2012 IL App (1st) 112750-U

THIRD DIVISION
September 19, 2012

No. 1-11-2750

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DON ROGERS, Plaintiff-Appellant, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; DIRECTOR OF ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; BOARD OF REVIEW; and LAPHAM-HICKEY STEEL CORPORATION, c/o PERSONNEL PLANNERS, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 11 L 50191 Honorable James C. Murray, Jr., Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Justices Neville and Steele concurred in the judgment.

O R D E R

¶ 1 *Held*: Where employee violated company's policy by reporting for work under the influence of alcohol and refusing to be tested upon supervisor's direction, Board's determination that employee committed misconduct thus making him ineligible for unemployment benefits was not clearly erroneous; the decision of the Board was affirmed.

¶ 2 Plaintiff Don Rogers appeals *pro se* from the circuit court's order affirming the decision of the Board of Review (the Board) of the Illinois Department of Employment Security (the

Department) finding him ineligible for unemployment benefits after he was discharged for refusing to be tested for alcohol or drug consumption. On appeal, plaintiff contends he should receive unemployment benefits because he did not violate any company policy. He also asserts his employer failed to protest the initial finding of his eligibility for benefits within the required time period. We affirm the decision of the Board.

¶ 3 The record establishes that in 2010, plaintiff worked as a carpenter for Lapham-Hickey Steel Corporation. On August 11, 2010, Larry Chizewski, the plant manager, sent plaintiff a letter stating his employment was terminated for violating the company's policy regarding drugs and alcohol when he reported to work on August 4.

¶ 4 Plaintiff applied for unemployment benefits, asserting he left work because he was ill and denying that he violated a company policy. Lapham-Hickey received notice of plaintiff's application on August 17, 2010. On August 23, Lapham-Hickey filed a protest of plaintiff's claim for benefits, stating that plaintiff had been discharged for violating the company's drug and alcohol policy.

¶ 5 On September 24, 2010, the Department found plaintiff eligible for benefits because his employer "did not provide supportive information to substantiate the discharge." On September 30, 2010, Lapham-Hickey challenged that determination and requested a hearing. Lapham-Hickey submitted a copy of its company policy on drugs and alcohol, along with plaintiff's signed acknowledgment of that policy, completed in 2007.

¶ 6 On December 3, 2010, a Department referee conducted a telephone hearing with plaintiff, Chizewski and an employer representative taking part. Chizewski testified that plaintiff was discharged from his employment, as effected by the August 11 letter, because on August 4, 2010, plaintiff reported to work and then indicated he was leaving shortly thereafter. When Chizewski asked plaintiff why he was leaving, he smelled alcohol on plaintiff's breath and asked if he had

been drinking. Plaintiff replied he had not been drinking but wanted to leave early to avoid being charged for time off. Chizewski further testified that another employee "verified" his suspicion that plaintiff had been drinking.

¶ 7 Chizewski asked plaintiff "about two or three times" to go to the medical center to take a drug and alcohol test. Plaintiff refused and said he "just wanted to go home and chill out." As plaintiff left the workplace, Chizewski asked plaintiff to return three times and told plaintiff he would be suspended from his job with intent to discharge based on his refusal to be tested, to which plaintiff responded, "You got to do what you got to do." Chizewski said plaintiff received a handbook describing the company's alcohol and drug testing policy when he began working at Lapham-Hickey.

¶ 8 Plaintiff testified that on August 4, he was scheduled to begin work at 2:30 p.m. and he punched out at 2:45 p.m. and encountered Chizewski as he was leaving. Plaintiff told Chizewski he was ill. Plaintiff told Chizewski he had not had any alcohol and further testified he was never told to take a drug or alcohol test, though he admitted he was aware of the company's alcohol testing policy. When plaintiff arrived at work the next day, he was given a letter stating he was suspended, and plaintiff was ordered to leave the premises. Plaintiff said he left work because he was "off the clock" and was sick.

¶ 9 The employer representative asked plaintiff why he reported to work on August 4 if he was ill, and plaintiff replied that he was going to attempt to work but that it was very hot outside and inside the workplace and his stomach was "bubbling" and he "had to leave."

¶ 10 On December 4, 2010, the Department referee issued an order disqualifying plaintiff from receiving unemployment benefits under section 602(A) of the Illinois Unemployment Insurance Act (the Act) (820 ILCS 405/602(A) (West 2010)). The order stated that plaintiff refused his employer's direction to take an alcohol test pursuant to a known company policy, his actions

"constituted a deliberate and willful disregard of the employer's interests," and that plaintiff had been discharged from his employment for misconduct connected to his work. Plaintiff appealed to the Board, which affirmed the denial of benefits on February 12, 2011.

¶ 11 On February 23, 2011, plaintiff filed a complaint in the circuit court seeking administrative review of the Board's decision. On July 12, 2011, the circuit court remanded the case to the Board for a determination of whether Lapham-Hickey filed a timely protest of plaintiff's claim for benefits, retaining jurisdiction to conduct administrative review. On August 17, 2011, the Board filed a supplemental decision stating that plaintiff's employer filed a protest of plaintiff's claim within the required time period. On September 14, 2011, the circuit court affirmed the Board's decision. Plaintiff has appealed from that order.

¶ 12 Before addressing the merits of this appeal, we note that plaintiff's brief consists of an extended recitation of facts and unsupported contentions that fails to conform with the requirements of Supreme Court Rule 341 (eff. July 1, 2008) in every respect, including the absence of a jurisdictional statement or statement of the case, references to the record or legal arguments with accompanying citations to authority. A *pro se* litigant is held to the same standards as a litigant represented by counsel. *In re Estate of Pellico*, 394 Ill. App. 3d 1052, 1067 (2009). Nevertheless, this court may consider the facts and allegations in a case where they can be reasonably discerned and where the record is straightforward. See *In re Marriage of Betts*, 159 Ill. App. 3d 327, 330-31 (1987). We also have the benefit of the Board's cogent appellate brief. *Tannenbaum v. Lincoln National Bank*, 143 Ill. App. 3d 572, 575 (1986).

¶ 13 In this appeal, plaintiff challenges the Board's determination that he violated a company policy. Plaintiff restates his version of the events surrounding the termination of his employment and contends his unemployment benefits "should be reinstated because I didn't break any rules" and that he was discharged "for going home early."

¶ 14 The main purpose of the Act is to alleviate the economic insecurity and burden caused by involuntary unemployment, and the Act "is intended to benefit only those persons who become unemployed through no fault of their own." 820 ILCS 405/100 (West 2010); *Jones v. Department of Employment Security*, 276 Ill. App. 3d 281, 284 (1995). An individual claiming unemployment insurance benefits has the burden of establishing his eligibility for those benefits, and an employee discharged for misconduct is ineligible to receive those benefits. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 327 (2009).

¶ 15 The Board is the trier of fact in cases involving claims for unemployment compensation, and we review the findings of the Board. *Village Discount Outlet v. Department of Employment Security*, 384 Ill. App. 3d 522, 524-25 (2008). 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*, 393 Ill. App. 3d at 327. An agency's decision is clearly erroneous where the entire record leaves the reviewing court with the definite and firm conviction that a mistake has been made. *Id*.

¶ 16 Misconduct under the Act involves the deliberate and willful violation of a reasonable rule or policy governing the individual's behavior in performance of his work. Three elements of misconduct must be established: (1) the rule or policy must be deliberately and willfully violated; (2) the rule or policy of the employer must be reasonable; and (3) the violation must have harmed the employer or it must have been repeated by the employee despite previous warnings. 820 ILCS 405/602(A) (West 2010); see also *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 826 (2009). Plaintiff does not challenge the second and third requirements.

¶ 17 As to the first element, an employee willfully or deliberately violates a work rule or policy by being aware of, and consciously disregarding, that rule or policy. *Hurst*, 393 Ill. App. 3d at 328-29. Plaintiff contended at his hearing that he simply wanted to leave work on the day

in question, and he denies violating a company policy. However, Chizewski testified that plaintiff refused to be tested for alcohol when ordered to do so after both Chizewski and another employer noticed the smell of alcohol on plaintiff's breath. It was the role of the Board, as the trier of fact in this case, to weigh the evidence, determine the credibility of witnesses, and resolve conflicts in testimony. *Id*. at 329. The Board's determination that plaintiff willfully violated a work rule or policy was not clearly erroneous.

¶ 18 Plaintiff also contends on appeal that Lapham-Hickey failed to file a protest within the required 10 days of the Department's initial finding that he was eligible for unemployment benefits. The record belies plaintiff's assertion. Lapham-Hickey's protest of plaintiff's claim states that the company received notice of the claim on August 17, 2010, and filed its protest of the claim by faxing a document to the Department on August 23, 2010.

¶ 19 Moreover, the circuit court remanded this case to the Board to determine whether Lapham-Hickey filed a timely protest. The Board concluded the company filed a protest of the claim for benefits within the required time period. In light of the record on appeal, plaintiff's contentions as to the timeliness of his employer's protest are unavailing.

¶ 20 Accordingly, the decision of the Board denying unemployment benefits to plaintiff is affirmed.

¶ 21 Affirmed.