2014 IL App (1st) 122676-U

FIRST DIVISION
March 10, 2014

No. 1-12-2676

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IRWIN W. SHAW,	)	Appeal from the Circuit Court of
	)	Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12 L 50538
	)	
ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; DIRECTOR OF THE ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; and BOARD OF REVIEW,	)	
	)	
Defendants-Appellants,	)	
	)	
and	)	
	)	
CHICAGO TRANSIT AUTHORITY,	)	Honorable
	)	Robert L. Cepero,
Defendant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justice Cunningham and Justice Rochford concurred in the judgment.

ORDER

¶ 1 ***Held***: Board of Review decision that plaintiff was ineligible for unemployment benefits because he was discharged for misconduct—using profanity and being disruptive in his workplace in confronting a supervisor—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 Irwin Shaw 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 bus operator for defendant Chicago Transit Authority (CTA) for misconduct: using profanity and being disruptive in his workplace when he became belligerent or argumentative with his supervisor. On appeal, the State Parties contend that the Board's decision was not clearly erroneous, while plaintiff responds that the Board's decision was clearly erroneous, based upon hearsay, and failed to consider a written statement he submitted.

¶ 3 Plaintiff filed a claim for benefits under the Act in December 2011 based on his employment by CTA from March 2001 through December 1, 2011. CTA filed a protest claiming that plaintiff was discharged for misconduct. CTA alleged that, on November 4, 2011, he "was involved in a verbal altercation with management regarding a parking ticket [he] was issued for parking in a prohibited space (fire lane)." CTA also claimed that, on November 5, 2011, he phoned "the home of the general manager and made threatening statements to the GM's wife. A police report was filed over the seriousness of the above matter." CTA's protest was accompanied by copies of documents from plaintiff's discharge proceedings.

¶ 4 A Department claims adjudicator investigated and ruled upon plaintiff's claim in December 2011, finding that he was discharged "because of a dispute with his supervisor * * * of such a nature," involving "threatening demeanor towards the general manager and his family," that it constituted misconduct rendering him ineligible for benefits.

¶ 5 Plaintiff sought reconsideration, which was denied in January 2012. His request for reconsideration was accompanied by a four-page statement narrating and explaining in detail his belief that he was being harassed by general manager Bernard Jackson. While the statement indicated that "I have phone records" to support his denial of phoning a threat to Jackson's home, no such records were attached.

¶ 6 Plaintiff appealed, and a Department referee held a hearing on January 26, 2012.

¶ 7 Elizabeth Watlitton testified for CTA that plaintiff was a full-time bus operator for CTA from March 2003 until his discharge on December 2, 2011, following a hearing with his union representative and Bernard Jackson, general manager of a CTA bus garage. On November 4, transportation manager Derek McFarland interviewed plaintiff "in regards to behavior, uh, violation or disturbance resulting from a parking ticket he was being issued for being parked in the fire lane." Before that discussion, Watlitton saw that plaintiff was "upset" and "really loud" regarding the ticket and heard him ask Jackson if he could disregard the ticket, and she asked him to calm down or leave the office rather than "be loud with the general manager." Plaintiff indeed left the garage as Watlitton suggested.

¶ 8 However, about two or three hours later, she heard Jackson and McFarland order a drug test for plaintiff "because of his behavior, using profanity." She heard plaintiff say that "I'm not gonna take this shit, he's not going to do this to me." At Jackson's behest, plaintiff had entered an office to meet with McFarland and another manager, Mr. Ali. However, plaintiff walked out of that office in the middle of being interviewed, went into an area "off limits to employees" and went up to Jackson's desk. There, he interrupted Jackson in a meeting with a clerk and said "why did you do this to me? This is bullshit, you're not going to get away with this, I'm not going to

tolerate it." Because Watlitton "didn't know what was going to transpire," she "got in between those guys" and asked plaintiff to leave. He did leave, and Watlitton led him back to the meeting with McFarland, where he was removed from service and given a date for a disciplinary hearing.

¶ 9 Plaintiff did not file a union grievance, to the best of Watlitton's knowledge, but he did have union representation in his discharge proceedings. At the interview or hearing for "gross misconduct, they gave him a violation also for threat because of the way that he (inaudible) himself towards the general manager." In explanation of his behavior on November 4, plaintiff submitted a three-page report explaining that "he felt he was wronged for being given a ticket [because] he had parked there in that location before, and that the person that had written him a ticket prior to him discarded the ticket and tore it up, so he felt that Mr. Jackson should've also torn up the ticket." Watlitton explained that CTA may issue traffic tickets or citations, that CTA managers are trained to issue tickets, and that plaintiff's ticket in question was issued by Jackson.

¶ 10 When asked what rules plaintiff had violated by his conduct on November 4, Watlitton testified that employees are not to use profanity and that plaintiff's actions were "considered gross misconduct because he was completely insubordinate" in being "disrespectful to supervisory personnel as well as the other coworkers that observed it, because it was something that everyone could see." In particular, the incident occurred in the training room during lunch-hour in the view of about 50 bus operators who then "asked what was going on." To her knowledge, plaintiff had no prior warnings or discipline for any acts of misconduct other than this incident.

¶ 11 Plaintiff testified that he was discharged by CTA on the stated grounds of threatening general manager Jackson on November 4, though he opined that his discharge was "pre-determined." When he came to work on November 4, the parking area was full. While

"you can't park as far as the cones," he denied that he had, but instead parked "by the tree." There were several other cars parked in the same area as plaintiff's car, but Jackson issued a ticket to plaintiff only. He went inside to ask about his ticket, and McFarland told him to go talk to Jackson. When he did so, standing outside Jackson's office rather than entering, "I wasn't rowdy or nothing at all" but asked politely to discuss the matter. Jackson responded by waving his hand dismissively. While plaintiff admitted that he raised his voice at that point, he denied using profane language. Watlitton asked plaintiff to calm down and leave, and he left to eat lunch.

¶ 12 When he returned, he was speaking with the office clerks. Plaintiff explained that an employee can be in the clerks' area "if the clerks call you back there." Jackson came out of his office, and plaintiff tried to talk to him again about the ticket in a "calm voice." When Jackson then "moved me to the side with his hands," plaintiff did not take offense but instead discussed the ticket. Plaintiff testified that he said "I'm not going to let you do me like that" and "I can't keep being nice about it." Jackson immediately ordered a drug test for plaintiff, which plaintiff considered improper because a drug test must be approved by two managers. Plaintiff went to another manager's office, where he was told that "if he sees to it * * * you're going to get fired." He then returned to Jackson's office and asked "calmly" why he was being drug-tested and taken out of service. However, "they think just because I'm big [that] I'm pissed off and mad." Plaintiff testified that "I know the rules and regulations that you can't * * * use insubordination by cursing and threatening people, so I never did that."

¶ 13 Plaintiff noted that he was accused of phoning Jackson's home to threaten him, to the effect that he should "make sure [his] insurance is paid up." Plaintiff testified that he has telephone records to prove that he did not call Jackson's home, but when he tried to raise this in his defense,

"it was already pre-determined" that he would be discharged. Plaintiff testified that he had no disciplinary record with CTA for the preceding five or six years and that his union grievance was still pending as of the referee hearing. On cross-examination, plaintiff testified that he believed Jackson "had a personal problem with me," in that he "kind of forced me to resign" as a supervisor and "cursed" at another manager because plaintiff brought him lunch. However, plaintiff denied having any problems with Watlitton.

¶ 14 The referee issued his decision in January 2012. He found that plaintiff worked for CTA as a bus operator for about 8 years and had no prior warnings for acts of misconduct. On November 4, 2011, plaintiff "became upset and belligerent with the general manager because he received a parking ticket for parking his personal car in the fire lane by a CTA agent." Plaintiff "used profanity and disruptive [*sic*] at the workplace and [was] eventually asked to leave the facility." He was then discharged after a hearing or meeting. The referee concluded that plaintiff's act "harmed the Employer's best interest," that the "Employer's policy was a reasonable rule * * * known to" plaintiff, and that his "act rose to the level of misconduct as defined under the Act" so that he was found ineligible for benefits.

¶ 15 Plaintiff appealed to the Board, in a notice of appeal asking the Board to "check my prior attachments from last appeal." The Board affirmed the referee's decision in April 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."

¶ 16 Plaintiff timely filed an administrative review action in the circuit court, which reversed the Board's decision in August 2012. The State Parties timely filed a notice of appeal.[1]

[1] We issued an opinion in this case on August 26, 2013. However, we have since granted

¶ 17 On appeal, the State Parties contend that the Board's (1) findings that plaintiff used profanity, became belligerent with his supervisor, and was disruptive in the workplace were not against the manifest weight of the evidence, and (2) decision that plaintiff was discharged for misconduct under the Act was not clearly erroneous. Plaintiff responds that the Board's decision was against the manifest weight of the evidence and clearly erroneous, and that the Board erred in (1) basing its decision primarily on hearsay, and (2) failing to consider a written statement that plaintiff submitted to the Board.

¶ 18 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).

¶ 19 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

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a petition for rehearing by the State Parties and vacated that opinion. *See Douglas v. Illinois Department of Employment Security*, 2014 IL App (1st) 123543-U.

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.

¶ 20 To disqualify an employee from receiving unemployment compensation 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.*

¶ 21 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.

¶ 22 An argument, issue, or defense not presented in an administrative hearing is procedurally defaulted and may not be raised for the first time on administrative review. *Id.*, ¶ 23. Similarly,

when hearsay evidence is admitted without an objection, it is considered by the Board and given its natural probative effect. *Id.*, ¶ 24.

¶ 23 Here, Watlitton testified to hearing plaintiff use profanity—the words "shit" and/or "bullshit"—in his confrontation with general manager Jackson. While plaintiff denied using profanity, he admitted to being loud during the confrontation, and this combined with Watlitton's testimony amply supports the conclusion that plaintiff's behavior was disruptive in his workplace. While Jackson did not testify to the telephone harassment initially alleged by CTA, neither the referee nor Board made a finding of, or even a reference to, such harassment in their decisions. As to the Board not considering plaintiff's statement, we see no error in the referee or Board making no express reference in their decisions to a merely narrative statement by plaintiff when plaintiff could have testified to the same effect at the referee hearing. On this record, we conclude that the Board's decision was not clearly erroneous and that neither the referee nor the Board erred in the admission or exclusion of evidence.

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

¶ 25 Circuit court reversed; Board of Review confirmed.