2019 IL App (1st) 182198-U
No. 1-18-2198
Order filed June 3, 2019

First Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ISMAEL AGUILAR, Plaintiff-Appellant, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, DIRECTOR OF ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, BOARD OF REVIEW, and O'HARE AUTO BODY LTD., Defendants (Illinois Department of Employment Security, Director Of Illinois Department of Employment Security, and Board of Review, Defendants-Appellees).	)	Appeal from the Circuit Court of Cook County. No. 18 L 50387 Honorable Michael F. Otto, Judge presiding.

JUSTICE GRIFFIN delivered the judgment of the court.
Presiding Justice Mikva and Justice Walker concurred in the judgment.

ORDER

¶ 1 *Held*: The Illinois Department of Employment Security Board of Review's determination that plaintiff was not eligible for employment benefits was not clearly erroneous where his employer presented evidence that plaintiff drove a customer's car to a hotdog stand without authorization in violation of company policy.

¶ 2 Plaintiff Ismael Aguilar appeals *pro se* from the judgment of the circuit court affirming the decision of the Illinois Department of Employment Security Board of Review (the Board) that Aguilar was ineligible for unemployment benefits because he was discharged for misconduct (820 ILCS 405/602(A) (West 2016)). We reverse the Board's decision..

¶ 3 Aguilar was employed by defendant, O'Hare Auto Body Ltd. (O'Hare), from July 20, 2017, until March 16, 2018, when he was discharged. Aguilar applied for unemployment benefits and O'Hare, through its president Thomas Stiefbold, protested. O'Hare claimed: "This employee was terminated for direct violation of company policy. He was caught driving a customer's vehicle off the property to buy himself lunch. For this reason, no benefits shall be awarded."

¶ 4 A claims adjudicator for the Department of Employment Security interviewed Aguilar. Aguilar stated that he drove a customer's vehicle to a hotdog stand. O'Hare's owner saw him and "didn't like it." Two days later, Aguilar's manager told him the "big boss" was mad at him and not to do it again. A week later, Aguilar was fired. The claims adjudicator was unable to contact Stiefbold, leaving messages instead. The adjudicator determined that, because Aguilar's actions were not repeated following a warning or explicit instruction, he was "not ineligible" for benefits. O'Hare's request for reconsideration was denied.

¶ 5 O'Hare appealed the adjudicator's decision, and a telephone hearing was scheduled for May 18, 2018. Aguilar was notified by mail of the hearing date and time, and the phone number

which the referee would call him. On that day, Stiefbold appeared for O'Hare, but Aguilar did not appear, as the referee could not reach him by phone.[1]

¶ 6 Stiefbold testified that Aguilar was employed as an auto body polisher from July 20, 2017, until March 16, 2018. One evening, shortly before Aguilar was terminated, Stiefbold was driving home and noticed a car at a hotdog stand approximately one block from O'Hare's shop. Stiefbold recognized it as an O'Hare customer's car because it had markings on the windows that are used to instruct the employees about the work to be done. Stiefbold circled back around and verified that it was a customer's car. Stiefbold contacted Aguilar's manager, and Aguilar was terminated the following Friday.

¶ 7 Stiefbold further testified that O'Hare has a policy that employees must provide proof of insurance before they are allowed to drive customer cars.[2] After providing proof of insurance, employees are only allowed to drive cars on O'Hare's three-acre property. Aguilar was not authorized to drive vehicles at any time, on or off the property. Aguilar was not authorized to drive to the hotdog stand. When Stiefbold saw the car, he was worried that it had been stolen. Stiefbold testified that that Aguilar was "absolutely" aware of the policy.

¶ 8 The referee found that Aguilar drove a customer's car to a hotdog stand. The referee further found that Aguilar was aware of O'Hare's policy. The referee concluded Aguilar "willfully and deliberately" violated O'Hare's policy regarding driving cars, that he was discharged for misconduct, and that he was disqualified from receiving benefits.

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[1]Aguilar has never claimed he did not receive the notification. In fact, the record on appeal shows the address and phone number on the notification match those Aguilar wrote on his *pro se* appellate briefs.

[2]Although O'Hare's written appeal notice mentioned that employees had to present not only proof of insurance but of a driver's license, Stiefbold did not testify regarding a driver's license requirement.

¶ 9 Aguilar appealed the referee's decision to the Board. In his notice of appeal, Aguilar asserted that he did not move a customer's vehicle off O'Hare's premises. Aguilar admitted he stopped at the hotdog stand, but claimed that the hotdog stand was only five meters from the repair facility, and that employees pass the stand every time they move a car. Aguilar added "I was not aware of employer's policy. If there was one." Aguilar did not explain his failure to appear for the telephone hearing with the referee.

¶ 10 The Board affirmed the decision of the referee on June 28, 2018. The Board, noting that Aguilar provided no reason for his failure to appear at the telephone hearing, held that Aguilar did not have good cause for failing to appear at the telephone hearing. The Board also held that the decision of the referee was well-founded and supported by the facts and law. The Board incorporated the referee's decision as part of its decision, and affirmed the decision of the referee finding Aguilar ineligible for benefits.

¶ 11 On July 3, 2018, Aguilar filed a complaint for administrative review. On September 19, 2018, the circuit court affirmed the decision of the Board. Aguilar timely appealed.

¶ 12 As an initial matter, we note that it is difficult to determine the legal issues Aguilar intends to raise due to inadequacies in his brief. In violation of Illinois Supreme Court Rule 341(h) (eff. May 25, 2018), Aguilar provides neither citation to the record nor pertinent authority. His arguments consist primarily of unsupported factual allegations that do not define or address the issue under review, let alone pertinent legal standards. It is within our discretion to strike a brief and dismiss an appeal for failure to comply with Rule 341. See *McCann v. Dart*, 2015 IL App (1st) 141291, ¶ 20. However, because we are able to ascertain the relevant issues

from the relatively simple record and the Board's cogent brief, we will reach the merits of this appeal. See *Stolfo v. KinderCare Learning Centers, Inc.*, 2016 IL App (1st) 142396, ¶ 19.

¶ 13 Decisions of the Board regarding eligibility for unemployment benefits are subject to review under the Administrative Review Law. (735 ILCS 5/3-101 *et seq.* (West 2016)). See 820 ILCS 405/1100 (West 2016). Because the decision to deny unemployment benefits based on an employee's discharge for misconduct involves a mixed question of law and fact, reviewing courts apply a clearly erroneous standard of review. *Petrovic v. Department of Employment Security*, 2016 IL 118562, ¶ 21. We review the final decision of the Board, not that of the referee or circuit court. *Id.* ¶ 22. However, when, as here, the Board incorporates the determinations of the referee into its decision and makes no additional independent factual findings, it is appropriate to consider the findings of fact and conclusions of law of the referee to determine whether the Board's decision is clearly erroneous. *Id*. Thus we will reverse the Board's denial of unemployment benefits only if we are left with the " 'definite and firm conviction,' " based on the record as a whole, that the Board made a mistake. *Id.* (quoting *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 393 (2001)).

¶ 14 Section 602(A) of the Unemployment Insurance Act (820 ILCS 405/602(A) (West 2016)) renders an individual ineligible for benefits if he has been discharged for misconduct connected with his work. The general definition of misconduct contained in section 602(A) reads:

> "the term 'misconduct' means 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).

This definition is met when the evidence proves: (1) there was a willful and deliberate violation of an employer's rule or policy; (2) the rule or policy was reasonable; and (3) the violation either (a) harmed the employer or a fellow employee or (b) was repeated despite a previous warning or other explicit instruction from the employer. *Petrovic*, 2016 IL 118562, ¶26; *Woods v. Illinois Department of Employment Security*, 2012 IL App (1st) 101639, ¶ 19. It is the employer's burden to prove the employee was discharged for misconduct. *Petrovic*, 2016 IL 118562, ¶ 28. We will address each element in turn.

¶ 15 The first element is a willful and deliberate violation of a rule or policy. Only those employees who intentionally act contrary to their employer's rules are disqualified from receiving unemployment benefits. *Petrovic*, 2016 IL 118562, ¶ 30. Stiefbold testified that O'Hare had a policy that only drivers who submitted proof of insurance were allowed to operate customers' automobiles, and that Aguilar was never authorized to do so. Stiefbold testified that plaintiff was "absolutely" aware of the policy. Aguilar admitted in his phone interview with the claims adjudicator that he drove a customer's car; and he presented no evidence at the subsequent appeal hearing rebutting Stiefbold's assertion that he knew about the policy. In light of Stiefbold's unequivocal and uncontested testimony, we cannot find that the Board clearly erred in finding that the policy existed, Aguilar knew about it, and Aguilar willfully violated it.

¶ 16 We note that Aguilar contends, on appeal, that a supervisor told him to move customer vehicles on O'Hare's three-acre facility, and that he sometimes "drove three or four cars in one day, that was part of my job." Aguilar also contends on appeal that he was not aware he could

not drive customers' cars, and "was never told or sign any paper about the [policy]." He claims he had to drive by the hotdog stand every time a manager ordered him to move the cars "to the back or the front." We simply observe that, because Aguilar never appeared for the telephone hearing with the referee, no evidence was presented to the referee to support these contentions. Therefore, we cannot find that the Board clearly erred by accepting Stiefbold's uncontested testimony about the existence of a policy that prohibited Aguilar from driving customer vehicles, on or off the property, and that Aguilar know about the policy, when he drove a customer's car to the hotdog stand.

¶ 17 Moreover, we cannot conclude that the Board clearly erred when it determined that such a policy was reasonable. Driving an automobile is not an activity without risks. Accordingly liability insurance for operation of an automobile is generally mandatory. See, *e.g.*, 625 ILCS 5/7-601 (West 2016). Moreover, these were customer cars. Therefore, a policy that requires employees driving customer vehicles to provide proof of insurance is inherently reasonable.

¶ 18 Finally, we are faced with the question of harm to the employer. O'Hare never alleged, and the Board does not argue here, that Aguilar's actions were repeated. Therefore, the question is whether Aguilar's actions harmed O'Hare. "The weight of authority recognizes that harm to the employer can be established by potential harm and is not limited just to actual harm." *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 329 (2009) (collecting cases). Here, there was clearly a potential for harm to O'Hare. Although Aguilar was not involved in an accident and did not apparently damage the vehicle, the potential for such harm existed the moment he got into a customer's car for which O'Hare was responsible and drove to a hotdog

stand, no matter how close to O'Hare's shop. Accordingly, we cannot conclude that the Board's decision that Aguilar's actions harmed O'Hare was clearly erroneous.

¶ 19 In sum, we conclude that the Boards' decision finding Aguilar ineligible for benefits was not clearly erroneous. We therefore reverse the decision of the Board.

¶ 20 Affirmed.