2013 IL App (2d) 120801-U
No. 2-12-0801
Order filed August 19, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CRAIG BLANCHFIELD,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 10-MR-1195
	)	
THE BOARD OF REVIEW OF THE	)	
ILLINOIS DEPARTMENT OF	)	
EMPLOYMENT SECURITY,	)	Honorable
	)	Terence M. Sheen,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* The Board's determination that plaintiff was discharged for misconduct was not clearly erroneous. The record reflected that the hearing referee heard conflicting testimony with respect to whether plaintiff kept an unsold item for his own use without authorization and mishandled the return of two items. Thus, we upheld the Board's finding that plaintiff was not entitled to unemployment compensation and affirmed the trial court's judgment.

¶ 2 Following a hearing, the Illinois Department of Employment Security Board of Review (the Board) affirmed a referee's decision to deny unemployment benefits to plaintiff, Craig Blanchfield, pursuant to Section 602(A) of the Illinois Unemployment Insurance Act (the Act) (820 ILCS

405/602(A) (West 2010)). Plaintiff sought administrative review of the Board's decision, which the trial court affirmed, and plaintiff timely appeals. The only issue on appeal is whether the Board clearly erred in determining that plaintiff was discharged from his employment for misconduct. We affirm the Board's decision.

¶ 3 I. Background

¶ 4 The record reflects that plaintiff worked as an associate at Wal-Mart from January 24, 2009, until he was terminated on December 31, 2009, following two separate incidents. The first incident involved the possession of a Nintendo DS game that plaintiff retrieved from a display stand (Nintendo incident). The second incident involved plaintiff's assistance with a customer returning fraudulent items (return incident). On February 25, 2010, a local branch office of the Illinois Department of Employment Security (the Department) granted plaintiff employment benefits after determining that his discharge did not result from misconduct.

¶ 5 On May 18, 2010, at Wal-Mart's request, the Department conducted an evidentiary hearing. Both plaintiff and a Wal-Mart coordinator, Ms. Gusman, testified at the hearing. With respect to the Nintendo incident, plaintiff testified that it occurred after two months of employment while he worked on the remodeling of another store. A supervisor had informed plaintiff that he could keep the Nintendo DS game since the display that it was encased in was to be discarded. Plaintiff informed a loss prevention officer about the incident, who did not instruct plaintiff to return the item. Subsequently, Wal-Mart officials told plaintiff at his termination interview that Wal-Mart had a policy to return display items for credit. Plaintiff returned the game after informing them that it was in his locker.

¶ 6 Gusman testified that in September 2009, plaintiff took a Nintendo DS game from a store that was being remodeled. Gusman testified that the person who allegedly gave plaintiff permission to take the game was not a supervisor, but instead was another sales associate. The instructions for the remodel were to "dispose all the features and the displaced retail value, to put them in *** so we can *** claim the merchandise and send it back to the *** to the vendor." Gusman testified that in the past, if an employee mistakenly placed merchandise in the garbage or in a compactor, the employee would "go back and pick that up." In this case, Wal-Mart was unable to return the Nintendo DS game for credit because it was in plaintiff's possession.

¶ 7 Regarding the return incident, plaintiff testified as follows. On December 24, 2009, two men purchased a video game from Wal-Mart. Subsequently, on December 26, 2009, one of the men came in and said to plaintiff, "[l]ook, I bought this game, this is a fabricated game, this is how I got it." Plaintiff responded that he had seen another fabricated game in the back room that was accepted on return, so he decided to take a new copy of the game up to customer service to seek approval. Plaintiff then explained the situation to a customer service associate, who completed the exchange. Plaintiff maintained that he did not give the customer the refund, but instead, he only brought the situation to customer service. Plaintiff further insisted that he showed the customer service associate that the CD was fabricated.

¶ 8 In response, Gusman testified that on December 27, 2009, plaintiff authorized the return of two fraudulent Xbox video games to the same customer, with that customer coming back for the second exchange after the first exchange had already taken place. The games were originally sold in the vendor's sealed packaging, but upon return only contained blank CDs. Gusman testified that plaintiff "just told customer service[to] go ahead and just do it, not notifying [them] that it was a

different CD *** inside the box." Gusman testified that plaintiff was only going to be "coached" about the fraudulent returns until she heard that plaintiff possessed the Nintendo DS game.

¶ 9 On May, 24, 2010, the hearing referee issued his decision, finding that plaintiff was discharged for misconduct. In his findings, the referee stated that plaintiff "was discharged for a second violation of the employer's policies when he retrieved a Nintendo DS game display for a customer that was intended to be returned [to] the vendor for a credit of $129." The referee stated the statutory definition for misconduct under the Act and held:

> "Workers have an affirmative duty to read and familiarize [] themselves with the written rules, policies, and procedures provided by the employer, as well as the affirmative duty not to engage in acts of dishonesty which tend to injure the employer's interests. The preponderance of the credible evidence is that the claimant breached his duty to the employer which was misconduct with the meaning of Section 602(A) of the Act."

The Board adopted the referee's decision and incorporated the referee's findings into its decision.

¶ 10 Thereafter, plaintiff filed a complaint for administrative review in the circuit court. On June 21, 2012, following a hearing, the trial court issued an order affirming the Board's decision. Plaintiff timely appealed.

¶ 11 II. Discussion

¶ 12 Plaintiff contends on appeal that the Board's determination was clearly erroneous. Plaintiff raises several arguments in support of this contention, including that the Board applied the wrong legal standard, the trial court's determination "should not be considered persuasive as the law was

incorrectly applied in its *** opinion and order," he did not willfully violate Wal-Mart's reasonable policies, and he did not harm Wal-Mart.

¶ 13 Section 602(A) of the Act provides that an individual who has been discharged for misconduct connected with his work is ineligible for unemployment benefits. 820 ILCS 405/602(A) (West 2010). Section 602(A) defines misconduct as:

> "[T]he 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." *Id.*

Thus, under the Act, employee misconduct involves (1) the deliberate and willful violation (2) of a reasonable rule or policy of the employer (3) where the violation harms the employer or is repeated after a warning. *Messer & Stilp, Ltd. v. Department of Employment Security*, 392 Ill. App. 3d 849, 856 (2009). While the claimant bears the burden of establishing being entitled to unemployment insurance benefits, the Act should be liberally construed in favor of awarding benefits; however, "the legislation was not meant to provide benefits to employees discharged for their own misdeeds." *Id.*

¶ 14 As we explained in *Abbott Industries, Inc. v. Department of Employment Security*, 2011 IL App (2d) 100610, we apply differing standards of review depending on the type of issue. *Id.* ¶ 15 (citing *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 819 (2009)). Specifically, we deem the Board's factual findings *prima facie* correct and will reverse such findings only if they were against the manifest weight of the evidence. *Abbott Industries*, 2011 IL App (2d) 100610, ¶ 15. However, we review *de novo* the Board's conclusions of law. *Id.* Finally, because the question of whether an employee was terminated for misconduct in connection with his work

presents a mixed question of law and fact, we apply the "clearly erroneous" standard of review and will reverse only if we are left with a "definite and firm conviction" that the Board's decision was a mistake. *Id.* ¶¶ 15-16.

¶ 15 In this case, upon our review of the record, we are not left with a definite and firm conviction that the Board's decision was a mistake. The only two witnesses to testify at the hearing were plaintiff and Gusman. Each witness provided conflicting accounts of both the Nintendo incident and the return incident. Regarding the Nintendo incident, on one hand, plaintiff testified that a supervisor told him that he could keep the Nintendo DS game because the display that encased it was going to be discarded. Plaintiff further testified that a loss prevention officer did not tell him to return the item after plaintiff informed him of the incident and that he returned the item after being advised at his termination hearing that Wal-Mart had a policy of returning unsold items for credit. On the other hand, Gusman testified that the person who allegedly gave plaintiff permission to take the Nintendo DS game was another sales associate, not a supervisor, and that the instructions for the remodel were to organize merchandise so that Wal-Mart could claim items and send them back to the vendor. Likewise, regarding the return incident, plaintiff testified that, because he had previously witnessed a fabricated game being accepted and returned, he decided to take a new copy of the game to customer service to seek approval for the return. Plaintiff testified that he explained the situation to customer service and they approved the return, not him. Gusman testified that plaintiff authorized two fraudulent returns to the same customer, with the customer coming back for the second exchange after the first exchange had already taken place. Gusman further testified that the games were originally sold in the vendor's sealed packaging, but upon return only contained blank CDs, and that plaintiff did not inform customer service that the returned items contained fabricated or blank CDs.

¶ 16 It is the Board's responsibility to weigh the evidence, determine the credibility of witnesses, and resolve any conflicts in testimony. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 329 (2009). We find no basis for interfering with the Board's credibility determination. See *id.* Put simply, the referee and the Board could have found Gusman's testimony more credible and concluded that plaintiff willfully violated the standard of behavior that Wal-Mart had a right to expect from its employees. See *Greenlaw v. Department of Employment Security*, 299 Ill. App. 3d 446, 449 (1998) (holding that an employee who used abusive, but not profane, language violated the standard of behavior an employer has a right to expect from an employee).

¶ 17 In reaching our determination, we find plaintiff's various arguments unpersuasive. Plaintiff argues that the "[the trial court's] decision should not be considered persuasive as the law was incorrectly applied in the June 21, 2012 Opinion and Order." However, Illinois law is well settled that, in reviewing the decision of an administrative agency, we review that agency's final decision and not that of the referee or the circuit court. *Abbott Industries*, 2011 IL App (2d) 100610, ¶ 15. As noted above, here, we are reviewing the Board's determination, not the trial court's. We also reject plaintiff's argument that his conduct did not harm Wal-Mart. The record reflects that Wal-Mart was unable to return the Nintendo DS for a credit and that Wal-Mart issued two refunds for fraudulent items.

¶ 18 Further, we recognize that the Board's written finding misstated the facts by noting that plaintiff was discharged "for a second violation of the employer's policies when he retrieved a Nintendo DS game display for a customer that was intended to be returned to the vendor for a credit of $219." However, that misstatement does not lead us to conclude that the Board's conclusion was clearly erroneous. The record reflects that during the hearing, Gusman clarified to the referee that

plaintiff's discharge resulted from two separate incidents, with one instance involving a return to customer service. We can affirm on any basis supported by the record (see *Northern Moraine Wastewater Reclamation District v. Illinois Commerce Comm'n*, 392 Ill. App. 3d 542, 563 (2009) (citing *Kimball Dawson, LLC v. City of Chicago Department of Zoning*, 369 Ill. App. 3d 780, 787 (2006) ("We may rely on any basis appearing in the record to affirm an agency's decision.")). Based on our review of the record, it is clear that the referee and the Board had a sufficient understanding of the circumstances leading to plaintiff's termination before issuing the order.

¶ 19 Finally, we reject plaintiff's argument that the referee and the Board applied the wrong legal standard when denying plaintiff's request for benefits. Plaintiff argues that the Board merely recited the standard of misconduct under the Act and found that "[t]he preponderance of the credible evidence is that [plaintiff] breached his duty to the employer which was misconduct within the meaning of [section 602] of the Act." Plaintiff argues that "breaching a duty to an employer" is not the appropriate legal standard used when considering whether an employee is entitled to unemployment benefits.

¶ 20 Upon our reading of the entire decision, we do not believe that the Board misstated the legal standard. The Board's decision stated that an employee has an "affirmative duty not to engage in acts of dishonesty which tend to injure the employer's interest." This statement, while not a model of clarity, is consistent with Illinois law holding that a court can find the existence of a reasonable rule or policy "through a commonsense realization that some behavior intentionally and substantially disregards an employer's interest." *Lachenmyer v. Didrickson*, 263 Ill. App. 3d 382, 388 (1994) (holding that an employee's conduct of throwing a file on a desk in the direction of a lead auditor met the statutory definition of misconduct because "[c]ommon sense implies the existence of a

policy against not only physical threats and violence but also throwing objects at supervisors even if the plaintiff had not been warned about getting along with fellow workers."). In this case, common sense implies the existence of policies against an employee keeping unsold items for personal use and authorizing fraudulent returns.

¶ 21 III. Conclusion

¶ 22 For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 23 Affirmed.