2013 IL App (1st) 123440-U

FOURTH DIVISION
December 19, 2013

No. 1-12-3440

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WILLIAM J. FOSTER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 2012 L 50997
	)	
ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; DIRECTOR OF ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; BOARD OF REVIEW; and CHICAGO TRANSIT AUTHORITY CTA MERCHANDISE MART PLAZA c/o BRUCE KIJEWSKI,	)	
	)	Honorable
	)	Robert Lopez Cepero,
Defendants-Appellees.	)	Judge Presiding.

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

ORDER

¶ 1 *HELD*: The board of review's decision denying unemployment benefits to plaintiff is affirmed; the board's finding that plaintiff committed wilful misconduct at work and therefore is

ineligible for unemployment benefits is not clearly erroneous.

¶ 2 After plaintiff William Foster was discharged from his employment with the Chicago Transit Authority (CTA), he filed for unemployment compensation benefits. The CTA challenged plaintiff's eligibility of those benefits. Ultimately, the Illinois Department of Employment Security board of review (board) found that plaintiff was discharged because he had committed misconduct at work by conducting personal union business while on his employer's time and, therefore, was not eligible for unemployment compensation benefits. The circuit court affirmed the board's decision. Plaintiff now appeals the board's decision claiming that the decision should be reversed because the CTA failed to prove that there was a policy in place and that plaintiff wilfully violated that policy. For the reasons that follow, we affirm the board's decision.

¶ 3 BACKGROUND

¶ 4 Plaintiff William Foster worked for the CTA as a foreman overseeing painting at various CTA properties for approximately 31 years until he was discharged on January 26, 2012. According to plaintiff's notice of discharge, on July 21 and 22 of 2011, he had been soliciting signatures at three work-site locations, Skokie Shop, Western Congress/Blue Line, and 77th Paint Shop, while he was assigned to be working out of the North Side

District. The signatures were being collected in order to dispute the CTA's unilateral decision to reduce wages for painters by approximately six dollars an hour. The notice of discharge also alleged that plaintiff had instructed other employees under his supervision not to use their GPS-enabled mobile phones, which was contrary to management directives. Accordingly, the CTA discharged plaintiff because he violated CTA rules 14 (e), (i), (j), (q), (u), and (w), which are violations of personal conduct falling under the following respective categories: conduct unbecoming of an employee, leaving an assigned work location, falsifying any written or verbal statement, performing personal work while on duty or on authority property, unauthorized use of personal car for company business, abuse of company time, and poor work performance. The CTA also discharged plaintiff for violating rules 18 (a) and (b), which state: "(a) employees must not change their scheduled working hours, assignments or duties unless authorized to do so by the appropriate supervisor. Tardy or unauthorized early departure is not permitted[]; (b) If unable to report for duty, employees must notify their immediate supervisor before there [*sic*] reporting time. Fulfillment of this requirement does not automatically constitute an excused absence."

¶ 5 Following plaintiff's discharge, plaintiff applied for

unemployment benefits. The CTA objected to his application arguing that plaintiff was disqualified from receiving such benefits under section 602(A) of the Unemployment Insurance Act due to work-related misconduct. The claims adjustor reviewing plaintiff's request for benefits determined that plaintiff had been discharged for misconduct, namely violating CTA rules by soliciting employee signatures for an action against the CTA while on company time, and disqualified plaintiff from receiving benefits under section 602(A).

¶ 6 Plaintiff filed a request for reconsideration, or in the alternative, an appeal to a Department of Employment Security administrative law judge. An appeal was filed, and an administrative law judge heard the case. At the hearing, plaintiff submitted several documents and testified on his behalf in support of his case, and the CTA offered the testimony of Geraldine Fielder in support of its case. The documents submitted by plaintiff included: a statement by plaintiff claiming that he was wrongfully discharged, materials relating to prior labor disputes involving the CTA, a copy of the petition that had been circulated on July 21 and 22 with 21 signatures, a petition labeled "Charge Against Employer" before the Illinois Labor Relations Board on behalf of the CTA Trades Coalition, and plaintiff's notice of discharge.

¶ 7 Geraldine Fielder testified that she had conducted an investigation into plaintiff's conduct and found that plaintiff was discharged for three reasons. First, on July 21 and 22, plaintiff left his work location to solicit signatures at multiple other work locations instead of performing his duties as a foreman. Fielder testified that while union representatives may obtain permission to do union business on company time, workers who were not union representatives, like plaintiff, would have been required to solicit signatures on their own personal time. Fielder noted that according to the GPS system, the employees who gave plaintiff signatures were not on break at the time plaintiff was visiting their locations. Further, on the 21st and 22nd, plaintiff indicated on the payroll that he had worked his full eight hours each day, despite admitting that he took time to obtain signatures on those days, thus amounting to falsification of his payroll. Additionally, while plaintiff was permitted to visit the three locations he had visited on the 21st and 22nd, Fielder learned that he had no business reasons to visit the Skokie Shop, and that the employees he had visited at Western and Congress were not his employees. And, although plaintiff stated that he went to the paint shop to procure supplies, according to his manager, he did not procure any supplies from the shop on the 21st or 22nd. It was plaintiff's

manager's belief that the only reason plaintiff was at the paint shop was to solicit signatures.

¶ 8 Fielder testified that the second reason for plaintiff's discharge was because the CTA had received reports from employees under plaintiff's supervision that he had instructed them not to use their CTA-issued, GPS-enabled mobile phones, in direct conflict with directives from CTA management. In an interview with Fielder, plaintiff admitted that he told his employees that the phones could not be used for disciplinary purposes, but denied instructing them not to carry the phones. Fielder further testified that plaintiff's employees advised her that they regularly left their phones at the office even though plaintiff told her this did not happen. Moreover, plaintiff initially denied receiving training relating to the use of the phones, but when confronted with a document with his signature acknowledging that he received such training, plaintiff stated that he signed the document in protest. Even though the phones were in fact used to track employees and verify payroll, plaintiff insisted that the phones could not be used for discipline, were not used for payroll, and were not a good business practice.

¶ 9 Fielder testified that the third reason for plaintiff's discharge was his insistence on signing payroll documents "under protest" for workers under his supervision. Because of this, CTA

manager Tim Webb had to re-verify payroll using the GPS phones. When Fielder decided it was appropriate to discharge plaintiff, she did not take into consideration any prior incidents of union activity. Fielder also testified that as a result of plaintiff's actions, many hours of production time were taken up in the investigation of plaintiff's case and the calling of employees as witnesses.

¶ 10 Plaintiff testified that the charges against him were false and inflated. He argued that he had legitimate reasons to be at each of the places he visited on the 21st and 22nd and, as a foreman, he argued that he was permitted to stop at various locations where employees were allowed to give him their grievances. Plaintiff testified that the locations he visited on the 21st and 22nd were for work purposes as he went to the South Shops to pick up respirators and paint primer and to the West Shop to deal with materials specifications. Plaintiff also stated that issues pertaining to workers were routinely discussed on company time, and that this did not prevent him from getting his work done. He also testified that he had a protected right to gather signatures and that his discharge constituted retaliation and discrimination.

¶ 11 Upon further questioning, plaintiff stated that he obtained approximately ten signatures at the South Shops and approximately

three at the Western station; ten signatures were from people who were on break. Plaintiff further stated that he did tell his employees that the GPS phones could not be used for discipline, but denied telling them not to use the phones. Plaintiff also explained that he signed the payroll "under protest" because the CTA was comparing GPS phone data to the payroll and he knew his hours would not match up due to his time-keeping practice of allocating hours spent obtaining supplies and materials across several jobs; he was worried that if his hours did not add up, the CTA would accuse him of falsifying documents.

¶ 12 On March 12, 2012, the administrative law judge found that the CTA had failed to establish that plaintiff intentionally left his work station to solicit signatures for a petition, and that there was not enough evidence to establish that plaintiff wilfully and deliberately violated any CTA rule or policy. The administrative law judge also opined that the CTA was looking for a reason to discharge plaintiff because he was an outspoken supporter of workers' rights. As a result, the administrative law judge awarded plaintiff unemployment benefits.

¶ 13 The CTA appealed the administrative law judge's decision to the board. After reviewing the transcript from the hearing before the administrative law judge and all other documents that had been submitted as evidence, the board determined that

plaintiff had been discharged for misconduct and set aside the administrative law judge's decision.

¶ 14 The board made the following findings in its decision. The board found the employer's testimony to be more credible than plaintiff's testimony due to inconsistencies in plaintiff's statements. Specifically, the board noted that prior to the hearing, plaintiff admitted that he spoke with employees about a raise they did not get, that he needed signatures in order to bring an action before the labor board, and that he obtained signatures from employees while most were on break. However, at the hearing, plaintiff stated that all of the signatures he obtained were from employees on break. The board also found that union representatives needed to get permission from management before discussing union matters on business time, and that plaintiff was not a union representative, yet chose to conduct legitimate union business during his scheduled work day, which involved soliciting signatures to file a complaint with the Labor Relations Board against the CTA. Further, the board found plaintiff's argument that he had a legitimate business purpose to be at each location he visited on the 21st and 22nd to lack credibility. Instead, the board found that plaintiff went to each place to gather signatures for his claim, under the pretext that he was going to do work. And last, the board found that

plaintiff violated the employer's time-keeping procedures by indicating on his time card that he conducted full days of work, even though he was also conducting personal union business. Further, while the board noted that plaintiff admitted that he told his employees that the employer could not use the GPS phones for discipline, it found plaintiff's testimony that he did not tell the employees not to use to the phones at all to lack credibility.

¶ 15 Ultimately, the board found that the CTA discharged plaintiff for leaving his work location at Forest Glenn to solicit signatures at other job locations rather than performing his work as a foreman, falsifying his time sheets, and instructing his employees not to use their company, GPS-enabled phones. As such, the board set aside the administrative law judge's decision and found that plaintiff was not eligible for unemployment compensation benefits because he had engaged in misconduct at work.

¶ 16 Plaintiff filed a complaint for administrative review in the circuit court of Cook County challenging the board's decision. Following oral arguments and a review of all the evidence submitted in the case, the circuit court upheld the board's decision finding that it was neither against the manifest weight of the evidence, contrary to law, nor clearly erroneous.

Plaintiff timely filed a notice of appeal appealing the circuit court's order which denied plaintiff unemployment benefits. For the reasons that follow, we affirm the board's decision.

¶ 17 ANALYSIS

¶ 18 In reviewing a decision by an administrative agency, we must review the final decision of that agency. *Abbott Industries, Inc. v. Department of Employment Security*, 2011 IL App (2d) 100610, ¶ 15 (2011). Thus, we review the decision by the board of review, which made the Department of Employment Security's final determination regarding plaintiff's claim, and not the decision of the administrative law judge or the circuit court. *Sudzus v. Department of Employment Security,* 393 Ill. App. 3d 814, 819 (2009).

¶ 19 When reviewing administrative agency decisions, we apply differing standards of review depending on the type of issue for which review is sought. *Abbott Industries, Inc.*, 2011 IL App (2d) 100610 at ¶ 15. When we review factual findings of the board of review, we deem those findings *prima facie* correct and will reverse only if they are against the manifest weight of the evidence. *City of Belvidere v. Illinois State Labor Relations Board,* 181 Ill. 2d 191, 204-05 (1998). The weight of the evidence and credibility of the witnesses is within the province of the board of review. *Jackson v. Department of Labor, Board of*

Review, 168 Ill. App. 3d 494, 499 (1988). Where, on the other hand, the issue is the correctness of the agency's conclusions of law, our review is *de novo*. *City of Belvidere,* 181 Ill. 2d at 205. Finally, where the determination is a mixed question of fact and law, we apply the "clearly erroneous" standard. *Abbott Industries, Inc.*, 2011 IL App (2d) 100610 at ¶ 15.

¶ 20 Section 602(A) of the Unemployment Insurance Act (the Act) states: "An 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 had earnings equal to or in excess of his current weekly benefit amount ***." 820 ILCS 405/602(A) (West 2010). "Misconduct" is defined within the Act 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." 820 ILCS 405/602(A) (West 2010). The existence of a reasonable rule or policy does not have to be proved by direct evidence, but can be found by a court to exist through a common-sense realization that some behavior intentionally and substantially disregards an employer's interest. *Meeks v. Department of*

Employment Security, 208 Ill. App. 3d 579, 585 (1993). "Harm" includes damage or injury to other employees' well-being or morale or to the employer's operations or goodwill, and we may find that harm occurred even if specific testimony of harm was not presented at the hearing. *Woods v. Illinois Department of Employment Security*, 2012 IL App (1st) 101639, ¶ 21 (2012). Further, harm occurs where employees are forced to discontinue their work for other purposes. *Livingston v. Department of Employment Security*, 375 Ill. App. 3d 710, 717 (2007). Here, the board found that plaintiff had engaged in misconduct at work and, therefore, is not eligible for unemployment benefits pursuant to section 602(A). On appeal, plaintiff claims that the board's decision was improper and should be reversed.

¶ 21 The question of whether an employee was terminated for misconduct in connection with work is a mixed question of law and fact, which requires us to apply the clearly erroneous standard of review. *Sudzus*, 393 Ill. App. 3d at 833; see also *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010); *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 327 (2009); *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 557 (2006). An agency's decision is clearly erroneous only where a review of the record leaves the court with a "definite and firm conviction that a mistake has

been committed." *AFM Messenger Service, Inc. v. Department of Employment Security,* 198 Ill. 2d 380, 395 (2001). For the reasons that follow, we affirm the board's decision denying plaintiff unemployment benefits due to his misconduct at work.

¶ 22 Plaintiff's Evidentiary Objections Are Waived

¶ 23 Plaintiff argues in his appellate brief that much of the evidence presented before the Department of Employment Security was hearsay and, therefore, was improperly considered by the board. However, not only are these arguments unsupported by any case law in plaintiff's appellate brief, but plaintiff never made any objections to any of the statements during the hearing. It is well established that when hearsay evidence is admitted without an objection, it is to be considered and given its natural probative effect. *Jackson v. Board of Review of Department of Labor*, 105 Ill. 2d 501, 508 (1985). Unobjected-to hearsay statements, which is what plaintiff now objects to on appeal, are admissible but given only their "natural probative value." *Village Discount Outlet v. Department of Employment Security*, 384 Ill. App. 3d 522, 525 (2008). As such, plaintiff's arguments throughout his brief that such hearsay statements should have been disregarded are without merit. As stated in the above cases, those unobjected-to statements, even if hearsay, may be given their natural probative value by the board.

¶ 24 The Board of Review's Decision Was Not Clearly Erroneous

¶ 25 The board found that plaintiff was discharged for misconduct at work. Plaintiff argues that this finding was improper because the CTA failed to prove that he consciously disregarded a rule of the CTA as there was no documented evidence of any such rule and no evidence that plaintiff knew of any such rule and knowingly violated it. Plaintiff also argues that there was no harm done to his employer as a result of his alleged acts. Defendant argues that the board's finding was proper because the board is able to consider unobjected-to hearsay evidence and because the record supports a finding that plaintiff was discharged for misconduct. "Misconduct" is defined within the Act 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." 820 ILCS 405/602(A) (West 2010). For the reasons that follow, we find that the board's decision that plaintiff engaged in misconduct at work was not clearly erroneous.

¶ 26 The evidence presented shows that plaintiff, an employee of the CTA for over 30 years, solicited signatures (to file a

complaint against the CTA) while he was on the CTA's clock, in violation of the CTA's policy that personal business is not to be conducted on the CTA's time. The existence of such a policy was not only testified to by Fielder, but amounts to common sense--employers expect their employees to be working while they are being paid. In the same respect, plaintiff indicated that he worked full work days on the 21st and 22nd even though he admits that he solicited signatures on those days, thereby falsifying payroll records. Further, the board found that plaintiff's contention that he did not direct employees not to use their GPS phones was not credible, and such directions were in violation of management directives and the training plaintiff received (and signed off on receiving). Moreover, the board made a finding that plaintiff's testimony lacked credibility whereas it found the employer's testimony to be credible. And, because CTA employees, including plaintiff, were taking time from work to solicit and/or give signatures in support of an action against the CTA, there was actual harm to the CTA. See *Livingston*, 375 Ill. App. 3d at 717.

¶ 27 Based on the above, we find that there was sufficient evidence to find that plaintiff engaged in misconduct at work, thus making him ineligible for unemployment benefits, such that we are not left with a "definite and firm conviction that a

mistake has been committed." *AFM Messenger Service, Inc.*, 198 Ill. 2d at 395. Accordingly, we affirm the board's decision finding that plaintiff was discharged for misconduct at work and, therefore, not eligible for unemployment benefits pursuant to section 602(A) of the Act.

¶ 28 While we recognize that plaintiff indicates in his reply brief that he was reinstated as of August 9, 2013,[1] whatever facts were presented in that matter are not before this court and our findings are limited to the record before us. See *People v. Heaton*, 266 Ill. App. 3d 469, 476 (1994) (only facts within the record may be considered on appeal.).

¶ 29 CONCLUSION

¶ 30 For the reasons stated above, we affirm the board's decision, which found that plaintiff was discharged for misconduct at work and, therefore, not eligible for unemployment benefits pursuant to section 602(A) of the Act.

¶ 31 Affirmed.

[1] It is well settled that new points cannot be raised for the first time in the reply brief. *Bess v. Daniel*, 42 Ill. App. 3d 401, 405 (1976); Ill. Sup. Ct. R. 341 (g) (eff. 1970). As such, arguments raised for the first time in reply will not be considered. *Id.*