

2018 IL App (1st) 172291-U

No. 1-17-2291

Order filed June 29, 2018

Sixth Division

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 DISTRICT

ARCHIE A. HARRIS,)	Appeal from the
Plaintiff-Appellant,)	Circuit Court of
)	Cook County.
v.)	
)	No. 17 L 50587
THE DEPARTMENT OF EMPLOYMENT SECURITY;)	
THE DIRECTOR OF EMPLOYMENT SECURITY; THE)	
BOARD OF REVIEW; and WAL-MART ASSOCIATES,)	
INC. c/o EQUIFAX (TALX UCM SERVICES),)	Honorable
Defendants-Appellees.)	Carl Anthony Walker,
)	Judge, presiding.

JUSTICE DELORT delivered the judgment of the court.

Presiding Justice Hoffman and Justice Connors concurred in the judgment.

ORDER

- ¶ 1 *Held:* Because there was sufficient evidence that plaintiff was discharged for misconduct, the Board of Review's denial of unemployment insurance benefits is affirmed.
- ¶ 2 Plaintiff Archie A. Harris appeals *pro se* from an order of the circuit court of Cook County affirming a final administrative decision by defendant, the Board of Review of the

Department of Employment Security (Board). The Board found that plaintiff was discharged for misconduct connected with his work, and thus, ineligible for unemployment insurance benefits. On appeal, plaintiff challenges the denial of benefits. We affirm.

¶ 3 The record shows that plaintiff was employed as a customer availability process (CAP) supervisor for Wal-Mart Associates, Inc., from June 14, 2011, until January 30, 2017, when he was discharged. Plaintiff applied to the Department of Employment Security (Department) for unemployment insurance benefits. He reported that he was discharged because he failed to timely clock out before receiving 54 minutes of overtime.

¶ 4 Wal-Mart protested plaintiff's claim for benefits. Tina Thomure, an unemployment claim specialist with TALX UCM Services, Inc., an authorized agent of Wal-Mart, submitted a written response to the Department stating that plaintiff was discharged for violating a reasonable and known company policy. Thomure stated that on January 26, 2017, assistant store manager Zachary Miller was gathering associates for the monthly safety and compliance meeting. Miller asked plaintiff to join the meeting. Plaintiff refused to attend, stating that he had more important things to do. Miller reminded plaintiff that as a CAP supervisor, his attendance was required, and regardless, Miller was directing him to attend. Plaintiff again refused to attend, and several other department managers overheard his refusal. Miller conducted the meeting without plaintiff. Afterwards, when addressed by management, plaintiff admitted that he refused to attend the meeting and stated that it was not part of his job. Miller discharged plaintiff on January 30.

¶ 5 Thomure explained that Wal-Mart's company policy provides that associates and supervisors in critical areas of the store, including the CAP supervisor, are required members of the store's safety team, and are expected to attend every safety team meeting. Wal-Mart's policy

further provides that associates are expected to follow all lawful directions from their supervisors. Plaintiff was previously made aware of these policies through both written and verbal notifications.

¶ 6 Thomure noted that there had been prior incidents in which plaintiff's conduct had been addressed by management. The written reports for each of these incidents were forwarded to the Department. On September 16, 2012, plaintiff was "coached" for attendance and punctuality after accumulating seven absences by arriving to work late each day. On April 4, 2014, plaintiff was coached for insubordination when he refused a reasonable request from his supervisor, claiming it was not in his job description. On September 26, 2015, plaintiff was coached for failure to follow a company policy and lack of respect for an individual when he became engaged in a verbal altercation with a vendor. On June 7, 2016, plaintiff was coached for poor business judgment and lack of respect for an individual when he engaged in an argument with another vendor that included several personal insults. On November 25, 2016, plaintiff was coached for again violating the attendance and punctuality policy after he changed his clock-in time on seven dates in one month. On each day, he was observed arriving late for work, punched in, then changed his time to reflect that he had arrived within 10 minutes of his start time. The written warning issued to plaintiff on this date indicated that if improper behavior continued, the next level of action taken would be termination.

¶ 7 Wal-Mart also provided plaintiff's exit interview completed by Miller to the Department. The report indicated that plaintiff was involuntarily terminated due to misconduct with coachings. Miller stated that plaintiff committed an act of insubordination when he refused to join the safety meeting on January 26. In addition, on January 27, plaintiff committed another act

of insubordination and violated a company policy when he refused management's direction to clock out after he was found to still be on the clock 30 minutes past his scheduled leave time. Miller further stated that plaintiff had been undermining management's authority among the store's associates by instructing them to not listen to management's directions.

¶ 8 A Department claims adjudicator conducted an initial telephone interview with plaintiff to assess his eligibility for benefits. During the interview, plaintiff stated that he was discharged because Wal-Mart did not allow overtime, and he exceeded his 40-hour weekly schedule by 50 minutes. Plaintiff stated that he had been working on a project which the marketing manager told him was a top priority. In order to finish, he worked over his 40 hours. Plaintiff claimed that the store manager, Todd (last name unknown), told him that he could work overtime, but that his manager Neel Sharma was not aware of that due to miscommunication. Plaintiff acknowledged that he was aware of the company policy, which was in the employee handbook. He claimed, however, that he was following the store manager's direction. Plaintiff stated that he had not received any prior warnings about this type or similar conduct, and he was not aware that he could be discharged for not complying with the policy.

¶ 9 After speaking with plaintiff, the claims adjudicator telephoned Wal-Mart and left a message requesting additional information. The adjudicator's summary indicates that the requested information was not provided.

¶ 10 The claims adjudicator issued a written determination finding that plaintiff was discharged because he failed to follow a manager's direction to clock out when he was found to be working past his scheduled leave time. The adjudicator further found that plaintiff's conduct

did not harm his employer or other employees. Consequently, the claims adjudicator concluded that plaintiff was eligible to receive unemployment insurance benefits.

¶ 11 Wal-Mart, through its agent, filed a written request for reconsideration of the adjudicator's decision, and an appeal to the Department referee. Wal-Mart argued that plaintiff was discharged for violating a reasonable and known company policy because he was insubordinate when he refused a manager's direction to attend a mandatory safety meeting. Wal-Mart further asserted that plaintiff had received five prior written warnings regarding his conduct, noting that three of those warnings were expired at the time of termination. Wal-Mart again submitted the written reports for the five prior incidents and the exit interview document, and requested a telephone hearing.

¶ 12 After reconsideration, the claims adjudicator again concluded, based on her original factual findings and reasoning, that plaintiff was eligible to receive benefits. Wal-Mart's appeal was then filed with the Department referee for a hearing.

¶ 13 Wal-Mart submitted to the Department written statements from three assistant store managers regarding plaintiff's conduct on his last days of employment. In a statement dated January 26, Miller stated that plaintiff refused his repeated requests to join the safety meeting. Plaintiff claimed that he was busy, he could hear from where he was working, and that his attendance was optional. Miller stated that plaintiff was insubordinate and refused to perform an essential function of his job. The store's safety team guide and policy provided that CAP supervisors are required members of the safety team. They are expected to participate in every safety meeting and communicate the information from the meeting to the associates who work in their area. Plaintiff failed to fulfill his duties by refusing to participate in the meeting.

¶ 14 In statements dated January 27, Bledi (last name not legible) and Neel Sharma, stated that Bledi was checking records to see if any associates had worked overtime and discovered that plaintiff had. Miller told Sharma to tell plaintiff to clock out. Sharma returned and said plaintiff denied he was working overtime and refused to clock out. Bledi again checked the computer records, which showed plaintiff was over his time by 45 minutes. Sharma and Bledi approached plaintiff together and told him that he was working overtime and needed to clock out. Plaintiff stated that his overtime was approved by the company and Todd, the store manager. Bledi stated that to his knowledge, no overtime was approved for anyone and that plaintiff needed to clock out. Plaintiff did so and left the building.

¶ 15 An administrative law judge (ALJ) conducted a telephone hearing to consider Wal-Mart's appeal. Miller testified under oath that plaintiff was discharged due to misconduct after he received "coachings." Similar to his prior written statement, Miller testified that plaintiff repeatedly refused to attend a safety team meeting, which was one of his responsibilities as a CAP supervisor. Plaintiff had attended prior safety meetings. Miller further testified that plaintiff was previously warned about aspects of his job. The ALJ asked whether plaintiff was previously warned about refusing a supervisory direction regarding meetings or anything else. Miller replied that in April 2014, plaintiff was coached for declining to speak to one of his supervisors and walking away from a conversation about his job responsibilities.

¶ 16 Miller further testified that plaintiff received a coaching in September 2015 for failing to respect an individual. He received another coaching in June 2016 for his judgment and failing to respect an individual when he engaged in a very disrespectful argument with a vendor. Miller could not recall plaintiff's exact response when he was fired, but plaintiff claimed that attending

the safety meeting was not part of his job. Because plaintiff had a history of insubordination, issues with respecting individuals, and three coachings, it was determined that he would be terminated for his refusal to attend the safety meeting.

¶ 17 Plaintiff testified that he was not fired for refusing to attend the safety meeting, but instead, because he worked overtime. Plaintiff pointed out that the meeting was on January 26, but the final coaching for working overtime occurred on January 27. He claimed that the managers told him that his overtime was not approved, but it actually was.

¶ 18 Plaintiff further testified that he had never previously attended a safety meeting. Plaintiff acknowledged that Miller asked him to attend the January 26 meeting. Plaintiff asked Miller if he could finish his work, and said that he would be right there. Plaintiff attended the meeting, arriving four to five minutes after it started. Prior to his arrival, he could hear everything from where he was working. Miller did not appear to have a problem with plaintiff finishing his work. Plaintiff's manager, Sharma, was standing close by and indicated that plaintiff was finishing a very important project, and that it would be acceptable if he arrived at the meeting a little late. Plaintiff shared this information with Miller when he was fired. Miller replied "you didn't come when I wanted you to." Plaintiff maintained that when he was fired, they barely discussed the meeting, and instead, focused on the overtime, which was the reason for his termination.

¶ 19 In response, Miller testified that two issues were discussed when plaintiff was terminated. The main issue was his insubordination for refusing to attend a meeting that was essential to his job function. In addition, the following day, plaintiff was insubordinate when he refused management's direction to clock out when he was found working past his scheduled leave time. Plaintiff claimed the store manager told him he could work overtime, but that was not true.

Miller again testified to the same remarks made in his written statement from January 26 regarding plaintiff's refusal to join the meeting. Miller denied that plaintiff said he would be at the meeting in a couple of minutes, and testified that he never attended the meeting.

¶ 20 In reply, plaintiff testified that he did attend the meeting. He again stated that he had never previously attended a safety meeting and claimed that Miller's testimony was fabricated. Plaintiff repeated that the last event addressed with him at that time of his termination was the overtime, which had been approved by Todd, the store manager. Plaintiff testified that Todd was on leave, and that there must have been a miscommunication regarding overtime. Plaintiff denied that he refused to clock out. Plaintiff testified that he and his staff were doing an excellent job, that his last two reviews indicated that he "exceed[ed] expectations," that he was dedicated to his job, and that he was eligible to be rehired by Wal-Mart in the future.

¶ 21 The ALJ issued a written decision setting aside the claims adjudicator's determination, and finding plaintiff not eligible for unemployment benefits. The ALJ found that plaintiff was directed to attend a safety meeting, which was a reasonable and lawful request. The ALJ further found that plaintiff refused to attend, and that his refusal was not based on a lack of skills or training. The ALJ concluded that there was sufficient evidence that plaintiff's acts constituted misconduct, as defined by the Unemployment Insurance Act (Act) (820 ILCS 405/602(A)(5) (West 2016)). Accordingly, plaintiff was discharged for misconduct and not eligible for benefits.

¶ 22 Plaintiff appealed the ALJ's decision to the Board. Plaintiff maintained that he never refused to attend the meeting. His manager, Sharma, directed him to complete his work and then attend the meeting, which is what plaintiff did. Plaintiff further maintained that he was not terminated for refusing to attend the meeting, but instead, for working overtime. He repeated that

he was approved for overtime by the store manager, and that there was merely a misunderstanding and lack of communication. Plaintiff argued that he never refused any directions from any member of the management team.

¶ 23 The Board found that the record adequately set forth the evidence, and that no further evidentiary proceedings were necessary. The Board stated that the record contained a variety of documents submitted by Wal-Mart which indicated that plaintiff had received a number of warnings for various violations of company policy, exercising poor business judgment and displaying a lack of respect for individuals. The Board detailed the five prior warnings. It then found that on January 27, plaintiff refused to clock out to avoid overtime when directed to do so by the assistant manager. In addition, plaintiff refused to attend a mandatory safety meeting. The Board found that the proximate cause of plaintiff's discharge was his insubordination on two concurrent days. On both days, plaintiff refused to follow a direct order given to him by a supervisor. The Board found that plaintiff's refusal to obey the directives of the assistant manager was not due to a lack of ability, skills, or training, nor would obeying the directives have resulted in an unsafe act. Instead, his refusal to clock out when directed to and refusal to attend the safety meeting were entirely for plaintiff's own reasons. Accordingly, the Board found that, pursuant to section 602(A)(5) of the Act, plaintiff's actions constituted misconduct. The Board concluded that plaintiff was not eligible for benefits, and affirmed the ALJ's decision.

¶ 24 Plaintiff appealed the Board's ruling to the circuit court of Cook County. The circuit court held a hearing and found that the Board's decision was not clearly erroneous. Accordingly, the court affirmed the Board's decision denying plaintiff unemployment benefits.

¶ 25 On appeal, plaintiff contends that the Board erred when it did not recognize that Miller's testimony at the telephone hearing was fabricated and inconsistent, and that Miller avoided answering questions from the ALJ. Plaintiff argues that instead of answering the ALJ's question about whether plaintiff had ever been warned about refusing supervisory direction, Miller referred to an expired coaching from 2014. Plaintiff asserts that Miller knew plaintiff had never before been warned. Plaintiff further argues that Miller falsely testified that he had a history of insubordination where only one of his prior coachings from 2014 was for insubordination, and it was expired. Plaintiff also contends that the Board did not give proper consideration to the facts which showed that he never refused to attend the meeting, but instead, that he followed the directions of his manager, Sharma, and attended the meeting after he completed his work.

¶ 26 Defendants respond that the Board's factual findings were not against the manifest weight of the evidence because plaintiff admitted that he was instructed to attend the safety meeting and instructed to clock out, and the evidence showed that he refused to follow both directives. Defendants point out that in 2016, the definition of "misconduct" in the Act was amended when the legislature identified eight enumerated work-related circumstances that constitute *per se* misconduct, for which benefits must be denied. Defendants argue that the Board correctly relied on section 602(A)(5) when it found that plaintiff's refusal to obey his employer's reasonable and lawful instructions constituted misconduct. Defendants thus argue that the Board's decision denying unemployment benefits to plaintiff was not clearly erroneous.

¶ 27 As a threshold matter, we note that plaintiff has failed to cite to any legal authority in his brief in violation of Supreme Court Rule 341(h)(7) (eff. July 1, 2017). Based on plaintiff's noncompliance with this rule, his appeal is subject to dismissal. *Marzano v. Department of*

Employment Security, 339 Ill. App. 3d 858, 861 (2003). However, because the issue is apparent, and we have the benefit of a cogent appellee's brief (see *Twardowski v. Holiday Hospitality Franchising, Inc.*, 321 Ill. App. 3d 509, 511 (2001)), we choose to entertain the appeal (see *Harvey v. Carponelli*, 117 Ill. App. 3d 448, 451 (1983)).

¶ 28 In addition, plaintiff attached to his brief a document entitled "UI Finding" and printouts of three emails that are not included in the record on appeal. We may not consider the information contained in these documents as they are not properly before this court and cannot be used to supplement the record. *Revolution Portfolio, LLC v. Beale*, 341 Ill. App. 3d 1021, 1024 (2003).

¶ 29 Plaintiff is challenging the denial of unemployment insurance benefits. This court reviews the final decision of the Board rather than that of the circuit court. *Petrovic v. Department of Employment Security*, 2016 IL 118562, ¶ 22. The Board's factual findings are considered *prima facie* true and correct, and will not be disturbed unless they are against the manifest weight of the evidence. *520 South Michigan Avenue Associates v. Department of Employment Security*, 404 Ill. App. 3d 304, 312 (2010). Under this standard, the Board's factual findings "must stand unless 'the opposite conclusion is clearly evident.' " *Id.* at 313 (quoting *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204 (1998)). Where the record contains any evidence that supports the Board's factual findings, they are not against the manifest weight of the evidence and must be sustained. *Woods v. Illinois Department of Employment Security*, 2012 IL App (1st) 101639, ¶ 16.

¶ 30 It is the Board's responsibility to weigh the evidence, determine the credibility of the witnesses, and resolve conflicts in the testimony. *Hurst v. Department of Employment Security*,

393 Ill. App. 3d 323, 329 (2009). Reviewing courts are precluded from reweighing the evidence, resolving conflicts in the testimony, or evaluating the credibility of the witnesses. *Woods*, 2012 IL App (1st) 101639, ¶ 16. Nor may a reviewing court substitute its judgment for that of the Board. *520 South Michigan Avenue*, 404 Ill. App. 3d at 317. If the issue on review merely involves conflicting testimony and witness credibility, the Board's determination should be sustained. *Id.* at 318.

¶ 31 Whether an employee was properly terminated due to misconduct, and thus, ineligible for unemployment benefits, is a mixed question of law and fact that is reviewed under the clearly erroneous standard. *Petrovic*, 2016 IL 118562, ¶ 21. The Board's decision is clearly erroneous where the court reviews the record and definitively concludes that a mistake has been made. *Id.*

¶ 32 Under section 602(A) of the Act, a person who is discharged by his employer for misconduct connected with his work is not eligible to receive unemployment insurance benefits. *Id.* ¶ 25. The Act defines "misconduct" as:

"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); *Petrovic*, 2016 IL 118562, ¶ 25.

¶ 33 In 2016, the legislature amended section 602(A) by adding a list of eight work-related circumstances under which an employee is disqualified from receiving benefits. *Petrovic*, 2016 IL 118562, ¶ 37, n.3 (citing Pub. Act 99-488 (eff. Jan. 3, 2016)). In addition to the above definition, the statute now further provides:

“The previous definition notwithstanding, ‘misconduct’ shall include any of the following work-related circumstances:

* * *

5. Refusal to obey an employer’s reasonable and lawful instruction, unless the refusal is due to the lack of ability, skills, or training for the individual required to obey the instruction or the instruction would result in an unsafe act.” 820 ILCS 405/602(A)(5).

¶ 34 Here, we find that the Board’s determination that plaintiff refused to obey reasonable and lawful instructions from his employer was not against the manifest weight of the evidence. Documents in the record and Miller’s testimony at the telephone hearing show that on January 26, Miller, an assistant store manager, asked plaintiff to join their monthly safety meeting. As a CAP supervisor, plaintiff’s attendance at the meeting was a required responsibility of his job. It was plaintiff’s duty to communicate the information from the safety meeting to the associates who worked in his area. Plaintiff repeatedly refused Miller’s requests to attend, stating that he had more important things to do and that it was not part of his job. Plaintiff continued doing his work and never attended the meeting.

¶ 35 In addition, the following day, January 27, assistant store manager Sharma instructed plaintiff to clock out when it was discovered that he was working overtime, which was not authorized. Plaintiff denied that he was working overtime and refused to clock out. Sharma and another manager, Bledi, double-checked the computer records and found that plaintiff was over his time by 45 minutes. Sharma and Bledi then approached plaintiff together, and told him that he was working overtime and needed to clock out. Plaintiff claimed that his overtime had been

approved by the store manager, which was not true. After being instructed a third time to clock out, plaintiff eventually did so.

¶ 36 Plaintiff testified that he never refused to attend the meeting, but instead, told Miller that he would be there in a few minutes, then joined the meeting late. Plaintiff also testified that he never refused to clock out, and maintained that his overtime was approved by the store manager. However, based on its ruling, the Board found plaintiff's testimony not credible. The Board found that plaintiff was insubordinate on two consecutive days when he refused to follow direct orders from his supervisors. Plaintiff challenges the Board's credibility findings, claiming that Miller's testimony was fabricated. It was the Board's responsibility to determine the credibility of plaintiff's and Miller's testimony, and this court will not disturb that determination. *Woods*, 2012 IL App (1st) 101639, ¶ 16; *520 South Michigan Avenue*, 404 Ill. App. 3d at 318.

¶ 37 The Board further found that plaintiff's refusal to obey the directives of the assistant managers was not due to a lack of ability, skills, or training, nor would obeying the directives have resulted in an unsafe act. Instead, plaintiff's repeated refusals to comply with his managers' directives to clock out and to attend the safety meeting were entirely for his own reasons. Consequently, plaintiff's refusal to obey his managers' instructions constituted misconduct as defined by section 602(A)(5).

¶ 38 Our review of the record reveals that an opposite conclusion is not clearly evident, and therefore, we will not disturb the Board's findings. *520 South Michigan Avenue*, 404 Ill. App. 3d at 313. Accordingly, the Board's determination that plaintiff was discharged for misconduct and not eligible for unemployment insurance benefits was not clearly erroneous. *Petrovic*, 2016 IL 118562, ¶ 21.

¶ 39 For these reasons, we affirm the judgment of the circuit court of Cook County affirming the Board's decision.

¶ 40 Affirmed.