2017 IL App (1st) 170210-U

No. 1-17-0210

Order filed October 30, 2017

First Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

JOHNNY A. GHOLSTON,	)	Appeal from the Circuit Court of
	)	Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 16 L 50738
	)	
THE DEPARTMENT OF EMPLOYMENT	)	
SECURITY; DIRECTOR OF EMPLOYMENT	)	
SECURITY; BOARD OF REVIEW; and ART VAN	)	Honorable James M. McGing,
FURNITURE MIDWEST, LLC,	)	judge presiding.
	)	
Defendants-Appellees.	)	

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Board of Review's decision that plaintiff was ineligible for unemployment benefits because he was discharged for misconduct was not clearly erroneous where evidence showed he acted aggressively in the workplace.

¶ 2 Plaintiff, Johnny Gholston, proceeding *pro se*, appeals from the order of the circuit court affirming the decision by the Board of Review (Board) of the Illinois Department of

Employment Security (Department) finding that he was ineligible for unemployment benefits because he was discharged for misconduct in connection with his work under section 602(A) of the Unemployment Insurance Act (Act) (820 ILCS 405/602(A) (West 2016)). The Board affirmed a Department referee's decision finding plaintiff ineligible because Art Van Furniture Midwest, LLC (AVF) terminated plaintiff's employment as a sales associate due to misconduct. On appeal, plaintiff argues that managers' and coworkers' statements that he acted aggressively were false and that, therefore, the actions leading to his dismissal did not constitute misconduct mandating denial of benefits. We affirm.

¶ 3 Plaintiff was employed as a sales associate at AVF from February 2014 to June 2016. On June 2, 2016, plaintiff was terminated from his position. On June 5, 2016, plaintiff filed for unemployment insurance benefits. In a letter dated June 17, 2016, AVF responded that plaintiff was ineligible for unemployment insurance benefits because he was discharged for misconduct.

¶ 4 AVF attached an "associate conference memorandum" and emails from several employees that were summarized in the memorandum, including from store manager Neal Aldoar, sales manager Marek Cygan, sales associate Raghda ("Rachel") Fakhouri, assistant office manager Katina Garcia, and a fifth employee with an unidentified position, Anas Hasan.

¶ 5 The conference memorandum indicated that plaintiff was terminated and provided an explanation:

> "On Thursday 06/02/16, [plaintiff] finished his shift and left the building, he came back extremely upset because the local police left a ticket on his car. He came inside the store and started arguing with the sales manager; and telling him that he is responsible, he asked [Cygan] why it is possible for another sales

> associate to have $35,000 in delivered business, [Cygan] replied to [plaintiff] that this question does not make any sense and he should worry about his own numbers. [Plaintiff] proceeded inside the store and went to the lunchroom where there were two employees [Hasan] and [Fakhouri]. They reported that [plaintiff] hit the door so hard to enter the lunchroom and he hit the lockers in a very violent way and he was upset and very loud. Both employees were scared and worry that that he might do something so they left the lunchroom.
>
> [Plaintiff] left the lunchroom to leave the building. [Garcia] witnessed [plaintiff] kicking the walls and he slammed the Exist [*sic*] door sharply when he left. And that made her worry into what he is going to do.
>
> [Plaintiff]'s behavior made four employees worry about their safety and made uncomfortable to be in the same place.
>
> Four employees gave statements into what happened."

¶ 6 On June 26, 2016, a Department claims adjudicator determined that plaintiff was ineligible for benefits because he was discharged as a result of misconduct as he had acted in "violation of a known and reasonable company rule." Plaintiff appealed that determination.

¶ 7 On July 21, 2016, a Department referee conducted an evidentiary hearing by telephone with the representatives of each party, plaintiff, and AVF employees Aldoar, Cygan, and Fakhouri.

¶ 8 Neal Aldoar testified that plaintiff was a full-time sales associate before he was "discharged for conduct." The human resources department informed plaintiff he was discharged, but Aldoar filled out the necessary paperwork. Aldoar stated that plaintiff had been

fired because of "misconduct one evening." It "came to [Aldoar's] attention" that, on that evening, plaintiff left the building to retrieve a ticket that had been placed on his car, returned to the store, and began knocking on the front door. It was "after hours" and "the store was closed." Cygan told plaintiff, "[i]f you want to come in, come through the side door." Plaintiff entered through the side door to the "lunchroom," where Fakhouri and Hasan were present. He was "acting violently" and "knocking on lockers and scream and being upset and hitting the wall." Plaintiff then left and went to the "office," where assistant office manager Katina Garcia saw him "like hitting the counter and being upset and screaming and this and that and he basically left."

¶ 9 Plaintiff had "a history of basically violent behavior at the workplace." There were outbursts prior to that evening "so many times" and Aldoar and Cygan had met with plaintiff "three to five times" to discuss them. Plaintiff had been informed his job would be in jeopardy if incidents continued to occur.

¶ 10 Marek Cygan testified that, on the evening plaintiff was discharged, employees had been doing inventory and closing the store. Plaintiff was coming back to the store from the parking lot and "it looked like he was very irritated." He knocked on the front door but employees were supposed to use the side door to enter and Cygan told him to do so. Plaintiff began kicking the door and explaining that he was about to close the store. Cygan told plaintiff "that this is not a part of his job." Cygan told plaintiff to use the side door and to "sign out and go home." Cygan left the area.

¶ 11 Cygan received a call from Fakhouri, who told him that plaintiff was kicking lockers in the break room and "saying that everybody is against him and stuff." Later, Cygan was by the office and saw plaintiff leaving and observed that "he was very violent as far as like *** hitting

the furniture bad [with his bag] and then he smashed the door when he was leaving and that was it."

¶ 12 Cygan testified that there had been "ongoing" issues with plaintiff. There had been "several complaints" and "coaching sessions" with plaintiff. Plaintiff "was clearly aware these shouldn't be happening again; he would lose his job."

¶ 13 Raghda Fakhouri testified that she was in the kitchen and saw plaintiff. He was "mad about something," "mumbling" and "slamming lockers." She "really got scared; [she] didn't know what was going on." Fakhouri asked Cygan what was going on and she was told about plaintiff "getting a ticket in the parking lot and blaming the managers for it." Fakhouri could not recall similar behavior from plaintiff in the past.

¶ 14 Plaintiff testified that he was hired as a full-time sales associate with AVF in April 2014 and was discharged on June 2, 2016. He acknowledged "little write ups" that were "tedious" and did not include his "side of what's going on." He stated, "It's like why are you guys writing me up for this, because I didn't do that." Plaintiff acknowledged he was given a "second written warning" in May 2015 that included notice that "[a]ny future conduct issues will result in additional corrective action up to and including termination." He acknowledged receiving a "third written warning" in July 2015 that indicated he violated AVF's "values and respect policy" and notified him further issues involving his conduct towards coworkers and managers would lead to termination.

¶ 15 On June 2, 2016, as plaintiff locked the doors, he saw that there was something on his car in the parking lot. Plaintiff testified, "I'm the person that, when we're closing, if [Cygan], or if [Aldoar] is closing, I'll lock the doors for them kindly." That evening, he left the doors open and

"ran" to his car, which had been ticketed. Plaintiff retrieved the ticket and walked back to the doors, but Cygan "ran up to the door and he was locking the doors and he was smiling, laughing at [him]." He told Cygan he got a ticket and to "quit playing." Cygan asked plaintiff if he was "punched out," told him to "go home," and stated, "I don't need you to lock my doors." When plaintiff continued the conversation, Cygan asked if he was "getting loud with the manager."

¶ 16 Plaintiff went to the lunchroom, where Fakhouri was the only person present, "opened [his] locker and closed [his] locker," and "said, I'm going home." He denied carrying a bag that day, explaining that he left all the things in his locker. The lockers were hard to close. He exited, "not even past the office, slanted the other way towards the middle aisle, out the door *** not touching anything."

¶ 17 Plaintiff later called Aldoar to tell him he would be in for work late the next day after working late on June 2, 2016. Aldoar responded that, "no; don't come in., I heard you were in a situation with [Cygan] *** and damaged store property." Plaintiff told Aldoar about "the situation what happened" but he was "discharged over the phone."

¶ 18 Plaintiff denied ever yelling at anyone and denied ever hitting or kicking any of AVF's property on June 2, 2016. He did not violate any rules or policies before leaving work that day. He did not know what motive Fakhouri would have to lie about what occurred on June 2, 2016.

¶ 19 AVF submitted, *inter alia*, pages from the AVF employee handbook which were marked as exhibits by the Department referee at the hearing. One of the handbook pages was an acknowledgement of receiving the handbook, which had been signed by defendant. The other pages of the exhibit include a list of offenses for which an employee may be subject to

termination. Included in the list is a rule prohibiting associates from "intimidating, threatening, cursing or interfering with associates."

¶ 20 The Department referee ruled against plaintiff, finding that he was fired for misconduct. In doing so, the referee made the following findings of fact:

> "The claimant was employed as a full time sales associate. He started working for the employer on or about 4/5/2014. The claimant last performed work and earned wages on 6/2/2016. The claimant was discharged for violating the employer's policies by displaying disruptive and aggressive behavior on 6/2/2016. The claimant was upset that he received a ticket on his vehicle and returned to the employer's premises kicking the front door, slamming lockers and hitting tables and chairs on display. The claimant was yelling and accusing the employer of causing in [*sic*] to get the ticket on his vehicle. The claimant had been previously warned about similar conduct."

¶ 21 Plaintiff appealed the referee's determination to the Board, which affirmed the referee's decision. In doing so, the Board indicated that it had reviewed the record, including plaintiff's application for benefits and the transcript of the telephone hearing, and found it to be adequate and that further taking of evidence was unnecessary. The Board noted that plaintiff had submitted a written argument along with his appeal, but stated that it had not considered that argument because plaintiff failed to certify in writing that he had mailed or served it upon the opposing party, as required by section 2720.315 of the Benefits Rules. 56 Ill. Adm. Code § 2720.315(a)(1) (2009).

¶ 22 Thereafter, plaintiff filed a *pro se* complaint for administrative review and, on January 25, 2017, the circuit court affirmed the Board's decision. Plaintiff timely appealed.

¶ 23 On appeal, plaintiff contends that his actions leading up to his termination did not constitute misconduct. Plaintiff argues that the Board erred by "not viewing the witness [*sic*] statements correctly" because all of the testimony was false. Plaintiff also argues that the Board erred because Hasan and Garcia did not testify at the hearing held by the Department referee. The State parties respond that the Board's conclusion that plaintiff was fired for misconduct is supported by the record.

¶ 24 Section 602(A) of the Act provides that a person is ineligible for unemployment insurance benefits when that person was "discharged for misconduct connected with his work." 820 ILCS 405/602(A) (West 2016). 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 2016).

¶ 25 The disqualification for misconduct is not intended to encompass all rightful terminations of employment but to exclude claimants who intentionally commit conduct that they know is likely to result in their termination, on the assumption that an employee who deliberately violates a known rule does so knowing that unemployment will likely result. *Petrovic v. Department of Employment Security*, 2016 IL 118562, ¶ 27. The elements of misconduct require that (1) the claimant deliberately and willfully violated a rule or policy of the

employer, (2) the rule or policy was reasonable, and (3) the violation either harmed the employer or was repeated despite warnings. *Id.* ¶ 26.

¶ 26 We review the decision of the Board, not the circuit court. *Id.* ¶ 22. The Board is the trier of fact in cases under the Act, and its findings of fact are considered *prima facie* true and correct. *Williams v. Department of Employment Security*, 2016 IL App (1st) 142376, ¶ 52. We shall not reweigh the evidence or substitute our judgment for that of the Board. *Id.* ¶ 53. 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. *Petrovic*, 2016 IL 118562, ¶¶ 21, 26. The Board's decision is clearly erroneous only if, "based on the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Id.* ¶ 21.

¶ 27 Regarding the first factor, we find the Board did not commit clear error when it found that AVF had a rule prohibiting employees engaging in intimidating and threatening behavior towards coworkers or customers.

¶ 28 Misconduct requires violation of an existing rule or policy. *Jackson v. Board of Review of Department of Labor*, 105 Ill. 2d 501, 512-13 (1985). An employer may prove the existence of a reasonable rule or policy "by a commonsense realization that certain conduct intentionally and substantially disregards an employer's interests." (Internal quotation marks omitted.) *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 557 (2006). Such a rule or policy need not be written or otherwise formalized. *Id.*

¶ 29 It is clear from the record that AVF's rule prohibiting employees from acting in an intimidating and threatening manner was imposed in writing and was commonsense. AVF's

employee handbook, signed by the plaintiff, had a written policy against employees "intimidating, threatening, cursing or interfering with associates." The handbook lists this offense as a "serious conduct offense" which could result in termination. Additionally, it is common sense that the use of intimidating and threatening behavior "intentionally and substantially disregards an employer's interests." (Internal quotation marks omitted.) *Manning*, 365 Ill. App. 3d at 557. Such a rule or policy is not required to be in writing or otherwise formalized. *Caterpillar, Inc. v. Department of Employment Security*, 313 Ill. App. 3d 645, 654 (2000). Accordingly, the Board did not commit clear error when it found that AVF had a rule prohibiting acting in an intimidating or threatening manner in front of coworkers.

¶ 30 The Board did not clearly err in finding that plaintiff willfully violated AVF's rule against acting in a threatening or intimidating way. 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, 714 (2007). This includes employees "who intentionally commit conduct that they know is likely to result in their termination." *Petrovic*, 2016 IL 118562, ¶ 27. Plaintiff does not dispute he was aware of AVF's rule against intimidating and threatening behavior. Nor does plaintiff dispute he received previous warnings after behaving in a hostile manner in interactions with guests and coworkers on prior occasions. Having been warned other times for similar behavior, plaintiff cannot seriously contend that he did not know that slamming lockers and hitting furniture in the presence of coworkers and managers would likely result in his termination. Plaintiff merely contends that all of the testimony presented against him was false. The Board accepted this testimony as true and rejected plaintiff's denial. We will not reweigh evidence or judge credibility on appeal. See

Williams, 2016 IL App (1st) 142376, ¶ 53. In other words, his actions were deliberate and willful within the meaning of the Act and we cannot say definitively or firmly that the Board's decision was clearly erroneous.

¶ 31 As to the third and final factor, the Board did not clearly err in finding that AVF was harmed by plaintiff's actions on June 2, 2016. "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) (2014); *Manning*, 365 Ill. App. 3d at 557 ("[T]he employee's conduct should be viewed in the context of potential harm, and not in the context of actual harm."). This standard clearly encompasses intimidating and threatening behavior this standard. See *Greenlaw v. Department of Employment Security*, 299 Ill. App. 3d 466, 448 (1998). Cygan testified he saw plaintiff kicking the front door. After plaintiff entered and came back through the front to exit, Cygan observed him acting violently, "hitting" the furniture and "smashing" the door when he left. Fakhouri testified to the referee that plaintiff's "mumbling" and "slamming lockers" made her feel threatened. The Board adopted the referee's decision and, in doing so, implicitly agreed with the referee's decision that the testimony of the AVF's employees was more credible than plaintiff's testimony, 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).

¶ 32 As a final matter, plaintiff argues that the referee committed clear error because it did "not hav[e] all witnesses at the phone hearing to make their statements," as "only [Fakhouri] attended." But "[a]s a general rule, issues or defenses not raised before the administrative agency will not be considered for the first time on administrative review." *Carpetland U.S.A., Inc. v. Illinois Department of Employment Security*, 201 Ill. 2d 351, 396-97 (2002). Plaintiff did not challenge the failure to call the missing witnesses, Garcia and Hasan, to testify during the telephone hearing at the administrative level. Moreover it is not clear on what legal theory plaintiff bases this challenge because his *pro se* brief includes no legal argument or citations to relevant authority in violation of Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2017). Accordingly, we will not consider plaintiff's claims based on witnesses' absence from the hearing for the first time on review.

¶ 33 Accordingly, the evidence supports the Board's finding that plaintiff willfully violated a reasonable AVF rule thereby causing harm to the company. We therefore conclude that the final determination of the agency finding plaintiff was ineligible for unemployment benefits because he was discharged based on misconduct connected with his employment was not clearly erroneous. We affirm the judgment of the circuit court of Cook County.

¶ 34 Affirmed.