THIRD DIVISION
June 8, 2011

No. 1-10-1683

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEDRO CASALES, Plaintiff-Appellant, v. THE ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; Director, The Department of Employment Security; The Board of Review, Defendants-Appellees (CAMPAGNA-TURANO BAKERY, INC., c/o NSN EMPLOYER SERVICES, Defendant).	)	Appeal from the Circuit Court of Cook County. No. 09 L 51525 Honorable Elmer James Tolmaire III, Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.

Justices Neville and Murphy concurred in the judgment.

O R D E R

HELD: When an employee was discharged for misconduct after he refused to work at his assigned position and left the workplace, he was not eligible for unemployment benefits.

Plaintiff, Pedro Casales, appeals from an order of the circuit court of Cook County, affirming a decision by the Board of Review of the Illinois Department of Employment Security (Board) denying him unemployment insurance benefits for misconduct in connection with his work under section 602(A) of the Illinois Unemployment Insurance Act (Act) (820 ILCS 405/602(A)(West 2008)).[1] Plaintiff contends that the Board erred in finding that he engaged in misconduct under section 602(A) and in failing to apply section 601(A) of the Act (820 ILCS 405/601 (West 2008)), addressing unemployment benefits for employees who voluntarily leave the workplace. Defendants assert that the Board's findings of fact were not against the manifest weight of the evidence, and its conclusion that plaintiff's misconduct disqualified him from receiving unemployment benefits under the Act was not clearly erroneous. Further, defendants argue that section 601(A) of the Act does not apply here because plaintiff was discharged from his job. For the reasons set forth below, we affirm.

Plaintiff was employed as a packer at Campagna-Turano Bakery (bakery) from September 26, 2004 until April 23, 2009, when his employment was terminated after he refused his foreman's request that he work that day at a position near an oven. Plaintiff applied to the

[1]Section 602(A) provides in relevant part "An individual shall be ineligible for benefits for the week in which he has been discharged for misconduct connected with his work ***. For purposes of this subsection, the term "misconduct" means 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 2008).

Illinois Department of Employment Security (Department) for unemployment benefits and his employer filed a protest. On May 23, 2009, a claim's adjudicator denied plaintiff's application for benefits pursuant to section 601(A) of the Act, because "the claimant left work voluntarily without good cause attributable to the employer."

Plaintiff appealed the claims adjudicator's decision and a telephonic hearing was held before a Department referee on July 1, 2009. At that hearing, plaintiff testified, through an interpreter, that on the date his employment was terminated, he went home because of health issues after he was asked by the packaging foreman, Salomon Gonzalez, to work a line position near the oven. He stated that "[w]hen I'm in extremely hot places, I have a problem with my stomach and with my throat. My throat gets swollen and it gets infected." Plaintiff said that in February 2008, he had provided his employer with a note from a doctor stating that he had a stomach problem and needed to take his food on time and needed a better work schedule to accommodate his schedule for eating. When the bakery refused to change his schedule, plaintiff filed a complaint with the Illinois Human Rights Commission. Plaintiff said that he withdrew his complaint after his employer, through its agent, Sam Blasi, agreed to let him work on the packing line and not to move him from there. Plaintiff also testified that before leaving the bakery on April 23rd, he tried to talk to Martha Gonzalez, a human resources representative at the bakery, but she was not available. He said that later that afternoon, Martha Gonzalez called him and told him that he had been discharged from his job.

During questioning from the bakery's representative, plaintiff acknowledged that the doctor's note he provided to the bakery only stated that he needed to work a shift that would

allow him to eat his meals on a regular schedule and that he provided no other doctor's note to his employer. He also stated that the bakery's policy is for employees to rotate between different positions on the line and that he had worked in the position near the oven in the past and as recently as a week before his termination, but only for "ten minutes or thirty minutes at the most when somebody had to take lunch." He said that on April 23, 2009, he was told by Sal Gonzalez that he would have to work near the oven exit for his entire shift, that he told Gonzalez that if he could not work at a different position he would go home, and that Gonzalez then told him to leave. Before he left the bakery, plaintiff said that he talked to Ignacio Romero and told him that Sal Gonzalez assigned him to work near the oven but that he could not work there because of his "drug problem" and that he would leave if he was not assigned to a different position. Plaintiff said that Romero went to talk to someone and when he returned, he told plaintiff he could leave because there was nothing he could do for him.

Martha Gonzalez testified that on April 23, 2009, plaintiff was scheduled to work from 5 a.m. until 4:30 p.m. but that he punched out at 5:12 a.m. She testified that she did not speak to plaintiff before he left but called him at about 2 p.m. that day and, in translating for Sam Blasi, told plaintiff that he was being terminated for walking off the job. Gonzalez stated that the plaintiff told her that he left because had been told to work near the oven and could not work there because of his stomach problems. Gonzalez said that they had received a letter from plaintiff's doctor but that it did not state that plaintiff could not work in hot conditions.

Salomon Gonzalez testified that on April 23, 2009, he assigned plaintiff to a position near the oven and that he had previously assigned him to that position two weeks earlier for about 30

to 45 minutes. Gonzalez testified that in the past plaintiff said that he did not want to work near the oven because he had problems, but did not explain what those problems were. After receiving his assignment on the date in question, plaintiff told Gonzalez that if he was going to be put in that position, he wanted to go home because he was not able to work near the oven. Gonzalez said that he told plaintiff to speak to human resources or bring a note from a doctor.

Sam Blasi testified that plaintiff had submitted a doctor's note in February 2008, which asked that plaintiff be given a daytime schedule until his medical condition improved. He stated that the letter did not address any heat-related restrictions. Blasi stated that after plaintiff filed a complaint with the Illinois Human Rights Commission, the bakery made a verbal agreement with plaintiff that he could work a day shift but that no agreement was made regarding the positions where he would work.

On July 23, 2009, the referee issued a written decision setting aside the claims adjudicator's determination that plaintiff was not entitled to benefits. The referee found that section 601(A) of the Act did not apply because the evidence presented showed that plaintiff did not voluntarily resign, but rather, was discharged. However, the referee found that plaintiff was not disqualified from benefits under section 602(A) of the Act because the evidence did not show that he was discharged for misconduct connected with his work.

The employer appealed the referee's decision, arguing that plaintiff was discharged for insubordination for refusing to work near the oven and therefore, was not entitled to benefits under section 602(A) of the Act. On October 21, 2009, the Board issued a final administrative decision reversing the referee and finding that plaintiff was not entitled to benefits under section

602(A) of the Act because plaintiff's employer had "no evidence that working by the oven exit would jeopardize the claimant's health" since "[t]here was no medical note or restriction that the claimant could not work a particular line assignment or position." Therefore, the Board concluded that plaintiff's refusal to work near the oven was a "willful and deliberate violation of the employer's policies and procedures." The Board did not address plaintiff's eligibility for benefits under section 601(A) of the Act.

On November 4, 2009, plaintiff filed a complaint for administrative review in the circuit court of Cook County. On May 4, 2010, after hearing arguments, the trial court issued an order affirming the Board's finding that its decision was not against the manifest weight of the evidence, contrary to law, or clearly erroneous. On June 2, 2010, plaintiff filed a timely notice of appeal to this court.

It is well settled that in an appeal from a decision denying unemployment compensation benefits, it is the duty of this court to review the decision of the Board rather than the circuit court. *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 819 (2009). The Board is the trier of fact and we must defer to its factual findings unless they are against the manifest weight of evidence. *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 556 (2006). The question of whether an employee was properly terminated for misconduct in connection with his work involves a mixed question of law and fact, to which we apply the clearly erroneous standard of review. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 327 (2009). An agency's decision may be deemed clearly erroneous only where a review of the record leaves the reviewing court with a definite and firm conviction that a mistake has

been made. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001).

Under the Act, an individual claiming unemployment insurance benefits has the burden of establishing his eligibility. *Manning,* 365 Ill. App. 3d at 557. Individuals who are "discharged for misconduct" are ineligible to receive unemployment benefits under the Act. 820 ILCS 405/602(A)(West 2008). Three elements must be proven to establish misconduct: (1) that there was a "deliberate and willful violation" of a rule or policy; (2) that the rule or policy of the employing unit was reasonable; and (3) that the violation either has harmed the employer or was repeated by the employee despite previous warnings. 820 ILCS 405/602(A)(West 2008); *Czajka v. Department of Employment Security*, 387 Ill. App. 3d 168, 174 (2008). An employer is not required to prove the existence of a reasonable rule by direct evidence, and a court may find the existence of a reasonable rule "by a commonsense realization that certain conduct intentionally and substantially disregards an employer's interests." *Manning*, 365 Ill. App. 3d at 557 quoting *Greenlaw*, 299 Ill. App. 3d at 448 Standards of behavior that an employer has a right to expect constitute a reasonable rule or policy. *Manning*, 365 Ill. App. 3d at 447 citing *Bandemer v. Department of Employment Security*, 204 Ill. App. 3d 192, 195 (1990).

Plaintiff contends that the Board found that plaintiff engaged in misconduct by refusing to work at a position near the oven without providing medical documentation stating that health issues precluded him from working in that position. Plaintiff contends that this finding was in error because the bakery had no formal rule or policy requiring that an employee provide medical documentation in order to be excused from a work assignment for health reasons. Further,

plaintiff asserts, he had no reason to know of the bakery's purported policy because the bakery had previously accommodated his need to avoid areas of extreme heat without requiring medical documentation in advance. During the five years he worked for the bakery, he asserted, he was only assigned to work near the oven for short periods of time to relieve other employees and had never rotated through that position, despite the bakery's policy of rotating employees to every position. Therefore, plaintiff contends, because there was no formal policy and no reason for him to foresee that medical documentation would be required in order for him to avoid working near the oven for his entire shift, there was no deliberate or willful violation of a policy.

Plaintiff also asserts that even if there were such a rule requiring medical documentation in order to be excused from a work assignment, that rule would be unreasonable because it would contradict the requirements under section 601(A) and 601(B) of the Act (820 ILCS 405/601(A)(West 2008)), (820 ILCS 405/602(A)(West 2008)), as well as federal labor laws. Further, plaintiff argues that the bakery failed to show that it was harmed by his refusal to accept an assignment near the oven or repeated violations despite previous warnings, because there was no evidence that plaintiff was warned that he would be discharged if he did not accept the assignment. In fact, plaintiff asserts, in the past he had been offered assignments near the oven and had turned them down with no repercussions. Based on the foregoing, plaintiff argues that defendant has failed to establish misconduct under the Act and asserts that this court should therefore reverse the Board's finding denying benefits.

Defendants contend, however, that the policy plaintiff violated was not a policy requiring medical documentation, but rather, a policy requiring employees to perform assigned work and to

rotate assignments when instructed. This is a reasonable rule, defendants argue, and because plaintiff acted willfully and deliberately by refusing the assignment to the detriment of the bakery, this court should affirm. We agree with defendants. While it is true that the Board mentioned the absence of medical documentation, it did so to show that plaintiff acted deliberately and wilfully in refusing to work at his assigned position on the day he was discharged. Therefore, we must determine whether the Board erred in finding that plaintiff's refusal to accept the assignment from his foreman amounted to misconduct under the Act.

The bakery policy at issue was that employees work their assigned positions and would rotate assignments when instructed. This is clearly a reasonable policy, as an employer should expect its employees to follow directives from supervisors and perform the work assigned to them. Further, the evidence indicates that plaintiff acted willfully and deliberately in refusing to work the position assigned to him when he arrived to work on April 23, 2009. Plaintiff asserts that he was justified in refusing to work the assigned position because he has a chronic stomach problem that is exacerbated by working in hot conditions. Plaintiff also contends that he did not deliberately violate a rule or policy because he had no reason to expect that he would be assigned to work near the oven all day since he had previously been assigned to that position only in short intervals to accommodate his health concerns. While plaintiff did provide the bakery with a note from his doctor stating that he needed to eat on a regular schedule, which led to assignment to the day shift, there was nothing to suggest that he could not work any particular line assignment.

Further, although it is true, as plaintiff asserts, that he had previously worked near the oven only for short periods of time, the evidence was conflicting as to whether the bakery was

making an accommodation in light of his medical condition. Plaintiff testified that the bakery agreed not to rotate him to positions near the oven, however, he acknowledges that he did work in that position at least for short periods. Foreman Gonzalez testified that plaintiff said in the past that he did not want to work near the oven but did not explain why, and Blasi testified that the bakery's agreement with plaintiff only permitted plaintiff to work the day shift but did not address restrictions on positions where he could work. Given that plaintiff provided a note from a doctor stating that he needed to work the day shift but did not mention that he could not work near the oven and that plaintiff had previously worked near the oven in the past, and the conflicting testimony regarding the agreement between the bakery and plaintiff, it was not clearly erroneous for the Board to conclude that his refusal to work in the assigned position was a willful and deliberate violation of the bakery's policies.

Lastly, the Board did not clearly err in finding that plaintiff's conduct harmed his employer. Although, as plaintiff notes, the Board did not make an explicit finding of harm, the Board was not required to do so "when there is evidence in the record to support the finding." *Lachenmyer v. Didrickson*, 263 Ill. App. 3d 382, 385 (1994) citing *Nichols v. Department of Employment Security*, 218 Ill. App. 3d 803, 811 (1991). In determining whether an employer was harmed, the employee's conduct should be viewed in the context of potential harm, and not in the context of actual harm." *Manning*, 365 Ill. App. 3d at 557 citing *Greenlaw v. Department of Employment Security*, 299 Ill. App. 3d 446, 448 (1998). When, as here, an employee refuses an assignment from his employer and leaves 15 minutes into his shift it can reasonably be inferred that the employer was harmed by this conduct. Therefore, we find that the Board's

determination that plaintiff was discharged for misconduct connected with work under section 602 of the Act.

Next, plaintiff argues that the Board committed legal error by failing to address whether he was entitled to benefits under section 601(A) of the Act, which provides that a person who voluntarily leaves work without good cause attributable to the employer is ineligible for benefits. 820 ILCS 405/601(A)(West 2008). Defendants contend that the Board properly applied section 602(A) rather than section 601(A), because it agreed with the referee's finding that "The evidence presented showed that [Casales] did not voluntarily resign, rather he was discharged. Therefore, section 601(A) is not applicable to this matter." While it is true, as plaintiff notes, that Sam Blasi testified that plaintiff quit his job, most of the evidence indicated that plaintiff was discharged. Plaintiff, himself, testified that he had been discharged and represented in documents that were given to the referee that he had been let go. Therefore, the Board's finding that defendant was discharged, and that section 601(A) did not apply, was not clearly erroneous.

For the foregoing reasons, we affirm the order of the circuit court

Affirmed.