

FOURTH DIVISION  
May 2, 2013

No. 1-12-2246

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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PATRICK CANTORE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	No. 12 L 50552
THE ILLINOIS DEPARTMENT OF EMPLOYMENT	)	
SECURITY; DIRECTOR OF THE ILLINOIS DEPART-	)	
MENT OF EMPLOYMENT SECURITY; BOARD OF	)	
REVIEW; and PITT OHIO EXPRESS LLC,	)	The Honorable
	)	Daniel T. Gillespie,
Defendants-Appellees.	)	Judge Presiding.

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PRESIDING JUSTICE LAVIN delivered the judgment of the court.  
Justices Fitzgerald Smith and Epstein concurred in the judgment.

**ORDER**

¶ 1 *Held:* The Board of Review's decision that plaintiff was discharged for misconduct in connection with his employment and thus ineligible for unemployment insurance benefits, affirmed where plaintiff was shown to have repeatedly violated the employer's tardiness policy.

¶ 2 Plaintiff Patrick Cantore appeals from an order of the circuit court affirming the final administrative decision by defendant, the Board of Review of the Illinois Department of Employment Security (Board), that plaintiff was discharged for misconduct and thus ineligible to receive unemployment benefits under section 602A of the Illinois Unemployment Insurance Act (Act). 820 ILCS 405/602A (West 2010). On appeal, plaintiff contends that no evidence was

presented that he willfully violated any reasonable rule or policy of the employer, and that the Board's contrary findings were against the manifest weight of the evidence. He also contends that the Board erred in determining that no further evidentiary proceedings were necessary to resolve his claim, and by failing to determine whether his termination was due to his job performance.

¶ 3 The record shows that plaintiff was employed as a maintenance worker for Pitt Ohio Express, LLC (employer) from May 2011 until he was terminated in October 2011. Plaintiff applied for unemployment benefits with the Illinois Department of Employment Security, claiming that he had been discharged for being a "couple" minutes late.

¶ 4 On November 4, 2011, a claims adjudicator interviewed plaintiff regarding his termination. Plaintiff explained that he rode his bicycle 10 miles to work, which sometimes caused him to be late. Plaintiff acknowledged that there was a policy against tardiness, but also claimed that he was not aware of it.

¶ 5 The employer objected to plaintiff's claim for benefits, asserting that plaintiff was discharged for "continued poor performance and tardiness issues." In support, the employer submitted documentation of three warnings that had been given to plaintiff regarding his tardiness and work performance issues, and a time sheet reflecting when plaintiff had clocked-in for work from October 17 through October 26, 2011.

¶ 6 The first document was a form evidencing the verbal warning given to plaintiff on September 6, 2011, regarding his continuing issues with proper facility maintenance and tardiness. Plaintiff was informed that he had arrived more than five minutes late at least 10 times since August 1, 2011, and that there were occasions when the garbage had not been emptied and the restrooms had not been cleaned. Plaintiff was warned that his continued

unsatisfactory performance could result in termination. Plaintiff acknowledged that the issue had been discussed with him by signing and dating the bottom of the form.

¶ 7 The second document was a letter dated September 14, 2011, from Jim Maug, the employer's building maintenance manager, to plaintiff. Maug reminded plaintiff that he was expected to punch in no later than five minutes after the start of his shift, and that he was not permitted to stay after the end of his shift unless he was given prior approval by Maug, or Roman Sakas, the on-site supervisor. Maug also addressed continuing issues regarding the cleanliness and maintenance of the building, and informed plaintiff that his orientation period would be extended a second time so that he could make appropriate changes to his performance and behavior. Maug informed plaintiff that he would be "subject to immediate termination" if he did not meet the employer's requirements. Plaintiff acknowledged his review of the letter by signing and dating the bottom right corner.

¶ 8 The third document was a copy of an email exchange between plaintiff and Don Whitfield, Employee Relations Supervisor, regarding an additional extension of his orientation period. On October 3, 2011, Whitfield explained that the purpose of the email was to summarize a prior meeting between himself, plaintiff, Maug and Sakas. He informed plaintiff that his work performance continued to be unsatisfactory, and that he was required to maintain accurate information on his time sheet. Plaintiff was again informed that if he did not improve, he may be subject to termination. On the following day, Plaintiff acknowledged that he had received the letter and replied, "I read it and understand it."

¶ 9 The employer also submitted a time sheet for the week of, and week prior to, plaintiff's termination on October 26, 2011, which indicated that during the course of eight work days, plaintiff punched in 29 minutes late on one occasion and between 8 and 13 minutes late on three

other occasions. The employer described plaintiff's tardiness in the last two weeks of his employment as "the final incident that led to his termination."

¶ 10 The claims adjudicator found that plaintiff was discharged for being tardy, that he had been provided written and verbal warnings about his tardiness, and that he was in violation of a known and reasonable company rule. She then concluded that plaintiff was terminated for misconduct connected with his work, and was therefore ineligible for unemployment benefits.

¶ 11 Plaintiff requested reconsideration of that decision. He argued that there was no verbal or written evidence, or anything that he had signed "about being late for work," that there was a policy that an employee could be between five and seven minutes late without penalty, and that he was terminated because the employer only needed "summer help" and did not want to pay benefits. A telephone hearing was conducted by a department referee on December 2, 2011. Before the hearing, the employer requested a continuance based on the unavailability of its key witness. The request was denied and the hearing proceeded with plaintiff as the only participating party.

¶ 12 Plaintiff claimed that the employer had made no contemporaneous objections to his tardiness, and only objected when it was preparing to terminate him. He stated that when he was terminated, the employer did not mention his tardiness or work performance; he was simply told that the company did not need him anymore and had to let him go. When the referee questioned plaintiff about the documented warnings submitted by the employer, plaintiff denied the truth of the assertions contained in the warnings and suggested that the documents had been fabricated. On December 5, 2011, the referee concluded that no evidence had been presented that plaintiff had willfully or deliberately violated any reasonable rule of the employer, and set aside the determination of the claims adjudicator.

¶ 13 The employer sought rehearing to provide testimony regarding plaintiff's willful misconduct. The request was granted, and another telephone hearing was conducted on January 4, 2012, before a different referee. At that hearing, Maug testified that plaintiff was terminated due to attendance and performance issues. When questioned about whether plaintiff ever gave a reason for being late so often, Maug stated, "I think that he said one day that he rode a bike." He testified that plaintiff had been warned about his tardiness on numerous occasions, including the verbal warning, letter, and email in the record. Maug further testified that he often received complaints about garbage cans overflowing and about the cleanliness of the bathroom areas at the work-site, both of which were plaintiff's responsibility to maintain.

¶ 14 Sakas testified that only once during plaintiff's employment did plaintiff give him an explanation for his late arrival—that he had woken up late. Sakas also observed that plaintiff had falsified his timesheet by claiming to have done certain work that had not been completed. In preparation for an audit of the work-site, Sakas had asked plaintiff to do a number of assignments, however, plaintiff did not complete them, and his failure to do so caused the employer to fail the related part of the audit.

¶ 15 Plaintiff testified that he was late because he rode his bike to work and he was forced to take a detour because of road construction along his route. The road construction had been going on since August, two months prior to his termination. Plaintiff did not recall being late as many times as the employer claimed, but if he was late, his tardiness was due to the road construction. Plaintiff testified that he believed "it all averaged" because he was never "an hour or two hours late." Plaintiff testified that when he started, Sakas had told him that if he was a couple minutes late, it was acceptable to make up the time after hours. Plaintiff denied that there was a problem with overflowing garbage cans, claimed that he did all of the assignments

required for the audit, and denied that the employer failed the audit. He admitted that he never told Maug or Sakas that his late arrivals were caused by road construction, but he thought that they knew. Plaintiff remembered one occasion when he was given a warning and "written up" for being tardy. He also remembered a meeting to discuss his job performance and the audit, in which he was told that his job could be in jeopardy, but he did not remember receiving a follow-up email about it.

¶ 16 On January 5, 2012, the referee issued a decision affirming the determination of the claims adjudicator that plaintiff had been terminated for misconduct and was ineligible for unemployment benefits. The referee found that despite repeated warnings, plaintiff violated the employer's rule that he report for work on time. Although plaintiff claimed his tardiness was caused by road construction, the referee noted that the construction had been going on for at least two months before plaintiff's final late arrival, and that he "did not take extra precautions to avoid being late, such as leaving earlier, which, in light of his prior warnings, was a reasonable expectation." The referee stated that "[a]lthough the claimant had problems doing his work, the Administrative Law Judge will not consider these in reaching his decision."

¶ 17 Plaintiff appealed to the Board, arguing that he had not been late, that the employer had a policy that permitted an employee to be up to seven minutes late, and that the employer was lying because they did not want him to collect unemployment benefits. The Board reviewed the record, including the transcript of the telephone hearing conducted on January 4, 2012, and determined that it adequately set forth the evidence so that no other evidentiary proceedings were necessary. The Board noted that plaintiff was responsible for reporting to work on time, and that tardiness under circumstances that can be reasonably anticipated and avoided may constitute misconduct connected with the work. The Board found that plaintiff's final late

arrivals, which led to his termination, were not due to reasons which were beyond his control to avoid. The Board then affirmed the referee's determination that plaintiff had been terminated for misconduct connected with his work and that he was ineligible for unemployment benefits.

¶ 18 Plaintiff subsequently filed a *pro se* complaint for administrative review of the Board's decision. The circuit court affirmed the Board's decision, and plaintiff now challenges the propriety of that judgment on appeal.

¶ 19 We initially observe that our review is limited to the Board's decision, rather than the decision of the referee or the circuit court. *Vill. Disc. Outlet v. Dep't of Employment Sec.*, 384 Ill. App. 3d 522, 524-25 (2008). In this case, the Board determined that plaintiff was terminated for misconduct in connection with his work and was thus ineligible for unemployment benefits. 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. *AFM Messenger Serv., Inc. v. Dep't of Employment Sec.*, 198 Ill. 2d 380, 385 (2001); *Sudzus v. Dep't of Employment Sec.*, 393 Ill. App. 3d 814, 826 (2009). An agency's decision will be deemed clearly erroneous only where the record leaves the reviewing court with the definite and firm conviction that a mistake has been made. *AFM Messenger Serv., Inc.*, 198 Ill.2d at 393 (2001).

¶ 20 Under the Act, an employee is ineligible for unemployment benefits if he was discharged for misconduct connected with his work. 820 ILCS 405/602(A) (West 2010). Misconduct precluding an award of unemployment benefits is established where it is shown that: (1) a deliberate and willful violation of a work rule or policy occurs, (2) the employer's rule or policy is reasonable, and (3) the violation either harms the employer or was repeated by the employee despite previous warnings.

¶ 21 Here, the record plainly establishes that the employer had a policy regarding employee attendance and tardiness, and that plaintiff repeatedly violated it. The record also establishes that plaintiff was repeatedly warned about his continued violations of the policy and the potential consequences. Notwithstanding his representations during the proceedings that he was never warned about his tardiness, plaintiff admitted that he was warned on at least two occasions: the first, when he was given a verbal warning and subsequently written up for being late, and the second, when he had a meeting with his supervisors to discuss his performance and was told that his job could be in jeopardy.

¶ 22 Plaintiff argues, nevertheless, that there is no proof of a deliberate act of misconduct on his part. We disagree.

¶ 23 "Willful misconduct stems from an employee being aware of, and consciously disregarding, a company rule." *Odie v. Dep't of Employment Sec.*, 377 Ill. App. 3d 710, 713 (2007). Here, the record demonstrates that plaintiff was aware of the employer's tardy policy, yet repeatedly violated it. Plaintiff's arguments, that employees could be between five and seven minutes late without penalty and that he was permitted to make up late time after hours, are contrary to the information provided to plaintiff in the warnings, where he was specifically told that he was expected to clock-in no later than five minutes after the start of his shift, and that he was not permitted to stay after the end of his shift without prior approval. Moreover, plaintiff cannot validly argue that rules prohibiting excessive absenteeism and tardiness are not reasonable under the Act, (*Nichols v. Dep't of Employment Sec.*, 218 Ill. App. 3d 803, 811 (1991)), and in this case, the evidence of plaintiff's repeated violations of the employer's reasonable work policy, when, as the Board noted, he had the ability to avoid them, support the Board's finding of a deliberate and willful violation of the policy by plaintiff.



¶ 24 As to the third prong, plaintiff summarily argues in his brief that there was "no evidence of harm to the defendant's business" to support the Board's decision. This court has noted, however, that under Illinois Department of Employment Security regulations, "[a]bsences and tardiness always cause harm to the employer, even if a worker is allowed to make up the time. This is because absences and tardiness cause disruption to the general operations of any business." *Woods*, 2012 IL App (1st) 101639, ¶ 21, citing 56 Ill. Adm. Code 2840.25(b)(3) (2012). Viewing plaintiff's repeated tardiness in light of these regulations, it is evident that the harm element was satisfied in this case.

¶ 25 In sum, the Board's determination that plaintiff's repeated violations of the employer's tardiness policy constituted misconduct under the Act was not clearly erroneous. Accordingly, we affirm its decision.

¶ 26 Our conclusion is not altered by plaintiff's further contention that the Board erred in determining that no further evidentiary proceedings were required to resolve his claim because it was missing the following necessary documents: his time sheet record for the entire length of his employment, the employer's written policies on attendance and allowable overtime to make up for late arrival, and a letter to plaintiff regarding the first extension of his orientation period. As noted by defendant, plaintiff has waived these arguments because he failed to raise them during the administrative hearing and is raising them for the first time before this court. *Cinkus v. Vill. of Stickney Mun. Officers Electoral Bd.*, 228 Ill.2d 200, 212 (2008).

¶ 27 Plaintiff also maintains that the Board erred by deciding his claim based on tardiness, and failing to determine whether his termination was instead due to his job performance. He contends that if the reason for his termination was unsatisfactory job performance, he could have remained entitled to receive unemployment benefits because "mere insufficiency, ordinary

negligence, or good faith errors in judgment" do not disqualify a plaintiff from benefits.

*Winkelmeier v. Board of Review*, 115 Ill App 3d 154, 156 (1983). Although a termination based on poor performance and carelessness standing alone would not make a plaintiff ineligible for unemployment benefits, (*Messer & Stilp, Ltd. v. Dep't of Employment Sec.*, 392 Ill.App.3d 849, 862 (2009)), it is evident here that plaintiff's repeated tardiness constituted misconduct in connection with his work under the Act (*Alternative Staffing, Inc. v. Dep't of Employment Sec.*, 2012 IL App (1st) 113332, ¶ 35), thereby rendering him ineligible for benefits. Plaintiff has set forth no legitimate basis for requiring more.

¶ 28 Accordingly, we affirm the order of the circuit court of Cook County.

¶ 29 Affirmed.