FIFTH DIVISION
November 4, 2011

No. 1-10-2821

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23 (e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SHAN D. IGESS, Plaintiff-Appellee, v. THE ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; DIRECTOR of the Illinois Department of Employment Security; BOARD OF REVIEW; and CHICAGO TRANSIT AUTHORITY, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 10 L 50587 The Honorable Sanjay T. Tailor, Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

O R D E R

¶ *1* *Held*: Board's ruling that plaintiff was ineligible for unemployment benefits based on misconduct in connection with his work was not clearly erroneous; circuit court's order finding otherwise is reversed.

¶ 2 Defendants, Illinois Department of Employment Security (Department), Director of the Illinois Department of Employment Security, and Board of Review (Board), appeal from an order of the circuit court of Cook County reversing the Board's ruling that plaintiff Shan Igess is ineligible for unemployment benefits pursuant to section 602A of the Illinois Unemployment Insurance Act (Act). 820 ILCS 405/602(A) (West 2008). On appeal, defendants contend that

the Board's determination that Igess was discharged for misconduct in connection with his work was not clearly erroneous and should be upheld. Igess has not filed a brief in response; however, we may consider the issues raised under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 3 The record shows, in relevant part, that Igess was employed by the Chicago Transit Authority (CTA) as a bus operator from October 2003, until his discharge on October 1, 2009. He applied for unemployment benefits and claimed in his interview that he was discharged for his "failure to show for work or call in" on June 20 and 21, 2009. He explained that on both of those days, he showed up for work at the wrong time because he did not know when he was scheduled to work and was sent home. He attributed his tardiness to the fact that he was "having some personal problems." On June 27, 2009, he "went into the sick book," and was discharged upon his return, on September 17, 2009.[1]

¶ 4 The CTA protested the claim, contending that Igess was discharged for misconduct in connection with his work. In support, the CTA attached Igess' disciplinary history which showed, *inter alia*, that he received a written warning for an absence on May 2, 2008; a final written warning and one-day suspension for an absence on November 9, 2008; a final written warning, three-day suspension, and probation for an absence on March 5, 2009; was allowed one final absence on March 28, 2009; and was discharged for being a no call, no show on June 20 and 21, 2009. The documents further show that Igess "picked" his runs on June 20 and 21, 2009, and Rafael Escoto, who was interviewed on the CTA's behalf, noted that the June absences constituted Igess' fourth occurrence within a six-month period, as well as a violation of the

[1] Based on CTA documents contained in the record, this was the date of a hearing on Igess' "Excessive Absenteeism," and his discharge was effective as of October 1, 2009.

probation he had been on as of March 5, 2009. The claims administrator found that Igess was discharged for misconduct in connection with his work in that he violated a reasonable company rule by failing to show up for his scheduled shifts, and that he was therefore ineligible for unemployment benefits.

¶ 5 On November 18, 2009, Igess submitted an application for reconsideration of that determination claiming that he did not intentionally violate the rules. He stated, "On the dates in question for failure to show, these dates had employer related arrangments [*sic*] that were previously understood. Trade dates for baseball, schedule trades, & new schedule run picks. Stress also play [*sic*] a major role in these matters."

¶ 6 A telephonic hearing was held on December 29, 2009, and the referee began by entering into the record the documents in Igess' case file, including the disciplinary history which accompanied the CTA's protest. Sonetta Luckey, a CTA transportation manager II, then testified that Igess was a "pick employee," which is an employee who can pick his or her own "runs," *i.e.*, schedule. She also testified that the CTA has a progressive disciplinary policy in place whereby (1) the first missed assignment results in a written warning; (2) the second results in a final written warning and one-day suspension; (3) the third results in the operator being removed from service and referred to Luckey, who issues probation, a three-day suspension, and advises the employee that he/she must make immediate and sustained improvement in order to remain employed with the CTA; and (4) the fourth results in discharge, though Luckey often allows one additional absence under the probation for situations that may arise.

¶ 7 Luckey testified that Igess was issued a "corrective case interview" and placed on six-months probation due to his absenteeism on March 5, 2009, was a no call, no show on June 20,

2009, a no show on June 21, 2009,[2] and, consequently, on October 1, 2009, he was discharged for excessive absenteeism and missed assignments. This was Igess' second separation from the CTA for absenteeism.

¶ 8 In response to questions from the CTA's representative, Luckey testified that Igess was issued a final written warning and one-day suspension on November 9, 2008, that his probation stated that "no chargeable missed work assignments will be allowed during the probationary period," from March 5, 2009, to September 4, 2009, and that he was issued a written warning and suspension for his one permitted absence under the probation on March 28, 2009. At a meeting attended by Luckey and a union representative, Igess explained that on June 20 and 21, 2009, he could not remember his schedule because he had been involved in too many "voluntary trade agreements," which is an arrangement between management and two operators wherein a part-time worker will work the shift of a full-time worker so that he/she can take a day off. Luckey prepared a recommendation for Igess' discharge after the meeting.

¶ 9 In response to questions from Igess, Luckey stated that she was not aware that Igess was on the baseball team of the 74th Street garage. She also stated that it is not common practice, nor was it ever, for the team's coach to clear the players' Sundays with management so that they could play baseball, that each of the eight garages handle such things differently, and that she was not sure how it was handled at the 74th Street garage. She was aware, however, that if a player is off on a Sunday, he/she would have to replace that day with one of their off-days.

¶ 10 Igess testified that because he was on the baseball team and had Sundays off, he would trade his Saturdays with a part-time worker in order to have the weekends off. He was originally

[2] The disciplinary records submitted with the CTA's protest show that Igess was also a no call on this date.

scheduled to be off on Saturday, June 20, 2009, but was called in for work that day and showed up at the time he thought he was scheduled to report. He arrived four or five minutes late, however, and explained that this was a "misunderstanding of time" and "wasn't done on purpose."

¶ 11 With respect to his absence on Sunday, June 21, 2009, Igess testified that before the baseball season started, the team's coach asked him which day he wanted to trade for his Sundays, and he chose to trade his Tuesdays. The coach then cleared it with everyone and told him he was "OK," and the clerk also told him it was cleared. On the Sunday in question, the team was almost two months into the season with a 13-0 record, and, during that time, there had not been any problems with him taking off Sundays, and he never had to report to the clerk or manager. He thus played baseball that day. He subsequently took a few months off of work because of an injury, stress issues related to his job, and things "going on in my life," and first learned of the missed Sunday at a hearing held upon his return. Baseball season was over by that time, and he testified that "it never even registered in my understanding that I'm—I'm off on Sundays anyways. And that was during the baseball season."

¶ 12 Igess further testified that in 2007 or 2008, he was released for a month and then rehired and placed on probationary status. He stated that the release was due to "procedural performances," such as not wearing the right type of boots during winter, and not based on absences. Igess also acknowledged that he was on a final written warning as of March 28, 2009.

¶ 13 The referee concluded that Igess was ineligible for benefits under section 602A of the Act because he was discharged for "misconduct" in connection with his work. The referee found that Igess had repeatedly and deliberately disregarded the CTA's policies and interests, and

thereby hampered its business operations.

¶ 14 Igess appealed to the Board, and on March 22, 2010, the Board affirmed the referee's determination that Igess was ineligible for benefits. The Board concluded that the referee's decision was supported by the record and the law, and that taking further evidence was unnecessary.

¶ 15 On April 5, 2010, Igess filed a *pro se* complaint seeking administrative review of the Board's decision, and on August 25, 2010, the circuit court reversed the decision of the Board without stating the grounds for its ruling. Defendants now challenge the propriety of that order.

¶ 16 Our review of this administrative proceeding is limited to the decision of the Board, not that of the circuit court. *Kilpatrick v. Illinois Department of Employment Security*, 401 Ill. App. 3d 90, 92 (2010). In this case, the Board found Igess ineligible for unemployment benefits because he was discharged for misconduct in connection with his work. The question of whether an employee was properly discharged for misconduct under the Act is 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 will only be deemed clearly erroneous where the record leaves the reviewing court with the definite and firm conviction that a mistake has been made. *Czajka v. Department of Employment Security*, 387 Ill. App. 3d 168, 173 (2008), citing *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 393 (2001).

¶ 17 Under the Act, an employee is ineligible for unemployment benefits if he was discharged for misconduct in connection with his work. 820 ILCS 405/602(A) (West 2008). Misconduct in this sense refers to the deliberate and willful violation of an employer's reasonable rule or policy

that harms the employer or was repeated by the employee despite previous warnings. *Czajka*, 387 Ill. App. 3d at 174. For an employee to be ineligible for unemployment benefits based on a violation of an employer's attendance policy, there must be a deliberate and willful violation of that policy. *Wrobel v. Illinois Department of Employment Security*, 344 Ill. App. 3d 533, 538 (2003). An employee acts wilfully when he is aware of, and consciously disregards, a company rule. *Livingston v. Department of Employment Security*, 375 Ill. App. 3d 710, 716 (2007).

¶ 18 We initially observe that there is undisputed evidence that the CTA's attendance rules and policies are reasonable, that Igess' violations of those rules and policies caused harm to the CTA, and that Igess repeatedly violated those rules and polices despite previous warnings. See *Odie v. Department of Employment Security*, 377 Ill. App. 3d 710, 713 (2007). The dispositive issue is whether Igess deliberately and willfully violated those rules and policies when he missed work on June 20 and 21, 2009.

¶ 19 The evidence adduced at the hearing showed that Igess had been placed on probation for the period from March 5, 2009, to September 4, 2009, due to his repeated violations of the CTA's attendance policy, and that he was allowed one absence during that period on March 28, 2009. Notwithstanding his tenuous employment situation, Igess was a no call, no show on June 20 and 21, 2009, for runs which he had specifically picked, and he was discharged as a result. The initial explanation offered by Igess for his absenteeism/tardiness those days was that he had forgotten his schedule because he was involved in too many voluntary trade agreements. However, he later attributed his absenteeism to "personal problems" when interviewed by the claims adjudicator, then to stress and employer-related baseball arrangements in his application for reconsideration. He ultimately testified at the hearing that on Saturday, June 20, 2009, he

was called in to work after originally being scheduled to be off, and reported a few minutes late for his assignment. As for Sunday, June 21, 2009, he testified that he was playing baseball that day and thought that his coach had cleared all of his Sundays during the baseball season.

¶ 20 The record thus shows that Igess repeatedly violated the CTA's attendance policy such that he was placed on probation, was a no call, no show on two consecutive days during the probationary period (June 20 and 21), then offered a variety of inconsistent explanations for his failure to show up for work those days. Moreover, Igess' testimony that he was called in to work on Saturday, June 20, 2009, and that he thought his baseball coach had cleared Sundays off his schedule so that he could play baseball on Sunday, June 21, 2009, is directly contradicted by the documentary evidence in the record which shows that he specifically picked his runs on those two days. On this record, it was not clearly erroneous or contrary to law for the Board to conclude that Igess wilfully violated the CTA's attendance policy. *Livingston*, 375 Ill. App. 3d at 716.

¶ 21 This court's decision in *Odie v. Department of Employment Security* is instructive. In that case, plaintiff, a certified nursing assistant whose job was in jeopardy because of prior written warnings, was assigned to monitor and assist about 25 residents of a nursing center, took some extra-strength Tylenol for a toothache despite believing that it caused drowsiness, and fell asleep for about 10 to 20 minutes. *Odie*, 377 Ill. App. 3d at 711-12. When a visitor woke her up because a resident was shouting for help, she responded, " '[Y]eah she [does] that all the time,' said something about being there too long, then went back to sleep,' " and was subsequently discharged. *Odie*, 377 Ill. App. 3d at 711-12. In this court, plaintiff claimed that her actions did not constitute misconduct because they were unintentional, citing our decisions in *Wrobel* and

Washington v. Board of Review, 211 Ill. App. 3d 663 (1991). *Odie*, 377 Ill. App. 3d at 713. However, this court found those cases distinguishable, noting, *inter alia*, that plaintiff knew that her job was in jeopardy, unlike in *Washington*, and that because she voluntarily took Tylenol despite believing it caused drowsiness, her acts could not be excused as unintentional, as in *Wrobel*. *Odie*, 377 Ill. App. 3d at 714-15.

¶ 22 Here, similarly, Igess' employment situation with the CTA was tenuous due to his history of absenteeism which had culminated in his being placed on probation for six months in March 2009, and at the time of his final absences, he was on the last rung of the CTA's four-stage, progressive disciplinary policy. The record shows that his failure to report to work on June 20 and 21, 2009, also cannot be excused as unintentional where he voluntarily picked his runs on those days, failed to report for them despite his probationary status, then offered a series of explanations for his absences ranging from involvement in too many voluntary trade agreements, to personal problems and stress, and, ultimately, to being called in on one of his off-days and cleared to play baseball on the other. In light of Igess' conflicting reasons for not showing up for work on June 20 and 21, 2009, the Board was entitled to question his credibility (*Carroll v. Board of Review*, 132 Ill. App. 3d 686, 691 (1985)), leading it to conclude that he had no valid reason not to report to work on those days on which he had specifically picked runs, and, *a fortiori*, that he consciously disregarded the CTA's attendance policy by failing to report to work accordingly (*Livingston*, 375 Ill. App. 3d at 716).

¶ 23 We therefore find that the Board's ruling that Igess was discharged for misconduct in connection with his work was not clearly erroneous (*Czajka*, 387 Ill. App. 3d at 173), affirm that decision, and reverse the order of the circuit court of Cook County finding otherwise.

¶ 24 Reversed.