALJ concluded that plaintiff's misconduct was connected with his work and, thus, that his employment had been properly terminated. Accordingly, the ALJ held that plaintiff was not eligible for unemployment benefits.

¶ 11 Plaintiff appealed the ALJ's decision to the Board. Upon review, the Board affirmed the ALJ's decision. After noting the facts of the cause, the Board discussed the term "misconduct" and its requirements of an employee's deliberate and willful violation of an employer's reasonable rule or policy resulting in harm to the employer or another employee. The Board noted that, while plaintiff may have been given permission to sleep in his car, he was never given permission to set up a cot and pillow at the site by anyone. The Board further found that plaintiff's actions harmed Securitas by exposing it to possible liability. Accordingly, the Board concluded that plaintiff "deliberately and willfully committed an act of misconduct" and, thus, he was not eligible for unemployment benefits.

¶ 12 Plaintiff then filed a complaint for administrative review of the Board's decision in the trial court. Following argument, the trial court issued an Opinion and Order reversing the Board's decision and finding plaintiff eligible for unemployment benefits. Mirroring the definition used by the Board, the trial court noted that an employee's actions constitute misconduct "only if the

evidence in the record satisfies three requirements: (1) a deliberate and willful violation (2) of a reasonable rule or policy of the employer \*\*\* that (3) either (a) harmed the employer or a fellow employee or (b) was repeated despite a warning or explicit instruction from the employer." The court then went on to state that it could not conclude that plaintiff deliberately and willfully violated Securitas' policy. It believed that, although plaintiff testified he was aware of Securitas' policy against misuse of client property and knew this was contained in the employee handbook, it averred that "the rest of [p]laintiff's testimony makes clear that he did not believe his conduct constituted a violation of [Securitas'] policy." In support of this, the court noted its view that plaintiff believed he had permission to sleep at the client site, that another employee did not know this was impermissible, and that plaintiff thought his actions deserved only a warning. The trial court concluded that, because the "record does not support the Board's decision that [p]laintiff deliberately and willfully violated" Securitas' policy, "the Board's decision finding [p]laintiff ineligible for unemployment benefits is clearly erroneous and is reversed."

¶ 13

#### ANALYSIS

¶ 14 On appeal, IDES contends that the Board's determination that plaintiff committed misconduct connected with his work was not clearly erroneous. Reminding us that administrative review requires examination of the Board's decision and not that of the trial court, IDES points out that it provided sufficient evidence to satisfy the three elements of statutory misconduct, rendering plaintiff ineligible to receive unemployment benefits. We agree.

¶ 15 As the Board here comprises an administrative agency relegated to making decisions surrounding the employment of its own personnel, we note that, pursuant to the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2014)), it has discretionary authority in this regard. See *Stein v. Department of Employment Security*, 2017 IL App (3d) 160335, ¶ 17; see, *e.g.*,

*O'Boyle v. Personnel Board*, 119 Ill. App. 3d 648, 653 (1983). Thus, when an appeal is taken from a decision in this context, we, as a reviewing court, are called upon to review the decision of the Board, and not that of the trial court. See *Stein*, 2017 IL App (3d) 160335, ¶ 17 (citing *Petrovic v. Department of Employment Security*, 2016 IL 118562, ¶ 22). Significantly, the Board's findings and conclusion with respect to the facts presented in the cause are considered to be *prima facie* true and correct. See *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992); *O'Boyle*, 119 Ill. App. 3d at 653 (the agency is "charged with the primary responsibility of adjudication in [its] specialized area"); see also *Caliendo v. Martin*, 250 Ill. App. 3d 409, 416 (1993) (these activities are not the function of the court, but rather, are only for the agency); accord *Stein*, 2017 IL App (3d) 160335, ¶ 17 (citing 735 ILCS 5/3-110 (West 2014)). Accordingly, we may not reweigh the evidence, make any independent determinations of fact, substitute our judgment for that of the Board with respect to the facts, reassess witness credibility, or resolve conflicting evidence; we may not reverse any of the Board's factual findings unless they are against the manifest weight of the evidence. See *Abrahamson*, 153 Ill. 2d at 88; *Caliendo*, 250 Ill. App. 3d at 416; see also *Williams v. Department of Employment Security*, 2016 IL App (1st) 142376, ¶ 53 (citing *Woods v. Illinois Department of Employment Security*, 2012 IL App (1st) 101639, ¶ 16).

¶ 16 In the instant cause, because our review of the Board's decision requires us to determine the legal effect of a particular fact scenario, namely, whether plaintiff committed misconduct connected with his work by setting up a cot and pillow at the client site and sleeping there while off duty and without authorization, this appeal involves a mixed question of law and fact. See *Williams*, 2016 IL App (1st) 142376, ¶ 56 (whether employee was properly terminated for misconduct in connection with work is a mixed question of law and fact). Mixed questions of law and fact are



reviewed under a clearly erroneous standard. See *Petrovic*, 2016 IL 118562, ¶ 21; accord *Stein*, 2017 IL App (3d) 160335, ¶17. Ultimately, the Board's decision is considered to be clearly erroneous only when, based on the entire record, a reviewing court is left with the definite and firm conviction that a mistake has been committed. See *Petrovic*, 2016 IL 118562, ¶ 21; accord *Stein*, 2017 IL App (3d) 160335, ¶17; *Williams*, 2016 IL App (1st) 142376, ¶ 56.

¶ 17 Based upon our review of the entire record in the instant cause, we do not find that the Board's decision was clearly erroneous in finding that plaintiff was properly terminated for misconduct in relation to his work. Rather, we conclude that the trial court erred in reversing the Board's decision which found plaintiff ineligible for unemployment benefits.

¶ 18 The Board determined that plaintiff was ineligible for unemployment benefits pursuant to section 602(A) of the Unemployment Insurance Act (Act), which states that "[a]n individual shall be ineligible for benefits for the week in which he has been discharged for misconduct connected with his work and, thereafter, until he has become reemployed." 820 ILCS 405/602(A) (West 2014). Under this governing Act, "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." 820 ILCS 405/602(A) (West 2014). From this statutory definition, our courts have made clear that three main requirements must be met in order to establish misconduct on the part of an employee within the context of the Act. "It must be proven that (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.' "

*Williams*, 2016 IL App (1st) 142376, ¶ 55 (quoting *Woods*, 2012 IL App (1st) 101639, ¶ 19).

- ¶ 19 In the instant cause, the trial court properly declared at the outset of its Opinion and Order that the determination of plaintiff's alleged misconduct was a question of law and fact. Then, after examining the evidence that had been presented, it stated that it could not conclude plaintiff "deliberately and willfully violated" Securitas' policy against misuse of client property. However, by doing so, it is clear that the trial court improperly reweighed the evidence, particularly the credibility of the witnesses involved.
- ¶ 20 Inherently, the trial court's opinion credited plaintiff's testimony over all the other evidence presented. In fact, the trial court devoted the bulk of its decision to a discussion of plaintiff's testimony, going so far as to acknowledge that plaintiff was fully aware of Securitas' policy against misuse of client property, but then backtracking by concluding that his testimony did not seem to indicate he believed his conduct constituted a violation of that policy. The court cited plaintiff's belief that he had permission to sleep at the client's site (outside, in his car), and evidence that his coworker was unaware that what plaintiff was doing was impermissible. It was from this that the trial court declared that the Board's decision did not support a conclusion that plaintiff deliberately and willfully violated Securitas' policy and, thus, he did not commit "misconduct" pursuant to the Act.
- ¶ 21 However, in reaching this conclusion on this basis, the trial court made a credibility determination that plaintiff was truthful when he testified that he had permission to sleep at the site, and then used this determination to make a leap in logic that he did not willfully violate Securitas' policy against misuse of client property. The Board was not required to accept plaintiff's testimony in that light and, after reviewing all the evidence presented, it certainly did not. Thus, it was not the trial court's province to reassess that testimony. Rather, the trial court

was required to take the evidence at its face; had it done so, as it was required to do, it becomes quite clear that the statutory elements of misconduct were undeniably met in this cause.

¶ 22 First, based on the evidence presented, the Board could have easily found that plaintiff committed a deliberate and willful violation of Securitas' policy against misuse of client property. Securitas provided the Board with a copy of the relevant portions of its employee handbook. In that handbook, Securitas made clear to its employees that it would not tolerate misuse, or excessive or inappropriate use, of client property. Included in its definition of this misuse was "[s]howing up or socializing at a client site when not scheduled to work." The handbook warned that misuse of client property warranted "involuntary termination [of employment] on the first occurrence." In his testimony, plaintiff admitted he was well-aware of this policy from the moment he started working for Securitas. His signed receipt of the handbook was submitted into evidence.

¶ 23 Plaintiff testified that, in spite of his knowledge of this policy, he started sleeping on various clients' premises, and had been doing so for the last several years while working for Securitas. While he stated he had obtained permission from those clients to do so, he confirmed that he did not get the instant client's permission because there was no client personnel onsite whom he could ask. He averred that he asked Robert Smith for permission to sleep onsite, but plaintiff admitted that this was two years ago and that Smith only gave him permission to sleep in his car which was to be parked outside in the back of the client's building. This, however, is in direct contradiction to Securitas branch manager Jimenez's testimony, as well as the internal emails Securitas submitted into evidence. These rebutted plaintiff's testimony and demonstrated that Smith denied ever giving plaintiff authorization to sleep anywhere onsite at this client's building, outside in his car or otherwise. Additionally, Jimenez testified, just as plaintiff himself did, that

plaintiff admitted the cot and pillow were his and that he knowingly slept at the client's site when his shift ended and when he was not supposed to be on the premises, in direct violation of Securitas' policy against misuse of client property. Plaintiff justified his conduct by stating that he, himself, determined his action of setting up the cot and sleeping in the client's office would be permissible, labeling it as "a simple transition" and "carryover behavior" from sleeping outside in his car. But, ultimately, that fact remains here that there has never been any dispute, from plaintiff or anyone, and in fact plaintiff himself has consistently admitted, that he never obtained permission—from Smith, from Securitas, from the client or from anyone, for that matter—to set up a cot and pillow inside the client's building or to sleep in an office inside the client's building, vacant or otherwise.

¶ 24 From all this, the Board was free to find that plaintiff's testimony was incredible, to the extent that he claimed, and the trial court believed, that he did not deliberately and willfully violate Securitas' policy against misuse of client property or that he did not believe his actions constituted a violation of this policy. The Board's decision found that plaintiff never had permission to do what he did. This shows that the Board, therefore, did not find plaintiff's testimony, and his explanations attempting to justifying his actions, to be credible or even relevant to the main issue of whether he deliberately and willfully violated a known policy of his employer. He clearly did, and even more clearly, he unequivocally admitted to doing so. Moreover, even if the Board did accept plaintiff's testimony as credible, again, the fact remains that he admittedly did not have permission to sleep inside the client's office and that he knew this constituted a violation of Securitas' specific policy against misuse of client property.

¶ 25 Accordingly, we cannot say that the Board's conclusion with respect to the first element of misconduct under the Act was clearly erroneous. To the contrary, the circumstances, along with

the evidence presented, support the Board's finding that plaintiff deliberately and willingly violated Securitas' policy.

¶ 26 Similarly, with respect to the second statutory element required for a finding of misconduct, the Board could certainly conclude that Securitas' policy against misuse of client property was reasonable within the meaning of the Act. Again, Securitas provides security services to clients—one of the most basic necessities in running a business. That Securitas would prohibit its employees from inappropriate use of client property, including "[s]howing up or socializing at a client site when not scheduled to work" as specified in its employee handbook, is, for obvious reasons, more than reasonable if Securitas desired to retain, and obtain, new clients.

¶ 27 Finally, there was sufficient evidence for the Board to conclude that plaintiff's violation of Securitas' policy caused Securitas harm, thereby satisfying the third statutory element of misconduct. Our courts have found that in determining whether an employer was harmed under the Act, the employee's conduct should be viewed in the context of potential harm and not in the context of actual harm. See *Williams*, 2016 IL App (1st) 142376, ¶ 64. Interestingly, in the instant cause, plaintiff's actions harmed Securitas in both ways. Jimenez testified that, following Securitas' investigation, he spoke directly to the client about the cot and pillow plaintiff had set up in the client's office, as well as his sleeping there after his shift ended. Jimenez relayed that the client expressed it was "not happy" with Securitas over the incident and that the client explained to Jimenez that it leased the building and, thus, it was responsible for it and the surrounding property until the lease ended. Jimenez also explained that the client told him it wanted to ensure no misuse or damage occurred, which would render it responsible to its lessor. Clearly, plaintiff's actions jeopardized Securitas' contractual relations with its client, who had hired Securitas to secure the property in the first place.

¶ 28 Even were this not to be considered actual harm (which it is), Jimenez further testified to the potential harm plaintiff's misconduct inflicted on Securitas. Jimenez described that what plaintiff did gives a "bad \*\*\* view from the client's perspective that we [Securitas] allow our officers to do such things." That is, plaintiff was poised to give Securitas an unfavorable reputation in the security and monitoring industry as unreliable and unable to control its staff—particularly with respect to trusted client property. And, another theme that resonated throughout the evidence with respect to potential harm was the concept of accidental injury. The client discussed with Jimenez the dangers of a fire or accident in the building and expressed its worry about its responsibility to its lessor and to whomever was injured. Likewise, during the Board hearing, Securitas' representative questioned plaintiff on what would happen if he were hurt in the building or a fire broke out when he was not supposed to be there and no one knew he was there. Other than to say he was sure an officer on duty would know he was there, plaintiff provided no other way to avoid this potential harm. And, the Board noted in its decision that plaintiff remaining on the premises when off duty exposed both Securitas and the client to "possible liability" should plaintiff have been harmed there.

¶ 29 In sum, and based upon our thorough review of the record, we cannot say that the Board's conclusion that plaintiff was properly terminated for misconduct within the meaning of the Act was clearly erroneous. All the statutory elements of misconduct were met. That plaintiff may have obtained permission two years ago to sleep outside in his car onsite, that another employee did not think his conduct was impermissible, and that plaintiff believes his conduct merited only a warning as opposed to termination of employment are all irrelevant considerations. Instead, the evidence clearly bears out, via plaintiff's own admissions, that he knew of Securitas' policy against misuse of client property, one that was more than reasonable in governing employee

behavior in the performance of work duties, as well as the consequence of termination after the first violation; that he chose, without obtaining permission from Securitas or the client, to set up a cot and pillow and sleep in the client's office when he was off duty and when knew he was unauthorized to be in that location; and that his actions harmed Securitas by jeopardizing its relationship with the client and, potentially, its reputation in the security industry. Accordingly, the trial court should not have disturbed the Board's decision finding plaintiff ineligible for unemployment benefits.

¶ 30

#### CONCLUSION

¶ 31 For all the foregoing reasons, we reverse the judgment of the trial court and reinstate the decision of the Board.

¶ 32 Reversed; Board decision reinstated.