

No. 1-15-2739

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CRAIG A. MOORE,)	Appeal from the
)	Circuit Court of
)	Cook County, Illinois.
Plaintiff-Appellee,)	
)	
v.)	No. 15 L 50220
)	
ILLINOIS DEPARTMENT OF EMPLOYMENT)	Honorable
SECURITY, DIRECTOR OF ILLINOIS)	Robert Lopez Cepero,
DEPARTMENT OF EMPLOYMENT SECURITY,)	Judge Presiding.
and BOARD OF REVIEW)	
)	
Defendants-Appellants,)	
)	
(HARRIS, N.A. c/o SEDGWICK BRUCE)	
KIJEWSKI,)	
)	
Defendants.))	

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Circuit court's administrative review judgment reversed where Board of Review of Illinois Department of Employment Security did not clearly err in finding plaintiff ineligible to receive unemployment insurance benefits due to termination for misconduct.

¶ 2 In this administrative review action, defendants-appellants appeal from the circuit court's order reversing the judgment of Board of Review (Board) for the Illinois Department of Employment Security (IDES) denying unemployment insurance benefits to plaintiff-appellee Craig Moore. The court held that the administrative hearing did not comport with due process, and further disagreed with the Board's credibility determination. We reverse.

¶ 3 Moore was employed by Harris Bank as a mail and scan operator beginning in 2013. In April 2014, he was the subject of a Corrective Action Form due to his behavior when working with a colleague. Specifically, the Form stated that on April 18, Moore used inappropriate language in the presence of his co-worker. Moore admitted to feeling frustrated that day, but did not recall using any explicit language. He was reminded of Harris Bank's code of ethics and warned that additional outbursts would be unacceptable.

¶ 4 On June 5, 2014, Moore was terminated for violating Harris Bank's prohibition on workplace violence. The termination proposal, authored by Samuel Gonzalez, Moore's supervisor, alleged that on May 9, 2014, Moore and Gonzalez, along with several other Harris Bank employees, went to a restaurant to celebrate the retirement of a colleague. During the evening, while the co-workers were seated around a table, Moore asked the retiring colleague to tell everyone how she "really feels" about Gonzalez. When the retiree appeared puzzled, Moore said that if he were retiring, he would lunge over the table and assault Gonzalez. The group was shocked, and Moore repeated his statement. Moore continued that he did not fear repercussions because Gonzalez "'already f*&ked up [his] PPA [personal performance appraisal].'" When Moore left to smoke a cigarette, the other employees expressed concern and shock at his statements, and Gonzalez said that he found the statement to be threatening. This incident,

combined with Moore's behavior in April, for which he had received a warning, prompted Gonzalez to recommend termination.

¶ 5 Following his termination, Moore applied for unemployment benefits. Harris Bank protested the claim, but on September 25, 2014, IDES determined that Moore was eligible for benefits because the actions for which he was terminated were not "deliberate or willful." Harris Bank appealed on October 26, 2014, and a telephone hearing before a referee was scheduled for November 20, 2014. Harris Bank did not appear for the telephone hearing, and the referee dismissed the appeal the next day pursuant to 56 Ill. Adm. Code 2720.255.

¶ 6 On November 24, 2014, the referee issued a decision granting Harris Bank's request for rehearing on the basis that the failure to appear was due to a key witness's medical emergency. The referee's decision stated that Moore could present objections to the rehearing request at the rescheduled hearing, but if his objections were overruled, the referee would conduct a hearing on the merits.

¶ 7 At the rescheduled hearing on December 15, 2014, both parties appeared. Moore did not object to the rescheduling of the hearing. Gonzalez testified consistently with the termination memo regarding the events of May 9 that prompted him to recommend Moore's termination. Gonzalez also testified in further detail about the warning Moore received on April 22, 2014, for his behavior on April 18. Specifically, Gonzalez stated that on April 18, as a colleague approached Moore's workspace, Moore pounded on his desk and swore under his breath, and then, as his colleague was leaving, he muttered something to the effect of "'f*&king idiots."

¶ 8 Moore declined to cross-examine Gonzalez, and as he was not represented by counsel, he was examined by the referee. Moore testified that he attended his colleague's retirement party on May 9 at Gonzalez's urging. At the party, he "jokingly" told the retiree that if he was retiring, he

would "move the table," but denied that he had any intent to assault Gonzalez. Moore further admitted saying that Gonzalez "messed up" his PPA, but denied cursing when he made that statement. Moore testified that Gonzalez had previously joked about hitting him at a Christmas party in December 2013, which Gonzalez denied. Finally, Moore stated that he did not pound on his desk and swear on April 18, although he received a written warning for that behavior. Moore testified that when he signed the warning, he added a statement denying the incident, but the warning did not reflect a written denial.

¶ 9 The referee issued a decision on December 16, 2014, denying Moore unemployment benefits and finding that he threatened his supervisor using profane and abusive language, which constituted misconduct under the Unemployment Insurance Act (820 ILCS 405/100, *et seq.* (West 2012)) (the Act). Moore timely appealed to the Board, which affirmed the referee's decision on the basis that Moore's testimony, in contrast to Gonzalez's, lacked credibility. The Board characterized Moore's testimony that he merely told his co-workers that he would "move the table" as nonsensical, given that pushing a table aside is ordinarily a "prelude to further action."

¶ 10 Moore then appealed to the circuit court. Initially, he argued that the referee had no jurisdiction to grant what Moore characterized as a "continuance" for the hearing at Harris Bank's request because Harris Bank did not submit evidence in support of its claim that a medical emergency prevented its witness from attending. With regard to the merits, Moore challenged the Board's credibility determination. The circuit court agreed that the referee failed to follow "due process" in granting rehearing, and further held that that the record did not support the Board's credibility findings. The court also reprimanded the referee for failing to ask

questions regarding whether alcohol was consumed at the retirement party and whether the employees were "on the clock." Moore timely appealed.

¶ 11

ANALYSIS

¶ 12

In an appeal from an administrative review proceeding, we review the decision of the Board rather than the circuit court. *Lojek v. Department of Employment Security*, 2013 IL App (1st) 120679, ¶ 31. The Board's factual findings are presumed correct, and we will not reweigh the evidence or substitute our judgment for that of the Board. *Id.* The question of whether an employee's discharge was for misconduct within the meaning of the Act is a mixed question of both law and fact, which we evaluate under the clearly erroneous standard of review. *Universal Security Corp v. Department of Employment Security*, 2015 IL App (1st) 133886, ¶ 13. A Board's decision is clearly erroneous where the entire record leaves the reviewing court with "a definite and firm conviction that a mistake has been made." *Id.*

¶ 13

Before turning to the merits of the Board's decision, we first address Moore's argument that the referee lacked jurisdiction to reschedule the hearing after Harris Bank failed to appear on November 20. To be sure, when an appeal is dismissed due to a party's failure to appear, the dismissal is final unless that party either appeals to the Board within 30 days, or makes a request for rehearing "by letter or on the record" no later than 10 days after the missed hearing. 56 Ill. Adm. Code 2720.255(e)(1). According to Moore, Harris Bank did not comply with this procedure because the record does not contain its written letter requesting rehearing.

¶ 14

Ordinarily, Moore's failure to raise this argument before the Board would default his claim (see *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 212-13 (2008) (argument not presented at administrative hearing is procedurally defaulted)), but Moore attempts to circumvent this default by characterizing the referee's decision to reschedule

the hearing as a jurisdictional defect, which may, of course, be raised at any time (*Mitchell v. People*, 2016 IL App (1st) 141109, ¶ 19). But this argument fails as a factual matter because the record evidence reflects that Harris Bank *did* comply with the procedure for requesting rehearing set forth in section 2720.255(e)(1). Specifically, within 10 days following dismissal for failure to appear, the referee's November 24 decision to reopen the matter stated that Harris Bank requested the matter to be reheard due to a witness's medical emergency. Although no written request is found in the record on appeal, it is clear that Harris Bank timely requested rehearing and Moore's argument goes to the form and not the fact of the request. Thus, his jurisdictional argument fails. Further, because Moore was apprised of the request for rehearing and had the opportunity but failed to object to the hearing referee's exercise of discretion in allowing the request, he has forfeited the ability to challenge that decision on appeal.

¶ 15 With regard to the merits, we are mindful that the Act was intended to mitigate the insecurity caused by involuntary unemployment and thus must be liberally construed in favor of awarding benefits. *Petrovic v. Department of Employment Security*, 2016 IL 118562, ¶ 23. Nevertheless, not all unemployed individuals are entitled to the Act's protections: those who are discharged for misconduct due to their work, for example, are ineligible. *Id.* at ¶ 24. Significantly, disqualification for misconduct is not intended to exclude all employees who are fired from their jobs (*id.* at 27), but only those employees who commit a deliberate and willful violation of an employer's reasonable work rule or policy, which either (1) harmed the employer, or (2) was repeated by the employee despite a previous warning or explicit instruction from the employer (820 ILCS 405/602(A) (West 2012)); see also *Wood v. Illinois Department of Employment Security*, 2012 IL App (1st) 101639, ¶ 19. An employee's conduct is deliberate or

willful when he or she is aware of and consciously disregards the rule or policy. *Odie v. Department of Employment Security*, 377 Ill. App. 3d 710, 713 (2007).

¶ 16 The foregoing principles, applied in the context of this case, warrant denial of unemployment insurance benefits. It is undisputed that Harris Bank had a written policy against workplace violence and threats set forth in its Human Resources Operating Procedure. The policy defines workplace violence as threatening behavior or verbal abuse that "takes place on BMO premises or during the course of BMO business *or that involves BMO employees* or BMO property." (Emphasis added.) Moore does not contend that he was unaware of this policy or that the policy was unreasonable. Rather, Moore's primary argument is that the statements he made to Gonzalez were not connected with his work because they were made off work premises and after-hours. But this court has explicitly held that misconduct may exist "even if the abusive conduct occurred off work premises." *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 558 (2006) (citing *Caterpillar v. Department of Employment Security*, 313 Ill. App. 3d 645, 654 (2000) (abrogated on other grounds by *Abbott Industries, Inc. v. Department of Employment Security*, 2011 IL App (2d) 100610, ¶ 16)).

¶ 17 In *Manning*, the plaintiff employee was discharged for leaving a "hostile, intimidating and vulgar" message on her co-worker's home voicemail. *Manning*, 365 Ill. App. 3d at 554. This court held that notwithstanding the fact that the conduct for which the employee was discharged occurred after business hours and outside of work, she was not entitled to unemployment benefits because her vulgar message was directed at a co-worker and referenced the work environment, and as such, constituted misconduct. *Id.* at 558. Likewise, Moore's threat was directed against his supervisor and made in the presence of his co-workers. While among those same co-workers, he also used crude language to complain about his performance

evaluation. In this context, just as in *Manning*, it matters little that his threatening and vulgar remarks were made after work and off-premises.

¶ 18 To the extent that Moore challenges Harris Bank's contention that it was harmed by his remarks, this, too, is unpersuasive. "Harm" is not limited to physical or measurable damage or injury, but encompasses conduct that damages or injures other employees' "well-being or morale." 56 Ill. Adm. Code 2840.25(a), (b). Abusive and vulgar language certainly fits this standard. See *Greenlaw v. Department of Employment Security*, 299 Ill. App. 3d 466, 448 (1998) ("A claimant may be disqualified on the basis of misconduct when he or she uses abusive language, which is a form of insubordination."). While Moore testified that he made the comments jokingly and they were in keeping with the nature of his relationship with Gonzalez, Gonzalez testified that he did not perceive these comments in jest and felt threatened by them. The Board found Gonzalez more credible than Moore, and we will not disturb this finding. See *White v. Department of Employment Security*, 376 Ill. App. 3d 668, 671 (2007) (reviewing court may not judge the witnesses' credibility); see also *Baker v. Illinois Department of Employment Security*, 2014 IL App (1st) 123669, ¶ 21 (deferring to Board's credibility determination regarding whether plaintiff's co-workers interpreted plaintiff's remarks as threatening).

¶ 19 Significantly, Moore also received a previous warning for inappropriate language and behavior in April. In light of this written warning, Moore cannot seriously contend that he did not know that threatening his supervisor using vulgar language would likely result in his termination. In other words, his actions were deliberate and willful within the meaning of the Act (see *Petrovic*, 2016 IL 118562, ¶ 27 (disqualification for misconduct intended to include "individuals who intentionally commit conduct that they know is likely to result in their

termination["])), and we cannot say definitively or firmly that the Board's decision denying Moore unemployment benefits due to misconduct was clearly erroneous.

¶ 20 Because Moore was ineligible for employment benefits, we reverse the circuit court's order and reinstate the decision of the Board.

¶ 21 Reversed.