2013 IL App (1st) 122326-U

SECOND DIVISION
June 25, 2013

No. 1-12-2326

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SOURCE ONE STAFFING, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	
ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; DIRECTOR, ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY BOARD OF REVIEW; and JAVIER NEGRON,	)	No. 12 L 50476
	)	Honorable
	)	Margaret Ann Brennan,
Defendant-Appellees.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Justices Quinn and Connors concurred in the judgment.

O R D E R

¶ 1 *Held*: Circuit court correctly affirmed determination of Board of Review that plaintiff was eligible for unemployment benefits because he was discharged for reasons other than misconduct connected with his work.

¶ 2 Source One Staffing, Inc. (Source One), appeals from an order of the circuit court of Cook County affirming the ruling of the Board of Review of the Department of Employment Security (Board) that defendant Javier Negron (claimant), was eligible for unemployment benefits because he was discharged from his employment for reasons other than misconduct connected with his work. Source One contends that claimant voluntarily quit his job without

good cause attributable to Source One. Alternatively, Source One contends that claimant was discharged for misconduct.

¶ 3 Claimant worked for Source One, a temporary employment agency, from October 7, 2010, until July 25, 2011. He held a janitorial position with a Source One client, Industrial Hard Chrome (Industrial). When claimant left his employment, he applied for unemployment benefits. A claim form prepared by a claims adjudicator for the Illinois Department of Employment Security (Department) states that claimant alleged that he had been discharged by an Industrial supervisor named Dave because Dave was tired of claimant complaining. Claimant elaborated that he had complained about having to operate grinding machines while the operators would take breaks, because he was not trained to operate these machines. He also complained about having to clean sinks after people spit in them. Claimant was told that he was a temporary worker who should perform any function he was asked to perform. When he asked Dave for clarification of his job title and duties, Dave told him to leave. Claimant also stated that Source One then told him that they were unable to place him in another position and that he was discharged from his employment.

¶ 4 In a letter from Source One's branch manager, Helen Robles, to the Department, Robles alleged that claimant had resigned after complaining at an Industrial safety meeting about having to clean sinks when people had spit in them. Robles stated that Source One's written employment policy, which she attached to the letter, provided that an employee who failed to contact Source One for three consecutive weeks was considered to have voluntarily quit. Robles alleged that claimant had failed to contact Source One since July 2011.

¶ 5 Based upon this information, the claims adjudicator found that claimant was discharged from Source One because he had complained about being forced to operate grinding machines, for which he was not trained, when he had been hired as a janitor. The claims adjudicator found that claimant's actions resulting in his discharge were not deliberate or willful, and therefore he was entitled to unemployment benefits.

¶ 6 Source One then appealed to a Department referee, who conducted a hearing by telephone. At the hearing, Source One's branch manager, Helen Robles, testified that claimant had quit his job. Source One's sales representative on the account, Scott Lewis, elaborated in his testimony that on the day in question, he was notified that claimant had left his place of work at Industrial because he did not wish to wait for the plant manager, Rich Peterson. Lewis was told by an unidentified party that claimant was upset about having to clean sinks after people had spit in them. Lewis was also told that claimant was asked to wait for Peterson, but claimant stated that he no longer wished to work there and then left. Lewis admitted that he did not speak to claimant about this incident and was not present when claimant came in to pick up his check from Source One.

¶ 7 Claimant testified that when he complained at the safety meeting about his work assignments, his supervisor, Dave, told him he was a "lazy fucking asshole" and dismissed him from his employment with Industrial. Claimant testified that he did not go back to Source One because they were already displeased with him about his having to go to court periodically, apparently on a child support matter. However, he subsequently testified that he did go back to them on July 26, 2011, to pick up his check. Claimant had also told the Department's claims adjudicator that Source One had informed him that they had no work for him. At the hearing, Lewis asked claimant why he had not telephoned Lewis to discuss this incident. Claimant responded that Lewis had not wanted to speak to him.

¶ 8 The referee asked the Source One witnesses about "Dave," and they identified him as one of three plant supervisors at Industrial. The referee noted that, without Dave's testimony, all that Source One had presented about the safety meeting was hearsay. Source One attempted to contact Dave by telephone to obtain his testimony. The Source One representatives stated that they were unable to reach Dave by telephone because he was on the plant floor, where he was not permitted to use his cell phone.

¶ 9 Based upon this evidence, the referee found that claimant was discharged for reasons other than misconduct connected with his work, and therefore he was entitled to unemployment benefits. The referee found that Source One's evidence about what occurred at the safety meeting was hearsay, and was "not considered credible."

¶ 10 On appeal to the Illinois Department of Employment Security Board of Review (Board), Source One submitted a written statement by David A. Sircher. Sircher was "Dave," the Industrial plant supervisor who claimant testified had cursed at him and then discharged him at the Industrial safety meeting. In this written statement, Sircher asserted that it was claimant who cursed at him after being asked by Sircher to be quiet at the safety meeting. Claimant said that he was tired of cleaning up after everyone who was spitting in the sink, and if he found out who was doing so he was going to "fucking kick their ass." According to Sircher's statement, he spoke to claimant after the meeting, telling him that he had been rude and disrespectful and that threatening other employees would not be tolerated.

¶ 11 Claimant asserts that Source One has waived consideration of this unsworn statement because they failed to follow administrative procedures requiring that they explain why they could not have presented this evidence before the referee and also give the claimant an opportunity to respond to the allegations in the submitted material. See 56 Ill. Adm. Code 2720.315(b) (2009). We may relax requirements relating to waiver where principles of justice support the matter's consideration. *American Federation of State, County, and Municipal Employees v. County of Cook*, 145 Ill. 2d 475, 480 (1991). But here, the record establishes no supportable reason for Source One's failure to present the live telephone testimony of Sircher to the referee, where he would have been under oath and subject to cross-examination by the referee and claimant. The referee even gave the Source One witnesses the opportunity to contact Sircher by telephone during the hearing, but they claimed that he was on the Industrial factory floor and was not permitted to use his cell phone. There is no evidence in the record that this letter was considered by the Board, and we find that it should not be considered on appeal.

¶ 12 The Board concluded, based upon all the evidence before it, that the referee's decision granting benefits to claimant was supported by the record and the law. As we have noted, the referee determined that claimant was discharged from his employment by Source One for reasons not related to misconduct in his work. Source One then appealed to the circuit court of Cook County, which affirmed the decision of the Board. Source One now appeals.

¶ 13 Our review is of the decision of the Board, not the circuit court. *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 819 (2009). Section 602(A) of the Illinois Unemployment Insurance Act (820 ILCS 405/602(A) (West 2010)) provides that a former employee is ineligible for unemployment benefits if he was discharged for misconduct connected with his work. The statute is to be construed liberally in favor of awarding benefits. *Caterpillar, Inc. v. Fehrenbacher*, 286 Ill. App. 3d 614, 622 (1997). Where the Board has resolved a question of fact, our review is highly deferential; we will not disturb the Board's determination unless it is against the manifest weight of the evidence, where the opposite conclusion is clearly evident. *Pesoli v. Department of Employment Security*, 2012 IL App (1st) 111835, ¶20; *Woods v. Illinois Department of Employment Security,* 2012 IL App (1st) 101639, ¶ 16. When an issue presents a mixed question of law and fact, the "clearly erroneous" standard of review is applicable. *Childress v. Department of Employment Security*, 405 Ill. App. 3d 939, 942 (2010). Under that standard, we will disturb the Board's resolution of a mixed question of law and fact only if, upon review of the record, we are left with a definite and firm conviction that the Board erred. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001).

¶ 14 The Board adopted the referee's finding of fact that claimant was discharged by Source One. Although Source One contends that claimant effectively resigned his position by failing to contact Source One for three consecutive weeks after the meeting at Industrial, the referee chose to believe claimant's representation that Source One had informed him that they had no additional work for him. This finding of fact was not contrary to the manifest weight of the evidence and therefore we will not disturb it. Source One makes the alternative argument that if

claimant was discharged by them, it was for misconduct relating to his work, specifically his actions at the Industrial safety meeting. A person's discharge is for misconduct relating to his work if he deliberately violates a reasonable rule or policy of his employer and that violation either harmed the employer or was repeated by the person after a warning about that violation. *Pesoli*, at ¶ 29. This presents a mixed question of law and fact. The Board adopted the referee's determination that claimant was not discharged for misconduct relating to his work. The referee credited claimant's testimony that he was discharged by Industrial because he questioned their policy of sometimes having him operate grinding machines when he had been hired as a janitor and had not been trained to do such work. Claimant was subsequently told by Source One that they had no additional work for him. Because the Board did not find that claimant had engaged in misconduct connected with his work, they properly found that when Source One discharged him, he was entitled to unemployment benefits.

¶ 15 Our review of the record and the law leaves us with the definite and firm conviction that the Board did not err in its finding that claimant was entitled to unemployment benefits. *Childress*, 405 Ill. App. 3d at 942-43. Accordingly, we affirm the judgment of the circuit court which affirmed the Board's determination that claimant was entitled to unemployment benefits.

¶ 16 Affirmed.