2013 IL App (1st) 123511-U

THIRD DIVISION
DECEMBER 18, 2013

No. 1-12-3511

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NEBUWA W. UCHENNA, Plaintiff-Appellee, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, DIRECTOR of the Illinois Department of Employment Security; and BOARD OF REVIEW, Defendants-Appellants, MISERCORDIA HOME, Defendant.	)	Appeal from the Circuit Court of Cook County. No. 12 L 51023 Honorable Robert Lopez-Cepero, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

O R D E R

¶ 1 *Held*: Board of Review decision that plaintiff was ineligible for unemployment benefits because he was discharged for misconduct – using abusive language while refusing to accept supervisors' counsel on a disciplinary matter – was not clearly erroneous.

¶ 2 Defendants Department of Employment Security (Department) and its Director and Board of Review (Board) – collectively, the State Parties – appeal from an order of the circuit court reversing a decision by the Board finding plaintiff Nebuwa Uchenna (also identified in the record as Uchenna Nebuwa) ineligible to receive benefits under the Unemployment Insurance Act (Act). 820 ILCS 405/100 *et seq*. (West 2010). The Board affirmed a Department referee's decision finding plaintiff ineligible because he was dismissed from his employment as a caregiver for defendant Misericordia Home for misconduct: using abusive language while refusing to accept supervisors' counsel on a disciplinary matter. On appeal, the State Parties contend that the Board's decision was not clearly erroneous.

¶ 3 Plaintiff filed a claim for benefits under the Act in September 2011 based on his employment by Misericordia from April 2008 through September 12, 2011. Misericordia filed a protest claiming that plaintiff was discharged for misconduct: "conducting himself in an unprofessional and inappropriate manner towards the behaviors of the residents he was caring for by teasing the residents, inappropriate language towards the residents, [and] mocking or imitating the behavior of the residents." Misericordia's protest was accompanied by copies of the memorandum of plaintiff's discharge and a prior warning.

¶ 4 A Department claims adjudicator investigated and ruled upon plaintiff's claim in September 2011, finding that he was discharged for "inappropriate behavior and language towards a resident," but Misericordia "failed to provide proof of claimant's alleged misconduct" and informed plaintiff of only one complaint. The adjudicator found that plaintiff's conduct was not deliberate or willful so that he was "not ineligible" for benefits. Misericordia sought reconsideration, which was denied in October 2011.

¶ 5 Misericordia appealed, and a Department referee held a hearing on November 14, 2011.

¶ 6 Carol Connolly testified for Misericordia that plaintiff was employed as a caregiver or "direct service person" for disabled children and young adults from April 2008 through September 12, 2011, when he was discharged.

¶ 7 Joe Ferrara and Kristin Nicholls, administrator of Misericordia Home and plaintiff's supervisor respectively, testified that they met with plaintiff on September 9 to discuss reported incidents of comments and interactions that he had with certain residents and staff. He allegedly used an improper tone in addressing the residents he cared for and had an unspecified conflict with a particular resident. Ferrara and Nicholls had not set out to discharge plaintiff but merely to provide feedback so that he would "engage in better self-monitoring," and they told plaintiff that he would be transferred to another residential area of Misericordia, just 20 yards from his present workplace. Such transfers are not uncommon, testified Nicholls. However, plaintiff's "aggressive tone and some of the comments that he made" resulted in his discharge for insubordination. In particular, he interrupted Ferrara and Nicholls repeatedly, suggested that the resident he had the conflict with should be moved rather than himself, referred to their position as "shit" and "rubbish," and repeatedly stated that if their allegations were true, they should fire him. Because he "wasn't willing to hear and participate in a dialogue around being a better employee," but instead engaged in insubordination as defined in the Misericordia employee handbook, they resolved to "take him up on his offer to be terminated." Plaintiff was aware of the contents of the handbook from his initial and annual reviews, and he had no prior warnings for insubordination.

¶ 8 Plaintiff testified that, in the meeting in question, he was told that a resident had accused him of using "inappropriate language and behavior." He called the allegations false and asked for an investigation, without demanding that Ferrara or Nicholls fire him or using language like "shit" or "rubbish." While he denied raising his voice, he testified "that's the way I speak."

Ferrara denied the request for an investigation. Plaintiff denied refusing a transfer, though Ferrara and Nicholls had not told him where he would be transferred to and he did not ask. He was not told of his discharge during the meeting but later by telephone.

¶ 9 The referee issued his decision in November 2011. He found that plaintiff worked for Misericordia caring for disabled children and young adults and was discharged for insubordination after refusing a transfer. As plaintiff's supervisor and the facility's administrator tried to counsel plaintiff regarding incidents of inappropriate interaction with residents, telling him that a transfer to another assignment with different residents would be appropriate, plaintiff said "this is shit" and rubbish, was uncooperative, and refused transfer while saying that he would rather be terminated. The referee noted that insubordination is an employee's refusal to comply with his employer's reasonable directive, found that plaintiff's refusal to accept Misericordia's counsel and directives constituted insubordination, and concluded that plaintiff was discharged for misconduct and thus ineligible for benefits.

¶ 10 Plaintiff appealed to the Board, which found the record inadequate for not including a copy of Misericordia's policy on insubordination though it was entered into evidence at the referee hearing. The Board remanded for a hearing, with the evidence from the prior hearing to be incorporated into the record and the referee to issue a decision based on both hearings.

¶ 11 On remand, the referee held a hearing on March 23, 2012, admitting into evidence two pages from the Misericordia employee handbook, indicating in relevant part that "staff shall *** conduct all personal and professional activities with honesty, integrity, respect, fairness, and good faith in a manner that will reflect well on Misericordia," and "insubordination and/or refusal to follow the directives of a supervisor" could result in immediate discharge.

¶ 12 The referee issued his decision in March 2012, substantially identical to his November 2011 decision except for referring to the remand and the insubordination-policy evidence.

¶ 13 Plaintiff appealed to the Board, which affirmed the referee's decision in June 2012 in an order incorporating the referee's decision as supported by the record and law and finding that "the further taking of evidence [is] unnecessary."

¶ 14 Plaintiff timely filed an administrative review action in the circuit court, which reversed the Board's decision in October 2012. The State Parties timely filed a notice of appeal.

¶ 15 Before proceeding further, we note that plaintiff has not filed an appellee's brief. We shall consider the appeal on the brief of the State Parties alone. *In re Marriage of Earlywine*, 2013 IL 114779, ¶ 13.

¶ 16 On appeal, the State Parties contend that the Board's decision that plaintiff was discharged for misconduct under the Act was not clearly erroneous.

¶ 17 Section 602(A) of the Act provides that a person is ineligible for unemployment insurance benefits when he was "discharged for misconduct connected with his work." 820 ILCS 405/602(A) (West 2010). Misconduct is:

> "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).

¶ 18 The elements of misconduct under the Act are that the (1) claimant deliberately and willfully violated a rule or policy of the employer, (2) rule or policy was reasonable, and (3) violation either harmed the employer or was repeated despite warnings. *Pesoli v. Department of Employment Security*, 2012 IL App (1st) 111835, ¶ 29. A claimant's conduct was willful or deliberate if he was aware of but consciously disregarded a rule of the employer. *Id.*, ¶ 30. A

reasonable rule concerns standards of behavior that an employer has a right to expect from an employee and thus must appropriately relate to the workplace, but a rule or policy need not be written down or otherwise formalized, so that this court may make a common-sense recognition that certain conduct intentionally and substantially disregards an employer's interests. *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 827 (2009). Potential as well as actual harm may underlie misconduct. *Pesoli*, ¶ 32.

¶ 19 To disqualify an employee from receiving unemployment benefits for misconduct, an employer must satisfy a higher burden than merely proving that the employee should have been discharged. *Czajka v. Department of Employment Security*, 387 Ill. App. 3d 168, 176 (2008). Thus, while a single flurry of temper between an employee and a supervisor may suffice to warrant discharge, it is not sufficient to deny unemployment benefits absent the employee using abusive language or threats sufficient to constitute misconduct under the Act. *Id.* However, an employee's insubordinate refusal to discuss work performance and challenges to authority to discipline him, even when couched in moderate language, clearly disregard his employer's interests and have been held to constitute misconduct. *Carroll v. Board of Review*, 132 Ill. App. 3d 686, 692-93 (1985); see also *Greenlaw v. Department of Employment Security*, 299 Ill. App. 3d 446, 449 (1998)("[w]hile the words 'kiss my grits' were not profane, they were insubordinate because they were abusive and violated the standard of behavior an employer has the right to expect from an employee. [Citation.] Furthermore, that insubordinate conduct was compounded when plaintiff refused [supervisors'] request to sign the exit order and *** request to return to the office.")

¶ 20 We review the decision of the Board, not the circuit court. *Pesoli*, ¶ 20. The Board is the trier of fact in cases under the Act, and its findings of fact are considered *prima facie* true and correct. *Id*. We shall not reweigh the evidence or substitute our judgment for that of the Board.

Id., ¶ 26. The Board's decision as to whether an employee was discharged from employment for misconduct under the Act presents a mixed question of law and fact reviewed for clear error. *Id.*, ¶¶ 20, 33. The Board's decision is clearly erroneous only if, after reviewing the entire record, we definitely and firmly believe that a mistake has occurred. *Id.*, ¶ 20.

¶ 21 Here, though plaintiff testified otherwise, the testimony of Ferrara and Nicholls is sufficient evidentiary basis for the conclusion of the referee, and thus the Board, that plaintiff in the disciplinary meeting in question said "this is shit" and rubbish, was uncooperative, and refused a transfer while saying that he would rather be fired. Thus, the Board's conclusion that plaintiff was discharged for misconduct, in that he used abusive language while refusing to accept the counsel of his supervisors on a disciplinary matter, was not clearly erroneous.

¶ 22 Accordingly, we reverse the judgment of the circuit court and confirm the decision of the Board.

¶ 23 Circuit court reversed; Board of Review confirmed.