SIXTH DIVISION
SEPTEMBER 9, 2011

No. 1-10-3518

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LUIS A. PEREZ, Plaintiff-Appellant, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, DIRECTOR OF ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, BOARD OF REVIEW, and UNITED PARCEL SERVICE, INC. c/o UC EXPRESS, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 10 L 50599 Honorable James C Murray, Jr., Judge Presiding.

PRESIDING JUSTICE ROBERT E. GORDON delivered the judgment of the court. Justices Cahill and Garcia concurred in the judgment.

ORDER

¶1 *Held*: Where an employee of a delivery service fails to report an accident in accordance with company policy, a decision by the Board of Review of the Illinois Department of Employment Security to deny unemployment benefits was properly confirmed by the circuit court and affirmed on appeal.

¶2 Plaintiff, Luis A. Perez, is appealing the circuit court's confirmation of a decision by the Board of Review (Board) of the Illinois Department of Employment Security (Department) to deny him unemployment benefits under Section 602A of the Illinois Unemployment Insurance Act (Act). 820 ILCS 405/602A (West 2010). On appeal, plaintiff contends that the Board's finding that he was discharged for misconduct was clearly erroneous because: (1) the employer was not harmed by his failure to report; and (2) his notification of damage was equivalent to notification of an accident. For the following reasons, we affirm the Board's decision.

¶3 BACKGROUND

¶4 Plaintiff was employed by United Parcel Service (UPS) as a package delivery driver from 1992 until he was terminated on October 5, 2009. Plaintiff was terminated after an incident on September 23, 2009, when he failed to notify UPS of an accident involving the truck he was driving. Plaintiff filed for unemployment benefits from the Department of Employment Security (Department). The Department granted benefits on October 20, 2009 and notice of the award of unemployment benefits was sent to the employer on October 30, 2009. UPS filed an administrative appeal of the award on November 30, 2009.

¶5 The Department held an evidentiary hearing via telephone on January 13, 2010, and heard testimony from both plaintiff and a representative from UPS regarding the incident on September 23, 2009. Plaintiff testified that he was driving a package delivery truck on September 23, 2009, and he had "to go underneath [branches] to make a delivery." Plaintiff stated that, when he drove under the tree branch "it brushed the top of the vehicle." Upon returning to the garage and going through the car wash, plaintiff noticed a leak in the roof and reported the leak by noting it in a log "which is for [when] *** anything goes wrong with the vehicle" and is where you list "any repairs" that might need to be done. Plaintiff stated both that he thought the "purpose" of "report[ing] a leaking roof" was to notify the employer of an

accident, and that he had simply "reported damages" and did not view hitting the tree branches as an accident.

¶6 The administrative law judge (ALJ) also heard from Steve Steinberg (Steinberg), a "labor manager" in Chicago for UPS. Steinberg testified to the incident from information he had in a report, since he was not present when the truck came into contact with the branches. Steinberg testified that:

> "Mr. Perez was involved in an auto accident, where he hit a tree with one of our package cars. Contractually, he's obligated to notify us immediately of that auto accident, but he chose not to notify the employer. We were made aware of the damage to his vehicle through an inspection by our automotive department. And eventually through further investigation, we found that Mr. Perez had an unreported accident *** once it was proven that Mr. Perez was guilty of an unreported accident, we *** discharged him."

¶7 Steinberg also testified that plaintiff "eventually admitted to" the accident, but it "took quite some time, [be]cause his interpretation of an accident was not what [UPS] would consider to be typical." The damage that occurred from the accident, according to Steinberg, was a "hole in the top of [the] package car, as well as extensive scratches and denting along the top and side of the vehicle" which were visible "from the side of the vehicle."

¶8 Steinberg and plaintiff agreed that the policy requiring employees to report accidents to the supervisor was not unknown to the plaintiff, because plaintiff had been involved in a number of accidents in the past and had reported each one of them to his UPS supervisor.

¶9 The ALJ determined, after the evidentiary hearing, that plaintiff had failed to notify the employer of an accident in accordance with its policy and therefore was discharged due to misconduct pursuant to Section 602(A) of the Illinois Unemployment Insurance Act. This

section 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 and has [sufficient subsequent earnings]." 820 ILCS 405/602(A) (West 2010).

¶10 Section 602(A) goes on to define "misconduct" 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."

¶11 The ALJ denied benefits because plaintiff "tried to hide the accident from his employer," which constituted "misconduct as defined by Section 602A of the Act."

¶12 On January 20, 2010, plaintiff requested reconsideration of the ALJ's decision by the Board stating that he "was not asked to present any documentation to help [him] on [his] defense" and that the practice of driving underneath tree branches and having them "brush[] on the top of the roof of the truck" was "not unusual" and therefore he had no reason to suspect that an accident had occurred or that damage had been done to the truck. On March 10, 2010, the decision of the administrative law judge to not allow plaintiff to receive unemployment benefits was affirmed by the Board.[1]

¶13 Plaintiff then appealed to the Circuit Court of Cook County and the circuit court reversed

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[1] The record indicates that the initial decision of the Board stated that the decision of the ALJ was reversed. The Board issued a corrected decision indicating that the decision was affirmed on March 29, 2010.

and remanded the case back to the Board to determine "whether the employer had party status to appeal the adjudicator's award of benefits." In order to have party status, the employer must have filed a protest within 10 days of notification from the Department that benefits were allowed. 56 Ill. Adm. Code 2720.130(a)(1) (2011) ("The employing unit shall file, either by mail or by hand delivery, the protest within ten calendar days after the date of notice shown on the Form 'Notice of Claim of Last Employing Unit and Last Employer or Other Interested Party.' ").

¶14 On July 1, 2010, the ALJ held another evidentiary hearing via telephone, this time hearing evidence only from Ms. Shawn Wade, who testified on behalf of TALX, the organization that is responsible for all of the mailings that take place at UPS. Wade testified regarding the timeliness of the employer's protest of the award of unemployment benefits. Notice of the telephone hearing was mailed to plaintiff, but he did not participate.

¶15 Wade testified that the protest letter was "printed on October the 19th," "sent to [their] mail center, and from [their] mail center *** was mailed out to IDES." The ALJ noted that October 19 was within the 10 day window because the initial notice was dated October 7 and the ten days expired on October 17, which was a Saturday, so UPS had until Monday, October 19 to file a protest.

¶16 After filing a protest within a 10-day period, the employer is then required to file an appeal within 30 days of "delivery of the claims adjudicator's notification of [its determination]." 820 ILCS 405/800 (West 2010); see also 820 ILCS 405/702 (West 2010) ("Such decision may be appealed by the employing unit to a Referee within the time limits prescribed by Section 800 for appeal from a 'determination.'"). The ALJ determined that the appeal filed by UPS was timely, because the notification was dated October 30, 2009, and UPS filed their appeal on November 30, 2009. Although November 30 would have been the 31st day

after the notification, because November 29 was a Sunday, filing the appeal on November 30, 2009, was considered timely. The Board affirmed the ALJ's supplemental decision that UPS had party status.

¶17 The circuit court then reached its final decision on October 26, 2010, and confirmed the decision of the Board. This appeal follows.

¶18 ANALYSIS

¶19 I. STANDARD OF REVIEW

¶20 We review the Board's decision as the finder of fact not the decision of the circuit court and accept the Board's factual findings as *prima facie* true and correct. See *Jackson v. Board of Review of the Department of Labor*, 105 Ill. 2d 501, 510 (1985); *Kilpatrick v. Illinois Department of Employment Security*, 401 Ill. App. 3d 90, 92-93 (2010). The question of whether misconduct was the reason for discharging Perez is a mixed question of law and fact and is therefore reviewed under a clearly erroneous standard. See *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205 (1998) (determining that "a clearly erroneous standard of review is appropriate" when there is a "mixed question of fact and law"); *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 826 (2009). To find a judgment clearly erroneous, the court must have a "definite and firm conviction that a mistake has been committed." *Messer & Stilp, Ltd. v. Department of Employment Security*, 392 Ill. App. 3d 849, 856 (2009) (citing *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 393 (2001)).

¶21 II. ADEQUACY OF PLAINTIFF'S APPELLATE BRIEF

¶22 Defendant argues that this court should dismiss this appeal or deem any challenges to the Board's decision forfeited because the plaintiff's appellate brief does not conform to Illinois Supreme Court briefing requirements or present developed legal argument. This court "may

dismiss an appeal where the appellant's brief fails to comply with supreme court rules applicable to briefs." *In re A.H.*, 215 Ill. App. 3d 522, 529 (1991). However, Supreme Court Rule 341(e), which governs how parties are supposed to present their arguments in appellate briefs, "is an admonishment to the parties, and not a limitation upon this court's jurisdiction, [and] this court may nevertheless consider the merits of a party's appeal." *In re A.H.*, 215 Ill. App. 3d at 529; see also *Wilson v. Illinois Benedictine College*, 112 Ill. App. 3d 932, (1983). This court declines to dismiss the appeal on this basis and we decide the case on the merits.

¶23 III. STANDARD FOR MISCONDUCT

¶24 To establish misconduct the employer must show that three elements have been satisfied: "(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." *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 557 (2006); see also 820 ILCS 405/602(A) (West 2010).

¶25 The first question is whether plaintiff's action was willful and deliberate. The court in *Sudzus* found that "willful" means the employee is aware of the rule and disregards it. 393 Ill. App. 3d at 826; see also *Wrobel v. Illinois Department of Employment Security*, 344 Ill. App. 3d 533, 538 (2003) (explaining that willful conduct "is a conscious act made in violation of company rules, when the employee knows it is against the rules"). Plaintiff admitted that he was aware of the employer's policy that all accidents must be reported, due to the fact that he had been in multiple accidents in the past and had complied with this UPS policy. He also testified that he made the decision to record the leak on the repair log, but did not view the incident with the tree branches as an accident and therefore did not report it to his supervisor.

¶26 This court has also found that "[a] reviewing court need not find direct evidence of a rule

or policy and, instead may make a commonsense determination that certain conduct intentionally and substantially disregards an employer's interests." *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010). In the case at bar, the record includes the portion of the employer's rules and regulations which lists its policy on accident reporting. The rule states that "[a]ny employee involved in any accident shall immediately notify the Employer." The record reflects the existence of a rule and that plaintiff willfully and deliberately chose to disregard the rule by not reporting the accident. We do not find the decision of the Board or the circuit court regarding the first requirement for misconduct to be clearly erroneous.

¶27 The second requirement for misconduct is that the rule broken by the employee was "reasonable." 820 ILCS 405/602(A) (West 2010). "A reasonable rule encompasses standards of behavior that an employer has a right to expect from an employee *** such a rule need not be written down or otherwise formalized." *Czajka v. Department of Employment Security*, 387 Ill. App. 3d 168, 176-77 (2008); see also *Jackson*, 105 Ill. 2d at 512-13. "[A]n 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 v. Department of Employment Security*, 299 Ill. App. 3d 446, 448 (1998)).

¶28 The employer's representative, Steinberg, did not testify regarding the reasonableness of the rule, nor did the ALJ or Board specifically conclude that the rule was reasonable. However, a specific evidentiary ruling on each issue is not required when the Board indicates that they reviewed the entire record in making its decision. See *Lachenmyer v. Didrickson*, 263 Ill. App. 3d 382, 385 (1994). The Board indicated in this case that it "reviewed the record of the evidence in this matter *** [and] [t]he record adequately sets forth the evidence so that no further evidentiary proceedings are deemed necessary." As described above, this court may rely on a

"commonsense realization" to find that the rule is reasonable, which we do in this case. Commonsense allows us to find that it is in the interest of UPS to be made aware of any accidents involving its equipment, since it will be responsible for repairs to its equipment, as well as any damage that might have been done to the property of another. Therefore, the rule is reasonable and the second requirement for establishing misconduct has been met.

¶29 The final requirement is that the conduct "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 2010). This court has held that "[i]n 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. In *Manning*, the employee left a voicemail for a coworker which contained "hostile and intimidating language." *Manning*, 365 Ill. App. 3d at 558. Although there was no actual harm to the employer or another employee, "it was potentially harmful to [the employer's] interests because the use of hostile and intimidating language to a coworker could adversely affect the work environment." *Manning*, 365 Ill. App. 3d at 558.

¶30 Although there was actual harm to the vehicle, which was testified to both by the plaintiff and the employer,[2] this court must determine whether plaintiff's decision to not report the accident harmed or had the potential to harm the employer. Defendant argues that, by not reporting the accident, the employer could have been harmed by being "deprived [ ] of the opportunity to investigate and evaluate the circumstances, including whether any factors suggested that [plaintiff] was a careless or impaired driver." In addition, defendant argues in its brief that, by not reporting the accident, plaintiff "undermined his employer's trust," which

[2] The plaintiff testified that the roof was leaking, and Steinberg testified that there was a hole in the roof and scratches on the roof and side of the truck.

harms the working relationship between the employer and the employee.

¶31 Both of defendant's arguments for how the employer was or had the potential to be harmed are comparable to the potential harm that was allowed in *Manning* and satisfy the third requirement to establish misconduct. In *Manning*, like the case at bar, there was no actual harm demonstrated by the employer. Neither the employer in *Manning*, nor the employee who received the hostile telephone call, were actually harmed by Manning's actions, however, as in this case, due to Manning's actions, there was the potential for adverse effects on the work environment. By not reporting his accident, plaintiff, in this case, potentially harmed his working relationship with his supervisor, in a manner similar to *Manning*.

¶32 However, the record does not include any testimony from Steinberg or evidence which specifically indicates that being deprived of the opportunity to investigate would be harmful to the employer or that the accident did, in fact, undermine the supervisor's trust in the plaintiff. However, as the trier of fact, the Board can rely on both any evidence in the record and any reasonable inferences which can be drawn from the facts. See *People v. Milka*, 211 Ill. 2d 150, 178 (2004) (holding that "[t]he weight given witnesses' testimony, the witnesses' credibility, and the reasonable inferences to be drawn from the evidence, are all the responsibility of the fact finder"). We cannot say that it would be clearly erroneous for the Board to make a reasonable inference from the record that the employer's trust would be harmed by an employee's failure to report. Therefore, we find that the third requirement for misconduct was satisfied.

¶33 CONCLUSION

¶34 For the foregoing reasons, we affirm the decision of the circuit court and the Board's decision disqualifying plaintiff from receiving unemployment benefits.

¶35 Affirmed.