2012 IL App (1st) 113479-U

FOURTH DIVISION
December 20, 2012

No. 1-11-3479

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MICHAEL MAYO, Plaintiff-Appellee, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; DIRECTOR OF ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; and BOARD OF REVIEW, Defendants-Appellants, and RAHEEL FOODS, INC., Defendant.	)	Appeal from the Circuit Court of Cook County. No. 11 L 50783 Honorable Robert Lopez-Cepero, Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: The decision of the Illinois Department of Employment Security Board of Review that plaintiff was discharged for misconduct connected with work and thus ineligible for unemployment benefits was not clearly erroneous; circuit court judgment reversed.

¶ 2 Defendants, the Illinois Department of Employment Security (IDES), the IDES Board of Review (Board), and the IDES Director,[1] appeal from an order of the circuit court of Cook County reversing the Board's denial of plaintiff Michael Mayo's claim for unemployment benefits. Although the appellee has not filed a response brief in this court, we may proceed under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). On appeal from the circuit court's reversal, defendants contend that the Board's finding that plaintiff was ineligible for benefits because he was discharged for misconduct connected with his work was not clearly erroneous. For the reasons that follow, we reverse.

¶ 3 Plaintiff was employed as a cook at a fast food restaurant owned by Raheel Foods, Inc. (Raheel). Following his termination from employment, plaintiff filed a claim for unemployment benefits. In his application, plaintiff stated that he was discharged because of alleged insubordination. Specifically, plaintiff reported that he was told he was discharged for refusing a job assignment by an assistant manager, but stated, "This never happened." An IDES claims adjudicator denied plaintiff's claim, finding that he was disqualified under section 602(A) of the Illinois Unemployment Insurance Act (Act) (820 ILCS 405/602(A) (West 2010)), which provides that individuals discharged for misconduct are ineligible to receive unemployment benefits. Plaintiff appealed, and a telephone hearing was held before an IDES referee. Several issues were to be considered at the hearing, including whether plaintiff was discharged for misconduct in connection with work.

¶ 4 At the telephone hearing, Dave Gomez, an area manager for Raheel, testified that on October 6, 2010, plaintiff was scheduled to work until 4 p.m. About 3:30 p.m., Gomez was in

[1]An additional defendant in the proceedings below, Raheel Foods, Inc., is not a party to this appeal.

the restaurant's office when he heard the shift supervisor ask plaintiff to put some chicken in the grill oven. According to Gomez, plaintiff said, "No, there's a cook right out there in the lobby and I'm going home." By the time Gomez got out to the front counter about a minute later, plaintiff had already punched out and left. Gomez instructed the store manager to discharge plaintiff because he disobeyed an order, was disrespectful, and abandoned his shift. In addition, Gomez stated that they had had problems with plaintiff in the past. He testified that plaintiff had received a write-up in the past, but had refused to sign it. Gomez also testified that an employee manual is given to every employee.

¶ 5 Michael Sandoval, plaintiff's shift supervisor, testified that around 3:15 or 3:20 p.m. on the day in question, he told plaintiff to put some chicken in the grill and put some display chicken in the shelf. In response, plaintiff "disagreed and said that there was a cook out in the lobby, for him to do it." Sandoval testified that plaintiff left the restaurant at 3:30 p.m., and that the other cook, although he was in the lobby, did not start his shift until 4 p.m.

¶ 6 Luz Syalla,[2] the store manager of the restaurant where plaintiff worked, testified that when plaintiff came to work the next day, she told him she had been directed not to let him punch in. In response, plaintiff left the restaurant. Syalla also testified that she had given a copy of the employee manual to plaintiff and that employees are entitled to take a break during their shift. According to Syalla, plaintiff had been written up for an incident a month prior, but he refused to sign the form. She had given him a verbal warning as well.

¶ 7 Plaintiff testified that he was not given a copy of the employee manual. He stated that it was mandatory for restaurant employees to take a 30-minute break during their shifts. He explained that for the last two or three months of his employment, instead of taking his break and

[2]This witness's name also appears in the record as Luz Ayala.

working until 4 p.m. as scheduled, he would clock out 30 minutes early at 3:30 p.m. and go to physical therapy. According to plaintiff, Syalla was aware of this practice and had agreed to it.

¶ 8 Plaintiff testified that at 3:30 p.m. on the day in question, Sandoval did ask him to put grilled chicken in the oven. However, plaintiff stated that had Sandoval looked, he would have seen that the chicken was already in the oven. Plaintiff explained further:

> "My shift was over. The other cook was in the ... in the lobby. They didn't want him in the back because he's not experienced ... not as experienced as I am and Mr. Gomez is a manager and he was going to eat this guy up that he came back ... came back there and did something wrong. Well, that's not my problem. My shift was over. I had thirty minutes left, as he stated. I did what I was required to do and I was leaving, which ... which had been my program for the last three months. I didn't get nasty with Mr. Sandoval. I didn't get nasty with Mr. Gomez. Nobody said anything to me."

¶ 9 Plaintiff stated that he had never received any write-ups from his employer and his job performance was "exemplary from day one."

¶ 10 When the referee asked whether any of the witnesses had anything further to add, Syalla stated that she did have an agreement with plaintiff to let him leave work at 3:30 p.m. so he could go to physical therapy, as he had been in an accident. However, Syalla testified that it was her understanding that plaintiff had completed physical therapy by the day in question. She stated, "But to my knowledge, he was over with physical therapy, 'cause I asked him was he over with [*sic*] because he was giving my managers a hard time leaving upon himself by 3:30 every day without consulting them. There was no communication with them."

¶ 11 Plaintiff countered that he continued with physical therapy for two weeks after his employment ended.

¶ 12 Following the telephone hearing, the IDES referee affirmed the claims adjudicator's denial of plaintiff's claim for unemployment benefits. The referee found that plaintiff refused to comply with his employer's directive to put chicken in the oven, that plaintiff was discharged because he willfully and deliberately violated his employer's order, and that plaintiff's refusal to put chicken in the oven and his early departure from the workplace without permission amounted to insubordination. The referee concluded that because plaintiff was discharged for misconduct, he was disqualified from receiving unemployment benefits under section 602(A) of the Act. 820 ILCS 405/602(A) (West 2010).

¶ 13 Plaintiff appealed to the Board. The Board found that the record was adequate and that the referee's decision was supported by the record and the law. Incorporating the referee's decision as part of its own, the Board affirmed the denial of benefits. Plaintiff thereafter filed a complaint for administrative review, and the circuit court reversed the Board's decision.

¶ 14 On appeal, defendants contend that the Board's determination that plaintiff's actions constituted misconduct was not clearly erroneous.

¶ 15 In an appeal involving a claim for unemployment benefits, we defer to the Board's factual findings unless they are against the manifest weight of the evidence. *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 556 (2006). An administrative agency's findings of fact are against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205 (1998). In our role as a reviewing court, we may not judge the credibility of the witnesses, resolve conflicts in testimony, or reweigh the evidence. *White v. Department of Employment Security*, 376 Ill. App. 3d 668, 671 (2007).

¶ 16 To establish misconduct under 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. 820 ILCS 405/602(A) (West 2010); *Manning*, 365 Ill. App. 3d at 557. Whether an individual was properly terminated for misconduct in connection with his work is a question that 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 is considered to be clearly erroneous where the entire record leaves the reviewing court with the 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).

¶ 17 In the instant case, the record supports the Board's determination that plaintiff's actions constituted misconduct under section 602(A) of the Act.

¶ 18 First, Raheel presented evidence that plaintiff deliberately and willfully violated a workplace rule or policy in that he did not follow his supervisor's order to put chicken in the oven and then left work 30 minutes before the end of his shift without permission. Plaintiff did not deny that he refused to put chicken in the oven; he only testified that the chicken was already there. Plaintiff also admitted that he left work early. While he testified that Syalla, the store manager, had agreed to this practice, she testified that the agreement had come to an end before the day in question. On this factual issue, the Board apparently believed Syalla over plaintiff. This was its prerogative as the trier of fact, and we defer to the Board's credibility determination. On administrative review, we may not judge the credibility of the witnesses or reweigh the evidence. *White*, 376 Ill. App. 3d at 671-72.

¶ 19 Second, Raheel's policies that employees must follow supervisors' orders and work their scheduled hours are reasonable. We are mindful that Raheel did not present direct evidence of such workplace policies. However, employers are not required to prove the existence of a reasonable rule by direct evidence. *Manning*, 365 Ill. App. 3d at 557. Courts may find the existence of a reasonable rule or policy "by a commonsense realization that certain conduct intentionally and substantially disregards an employer's interests." *Greenlaw v. Department of Employment Security*, 299 Ill. App. 3d 446, 448 (1998). Here, common sense implies that refusing to follow directions given by a supervisor and leaving the workplace early without permission intentionally and substantially disregard the employer's interests.

¶ 20 Third, harm to the employer is not limited to actual harm, but can be established by potential harm. *Hurst*, 393 Ill. App. 3d at 329; *Manning*, 365 Ill. App. 3d at 557. For example, insubordinate behavior is harmful to an employer's interest in maintaining an orderly workplace. *Hurst*, 393 Ill. App. 3d at 329. In this case, plaintiff's behavior could adversely affect the work environment in that it could affect employee morale and cooperation. In addition, Raheel was without a cook for 30 minutes due to plaintiff's conduct. The element of harm was established.

¶ 21 After reviewing the entire record, we cannot say that the Board's determination that plaintiff was discharged for misconduct connected with work was clearly erroneous. Accordingly, we reverse. For the reasons explained above, we reverse the judgment of the circuit court of Cook County and uphold the Board's decision finding plaintiff ineligible to receive unemployment benefits.

¶ 22 Reversed.