2017 IL App (2d) 160625-U
No. 2-16-0625
Order filed July 11, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ZEMRIAH TODD, Plaintiff-Appellant, v. THE LLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; THE DIRECTOR OF THE ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; THE BOARD OF REVIEW OF THE ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; and OPERATIONS MANAGEMENT INTERNATIONAL, INC., Defendants-Appellants.	)	Appeal from the Circuit Court of Du Page County. No. 16-MR-0013 Honorable Bonnie M. Wheaton, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Hudson and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The Board of Review's finding that plaintiff was ineligible for unemployment insurance benefits because he was discharged for misconduct was affirmed where (1) plaintiff deliberately and willfully violated the employer's Lone Worker Policy; (2) the Lone Worker Policy was reasonable and applied to plaintiff on the date in question; and (3) plaintiff's violation of the policy harmed the employer.

¶ 2 Plaintiff, Zemriah Todd, applied for unemployment insurance benefits with the Department of Employment Security (Department) following the termination of his employment with Operations Management International, Inc. (Operations Management). Following a hearing, a referee for the Department determined that plaintiff was ineligible for unemployment benefits because he was discharged for misconduct connected with his work. The referee's decision was affirmed by the Board of Review (Board). Plaintiff filed a *pro se* complaint for administrative review of the Board's decision, and the trial court affirmed the Board's decision. On appeal, plaintiff appears *pro se* and contends that the Board erred in finding that he was discharged for misconduct. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 From March 2007 through August 1, 2013, plaintiff was employed by Operations Management as an operator at its wastewater treatment facility in West Chicago, Illinois. Operations Management had a "Lone Worker Policy" that required any employee who was working alone at the treatment facility to sign in to an online computer system. The Lone Worker system had two functions: (1) to call the lone worker every 60 minutes to ensure that the worker was responsive and safe, and (2) to notify the lone worker of any emergency or malfunction that occurred at the facility. Operations Management trained all employees on the Lone Worker Policy.

¶ 5 On July 1, 2013, plaintiff was scheduled to work from 11:30 a.m. to 7:30 p.m. At around 7:00 p.m., plaintiff became aware that he was the lone worker at the facility, but he did not sign into the Lone Worker system. Shortly after he became the lone worker, a piece of equipment malfunctioned, which prevented chlorine from being added to the wastewater. Because plaintiff failed to follow the policy, the computer system called off-site employees from an on-call list.

Plaintiff later received a phone call from an off-site employee notifying him of the equipment malfunction, and plaintiff eventually had to call other off-site employees to fix the malfunction. On August 1, 2013, Operations Management terminated plaintiff's employment.

¶ 6 Plaintiff applied to the Department for unemployment benefits, and a claims adjudicator awarded him benefits. Operations Management sought reconsideration of the decision, which the claims adjudicator denied. Operations Management then filed an administrative appeal, in asserting that plaintiff was discharged for misconduct based on his failure to follow the Lone Worker Policy, despite knowledge of the proper procedure. Operations Management attached plaintiff's termination letter detailing the reasons for his discharge. The letter stated that, in addition to other instances of inadequate work performance and failing to follow procedures, plaintiff was fired for the July 1, 2013, incident. Specifically, the letter stated that plaintiff's failure to follow the Lone Worker Policy resulted in two employees responding to the alarm on a call-in basis and the "loss of chlorination function violating the effluent permit."

¶ 7 On September 29, 2015, a Department referee held a telephone hearing. Max Kovalenko, a human resources partner for Operations Management, testified as follows. Plaintiff was discharged for failing to follow policies and procedures. Specifically, plaintiff violated the Lone Worker Policy, which existed for the safety of the employee who was working alone, as well as to ensure that the lone worker was immediately notified of any emergency or malfunction. On July 1, 2013, plaintiff knew that he was the lone worker at the facility, yet he failed to sign into the Lone Worker computer system. Because plaintiff did not take "appropriate action," the system did not notify him of an equipment malfunction that occurred while he was the lone employee. Other employees had to report to the facility on a call-in basis to fix the malfunction, even though plaintiff was already there. Plaintiff's failure to follow the Lone Worker Policy led

to a "breakdown" of procedures that caused a delayed response in fixing the equipment. The delay led to chlorine levels in the wastewater "getting lower and lower and lower." Kovalenko explained that Operations Management was required by government regulations to maintain specified levels of chlorine in the wastewater.

¶ 8 Kovalenko further testified that plaintiff was trained on the Lone Worker Policy, he was given a copy of the employer's policies and procedures upon hiring, and all employees were "constantly kept up" on all policies. When confronted by his supervisors after the July 1, 2013, incident, plaintiff explained that he did not log into the Lone Worker computer system because he had only 30 minutes left in his shift and "assumed that everything would be fine." Kovalenko also testified that plaintiff received various written warnings dating back to 2011 and 2012 for failing to carry out his job responsibilities and not following company procedures. Ultimately, plaintiff was issued a final written warning in February 2012, after which he signed a "Total Performance Commitment" stating that he would follow all policies and procedures.

¶ 9 Plaintiff testified about the events of July 1, 2013, as follows. He was scheduled to work from 11:30 a.m. to 7:30 p.m. He completed his work for the day around 6:50 p.m., and he became the lone worker at the facility around 7:00 p.m. Plaintiff did not activate the Lone Worker computer system. Instead, he entered a break room where he made entries into a data log and washed himself before he was to leave at 7:30 p.m. While he was in the break room, plaintiff received a phone call from an off-site employee informing him of an equipment malfunction and asking him to respond to the situation. Plaintiff was unable to fix the malfunction, so he called his supervisor who instructed him to call another employee. Other employees arrived at the plant and they fixed the malfunction by 7:45 p.m. Plaintiff remained at

the facility until the problem was fixed, because he was the "primary lab individual" who had to test the wastewater to make sure that it was in compliance with EPA requirements.

¶ 10 Plaintiff further testified that he knew that he was the lone worker on July 1, 2013, but he chose not to activate the Lone Worker computer system because the "system was on, duty was secure." He further explained that he chose not to activate the system because his work was finished, all of the facilities were locked, and the equipment was "online." Also, plaintiff did not think that it was "necessary" to activate the Lone Worker system when he had only 30 minutes remaining in his shift and had to walk roughly 40 yards to activate it, so "why would [he] wanna do that?" Moreover, plaintiff testified that the safety feature of the Lone Worker system was meaningless at that point in time, because he had less than 60 minutes of work left. Plaintiff explained that he was "in a very much safe area at the time" and that the Lone Worker system would notify on-call workers in the event of an emergency or equipment malfunction. Although he acknowledged that the system immediately notified the lone worker of any problems or malfunctions, plaintiff testified that no policies or procedures required him to activate the Lone Worker system with only 30 minutes remaining in a shift. Nevertheless, plaintiff admitted that he had been trained on the Lone Worker Policy and had activated the system in the past. He ultimately testified that he was discharged for a "number of violations," one of which was his failure to activate the Lone Worker system on July 1, 2013.

¶ 11 Following the telephone hearing, the referee issued a decision setting aside the claim adjudicator's award of unemployment benefits. The referee found that plaintiff was fired for misconduct connected with his work. Specifically, the referee found that plaintiff willfully and deliberately violated the employer's Lone Worker Policy when he chose not to sign into the system because his shift was ending in 30 minutes and he was getting ready to leave. The

referee further found that plaintiff's failure to log into the system caused harm to the employer's interests. The referee also noted that plaintiff was placed on a final warning for violating policies and procedures.

¶ 12 Plaintiff appealed the referee's decision to the Board. In December 2015, after reviewing the record of the hearing before the referee, the Board issued a decision affirming the referee. The Board determined that plaintiff deliberately and willfully violated the Lone Worker Policy when he failed to log into the system because he "assumed everything was okay." The Board also determined that plaintiff's deliberate and willful violation of the "reasonable" policy caused harm to Operations Management.

¶ 13 On January 5, 2016, plaintiff filed a *pro se* complaint for administrative review. After considering the administrative record and the pleadings, the trial court affirmed the Board's decision. It found that the evidence was sufficient to support the Board's decision and that the decision was not contrary to law.

¶ 14 Plaintiff timely appealed.

¶ 15 II. ANALYSIS

¶ 16 Initially, we address the deficiencies in plaintiff's *pro se* briefs. Specifically, plaintiff failed to comply with Supreme Court Rules 341(h) (eff. Jan. 1, 2016) and 342 (eff. Jan. 1, 2005).

¶ 17 Rule 341(h) governs the contents of the appellant's opening brief, and its provisions are requirements, not mere suggestions. *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 7. The purpose of this rule is to require parties to present clear and orderly arguments to the reviewing court so that it can properly ascertain and dispose of the issues involved. *Hall*, 2012 IL App (2d) 111151, ¶ 7. Failure to comply with the supreme court rules is not an

inconsequential matter; a brief that "lacks any substantial conformity to the pertinent supreme court rules may justifiably be stricken." *Hall*, 2012 IL App (2d) 111151, ¶ 7.

¶ 18 Here, plaintiff's brief is not in compliance with Rule 341(h). For example, his "introductory paragraph" stating the nature of the case (see Ill. S. Ct. R. 341(h)(2)) consists of four pages of facts and argument. Additionally, plaintiff's jurisdictional statement does not provide the supreme court rule or "other law" conferring appellate jurisdiction. See Ill. S. Ct. R. 341(h)(4). Instead, plaintiff's statement of jurisdiction maintains that the appeal is from two orders entered by the trial court, which include (1) an order dismissing count II of the complaint "alleging misconduct against plaintiff," and (2) an order granting summary judgment in favor of the Department on all "remaining claims" of the complaint. Plaintiff's *pro se* complaint contained only one count, and "no pleadings" other than the complaint and answer can be filed by the parties in administrative review proceedings unless required by the court. See 735 ILCS 5/3-108(b) (West 2016). Furthermore, plaintiff does not cite to the record once in his entire brief. His statement of facts is comprised solely of boilerplate caselaw concerning unemployment benefits and the standard of review in appeals from the decisions of administrative agencies.

¶ 19 Additionally, Rule 341(h)(7) requires that the appellant's argument section shall contain the contentions of the appellant with "citation of the authorities and the pages of the record relied on." Here, plaintiff's argument section contains citations to boilerplate caselaw concerning the definition of "misconduct" as it pertains to unemployment benefits. He cites no authority to support his argument that he was not fired for misconduct, nor does he cite the pages of the record that he relies on in support of his argument. Moreover, plaintiff's brief violates Rule 342(a), which governs the appendix to the appellant's opening brief. In his appendix, plaintiff

did not include an index to the record on appeal. He also failed to include the trial court's order affirming the Board's decision, as well as Board's written decision that was the basis of the *pro se* complaint for administrative review. Instead, plaintiff's appendix included documents that were not in the record on appeal.

¶ 20 *Pro se* litigants are required to follow and comply with the supreme court rules, including those that govern the contents of appellate briefs. *Twardowski v. Holiday Hospitality Franchising, Inc.*, 321 Ill. App. 3d 509, 511 (2001); see also *Tannenbaum v. Lincoln National Bank*, 143 Ill. App. 3d 572, 574 (1986) ("Although his right to appear *pro se* is well established, it is equally well established that when he does appear *pro se*, he must comply with the established rules of procedure."). Because of plaintiff's blatant violations of the supreme court rules, we would be justified in striking his *pro se* briefs. We nevertheless decline to do so, as we understand the issues that he seeks to raise on appeal, and we have the benefit of a cogent brief from defendants. See *Twardowski*, 321 Ill. App. 3d at 511.

¶ 21 Turning to the merits, plaintiff argues that the Board erred in denying unemployment benefits after it found that he was discharged for misconduct within the meaning of section 602(A) of the Unemployment Insurance Act (Act) (820 ILCS 405/602(A) (West 2016)). Specifically, he argues that he did not deliberately or willfully violate any rule, no rule or policy existed that governed his behavior, and he did not receive "any form of reprimand or warnings prior to 2011."

¶ 22 On administrative review, we review the findings of the Board, not the referee or the circuit court. *Farris v. Department of Employment Security*, 2014 IL App (4th) 130391, ¶ 35. The Board's decision that plaintiff was not eligible for unemployment benefits due to misconduct constitutes a mixed question of law and fact. *Farris*, 2014 IL App (4th) 130391,

¶ 35. A mixed question of law and fact requires a court to determine the legal effect of a given set of facts. *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 557 (2006). We review mixed questions under the "clearly erroneous" standard. *Farris*, 2014 IL App (4th) 130391, ¶ 35. A decision is clearly erroneous if, based on the entire record, the court is left with the "definite and firm conviction" that the Board's decision was a mistake. *Farris*, 2014 IL App (4th) 130391, ¶ 35.

¶ 23 Individuals who are discharged for "misconduct" are ineligible to receive unemployment benefits under the Act. 820 ILCS 405/602(A) (West 2016); *Farris*, 2014 IL App (4th) 130391, ¶ 37. Three elements must be met to establish misconduct under section 602(A) of the Act: (1) a "deliberate and willful" violation of a rule or policy; (2) the employer's rule or policy was reasonable; and (3) the violation either harmed the employer or was repeated by the employee despite previous warnings or "other explicit instruction from the employing unit." *Woods v. Illinois Department of Employment Security*, 2012 IL App (1st) 101639, ¶ 19.

¶ 24 Willful conduct is a "conscious act made in violation of company rules, when the employee knows it is against the rules." *Czajka v. Department of Employment Security*, 387 Ill. App. 3d 168, 176 (2008); see also *Livingston v. Department of Employment Security*, 375 Ill. App. 3d 710, 716 (2007) ("Willful conduct stems from an employee's awareness of, and conscious disregard for, a company rule."). Here, plaintiff admitted during the telephone hearing that he was aware of and trained on the Lone Worker Policy. He further explained that he deliberately chose not to activate the Lone Worker computer system on July 1, 2013, because he did not think that it was "necessary." Plaintiff stated that he chose not to activate the system because he completed his work, wanted to prepare to leave, assumed that everything would function normally, and he did not want to walk 40 yards to activate the system. On appeal,

plaintiff states that he knew about the Lone Worker Policy, but he "consciously was not thinking about it." Hence, plaintiff deliberately and willfully violated the employer's policy.

¶ 25 We must next determine whether the employer's rule or policy was reasonable. See *Pesoli v. Department of Employment Security*, 2012 IL App (1st) 111835, ¶ 31. A reasonable rule concerns standards of behavior that an employer has a right to expect from an employee. *Livingston*, 375 Ill. App. 3d at 716. Such a rule or policy is not required to be written or otherwise formalized. *Manning*, 365 Ill. App. 3d at 557. Also, an employer need not prove the existence of a reasonable rule or policy by direct evidence. *Manning*, 365 Ill. App. 3d at 557. Instead, a court may find the existence of a reasonable rule or policy by a "commonsense realization that certain conduct intentionally and substantially disregard's an employer's interests." *Manning*, 365 Ill. App. 3d at 557.

¶ 26 Here, plaintiff does not dispute that Operations Management had a Lone Worker Policy, nor does he dispute that the policy was reasonable. Instead, he contends that no rule or policy existed for situations where the lone employee had 30 minutes remaining in his or her shift, and that a policy governing those situations was never written or formalized.

¶ 27 As mentioned, an employer need not prove the existence of a reasonable rule by direct evidence, and such a rule need not be written or otherwise formalized. *Manning*, 365 Ill. App. 3d at 557. Instead, all that is required is that the rule must provide guidelines that are or should be known by the employee, and it must have been clearly expressed to the employee to provide notice that he or she could be fired for violating it. *Petrovic v. Department of Employment Security*, 2016 IL 118562, ¶¶ 31-32.

¶ 28 Here, the Lone Worker Policy was expressed to plaintiff and was clear. Indeed, plaintiff acknowledged that he was aware of and trained on the policy and that he followed the policy in

the past. Also, Kovalenko testified that plaintiff received a final warning in 2012 notifying him that he could be terminated for failing to follow Operations Management's policies; plaintiff acknowledged that he received such a warning and that he signed a "Total Performance Commitment" as a result. Moreover, the record is clear that the Lone Worker Policy had no caveats or conditions. Kovalenko testified that the lone employee was required to follow the policy no matter how much time remained in his or her shift. More importantly, however, plaintiff blatantly ignores one of the main purposes of the Lone Worker Policy, which was to ensure that the lone employee at the facility immediately responded to any emergencies or malfunctions. Plaintiff even acknowledged at the telephone hearing that the system immediately notified the lone employee of any emergencies or malfunctions, regardless of the time remaining in that employee's shift. The Department was therefore justified in concluding that the Lone Worker Policy applied to situations where the lone employee had 30 minutes remaining in a shift. Furthermore, the rule or policy need not be written or otherwise formalized (*Manning*, 365 Ill. App. 3d at 557), so we reject plaintiff's assertion that the second element was not proven because the policy was allegedly not in writing.

¶ 29 Additionally, the Lone Worker Policy was reasonable. It concerned an employee's standard of behavior when he or she was the only worker at the facility. The policy served two purposes: (1) to ensure that the lone employee was safe by periodically contacting that employee and having the employee respond; and (2) to notify the lone employee in the event of an emergency or equipment malfunction at the plant. Moreover, as defendants note, the policy's second purpose is particularly important, because it assisted Operations Management in complying with environmental permit regulations and requirements. It ensured that malfunctions, such as the low-chlorination malfunction that occurred here, were responded to

immediately by an on-site employee. See, *e.g.*, *Pesoli*, 2012 IL App (1st) 111835, ¶ 31 (employer policy against accessing patient health information was reasonable when it was promulgated to comply with federal statutes governing health information and to protect patient confidentiality).

¶ 30 As to the third element, plaintiff contends that he did not receive any "form of reprimand or warnings" before 2011 and that all of plaintiff's "warnings" that were introduced at the hearing "were repudiated" by his complaints of racial harassment and discrimination. Plaintiff cites no authority in support of this argument, but instead references a "Charge of Discrimination" form from the Illinois Department of Human Rights. That form is not included in the record on appeal, but is included only in the appendix to plaintiff's opening brief. "Attachments to briefs that are not included in the record are not properly before this court and cannot be used to supplement the record." *McGee v. State Farm Fire and Casualty Co.*, 315 Ill. App. 3d 673, 679 (2000). Apart from having no relevance to whether plaintiff was discharged for misconduct, the form is not properly before this court and we will not consider it.

¶ 31 Moreover, plaintiff does not argue that his failure to follow the Lone Worker Policy did not cause harm to Operations Management. Instead, plaintiff contends in his reply brief, without any citation to authority, that no "employee was harmed" by having to come to the facility on a call-in basis to fix the equipment malfunction. Rule 341(h)(7) provides that "points not argued are waived and shall not be raised in the reply brief[.]" Plaintiff's argument is thus forfeited.

¶ 32 Nevertheless, forfeiture is a limitation on the parties, not the court. See *O'Casek v. Children's Home and Aid Society of Illinois*, 229 Ill. 2d 421, 437 (2008). We will thus briefly address the third element. To establish this element, it must be proven that the employee's deliberate and willful violation of the reasonable policy must have either (1) harmed the

employer or (2) been repeated despite a warning or other explicit instruction from the employer. *Petrovic*, 2016 IL 118562, ¶ 26; 820 ILCS 405/602(A) (West 2016). Here, plaintiff received a final warning in 2012 notifying him that his failure to follow Operations Management's policies could lead to his termination. Moreover, to determine whether an employer was harmed, the employee's conduct should be viewed in the context of potential harm, not actual harm. *Farris*, 2014 IL App (4th) 130391, ¶ 38; see also *Livingston*, 375 Ill. App. 3d at 716 ("Harm need not be actual harm and can consist instead of potential harm."). Department regulations also indicate that "harm," under section 602(A) of the Act, includes damage or injury to the "employer's property, operations or goodwill." 56 Ill. Adm. Code 2840.25(b) (2014). Here, Kovalenko testified that plaintiff's failure to follow the Lone Worker Policy led to a "breakdown" of procedures. The system had to contact off-site employees to respond to an equipment malfunction, even though plaintiff was already at the facility. Plaintiff's violation of the Lone Worker Policy caused a delay in responding to the malfunction that ultimately threatened Operations Management's compliance with environmental regulations. Indeed, Kovalenko testified that the chlorine levels in the wastewater were "getting lower and lower and lower" during the delay. Accordingly, plaintiff's failure to follow the Lone Worker Policy damaged Operations Management's operations and threatened its compliance with environmental regulations, thereby causing harm.

¶ 33 Based on the above, the Board's decision that plaintiff was terminated for misconduct under section 602(A) of the Act was not clearly erroneous.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, the judgment of the circuit court of Du Page County affirming the decision of the Board is affirmed.

¶ 36 Affirmed.