

STATE OF ILLINOIS
DEPARTMENT OF EMPLOYMENT SECURITY

BOARD OF REVIEW

BOARD DOCKET NO. ABR-07-4413

LOCAL OFFICE: 047

CLAIMANT: (RESPONDENT)

EMPLOYER: (APPELLANT)

Ralph D Luna

Agency For Community Transit
P.O. Box 7500
Granite City IL 62040-7500

OFFICE USE NO. 306

TYPE OF APPEAL:

RDS DOCKET NO. AR-7013428A

MC-5.05 Misconduct

REF IDENT. NO. 557

ISSUE AND BENEFIT PERIOD:

SOC. SEC. NO.

01 03/11/2007 - 03/24/2007

DECISION

This is an appeal by the employer from a Referee's decision dated May 3, 2007, which set aside the claims adjudicator's determination and held that the claimant was discharged for reasons other than misconduct connected with work and is not subject to disqualification under Section 602A of the Illinois Unemployment Insurance Act. The employer is a party to these proceedings.

We have reviewed the record of the evidence in this matter, including the transcript of the testimony submitted at the hearing conducted by telephone on April 20, 2007, at which the claimant, counsel for the employer, and witnesses for the employer appeared. We have considered the arguments presented by the employer in accordance with Section 2720.315 of the Benefit Rules. The record adequately sets forth the evidence so that no further evidentiary proceedings are deemed necessary.

The record discloses that the claimant worked as a driver and then as a detailer for the employer, a public transit authority. The claimant was discharged for violation of a rule prohibiting the personal use of the employer's tools, equipment and facilities. The claimant alleged that the discharge was in retaliation for having filed an OSHA complaint.

On January 31, 2006 the claimant received a disciplinary letter suspending the claimant for three days. The claimant improperly used a forklift and damaged company property. The claimant stated that the discipline was for "chipping three bricks." (Tr. 32, ln.6). The claimant thought this discipline was unfair. "And there's case upon case where the mechanics have driven buses out of the

shop, and...torn up the rack...Yet they gave me three days off for chipping three bricks." (Tr. 35, ln.5-10). "So when you talk about discipline for somebody for chipping three bricks and you got (sic) this kind of chaotic stuff going on out there..." (Tr.36, ln.6-8). "Uh, the main thing that, that (sic), uh, I was concerned about is the fact that they gave me three days off for chipping three bricks, and there was (sic) worse things going on out there." (Tr. 41, ln.5-7).

The claimant stated "If (emphasis added) you're going to give me this (the three day suspension) because I have chipped three bricks, and I'm violating an OSHA (inaudible) OSHA violations (sic) by operating a fork truck, I'm gonna be calling OSHA." "And that's what [he] did." (Tr. 32, ln. 11-14). The claimant threatened the employer with a call to OSHA if he received the three day suspension. The employer did not retreat. The claimant waited until he was disciplined to file complaints with OSHA. The claimant then filed a retaliation charge against the employer. The retaliation charge was dismissed.

The next time the claimant received discipline it was a warning dated May 31, 2006. The claimant filed another charge claiming that the employer meted out the discipline in retaliation for the claimant's having filed an OSHA complaint some four months prior to the discipline. The charge of retaliation was dismissed.

By memo dated December 27, 2006, employees, including the claimant, were reminded that the personal use of company tools, equipment and facilities was prohibited. The claimant made a conscious decision to take a part, from his personal repair project, to the facility. Once there, the claimant used company equipment for the repair. By letter dated March 8, 2007, the claimant was terminated for this infraction. The claimant argued that the rule was ignored in practice. The credible evidence indicates that that was not the case.

The issue presented by this appeal is whether the claimant was discharged for misconduct connected with work under Section 602 of the Illinois Unemployment Insurance Act.

The primary purpose of the Illinois Unemployment Insurance Act is to provide benefits to individuals who are involuntarily unemployed due to a lack of suitable work and for no other reason. Accordingly, the Act disqualifies from benefits an individual who is discharged for misconduct connected with the work. In such cases, the individual is not involuntarily unemployed due to a lack of suitable work.

The filing of a charge with OSHA does not immunize an employee from future discipline. The charges of retaliation, filed by the claimant, were dismissed. The claimant willfully and deliberately violated a reasonable employer rule thereby harming the employer; morale was negatively affected. The claimant's misconduct could have compromised the public trust; public money was being spent on personal repair projects.

The Courts in *Petro v Board of Review*, 654 N.E.2d 232 (Ill.App. 2d Dist. 1995), *McAllister v Board of Review*, 635 N.E.2d 596 (Ill.App. 1st Dist. 1995), *Brode v Didrickson*, 645 N.E.2d 990 (1995), and *Greenlaw v Department of Employment Sec.*, 701 N.E.2d 175 (Ill App 1st Dist. 1998),

did not require a showing of actual harm to conclude that the harm element of Section 602A was satisfied. In *Brode* and *Greenlaw* the Court found that the claimant's conduct should be viewed in the context of potential harm and not in the narrow context of actual harm. Clearly this incident had the potential to affect employee morale and cooperation and ultimately harm the employer. See *Greenlaw*, 299 Ill.App.3d at 448, 233 Ill.Dec. 532, 701 N.E.2d 175. The court reiterated, in *Livingston v Department of Employment Security*,—N.E.2d—, 2007 WL 2163996, Unempl. Ins. rep. (CCH) P 8511, (Ill.App. 1 Dist. 2007) that harm need not be actual harm and can consist instead of potential harm.

The Referee misstates the requirement that the employer express immediate and continuing nonacceptance of a rule violation to prevent a finding that the employer condoned offending behavior. This announced requirement is a requirement held to claimants who argue that they left work voluntarily with good cause attributable to the employer. The requirement is inapplicable in this case.

Accordingly, we conclude that the claimant was discharged for misconduct connected with work and is subject to a disqualification of benefits from March 11, 2007, and thereafter until the claimant requalifies for benefits under Section 602A of the Illinois Unemployment Insurance Act.

The decision of the Referee is REVERSED.

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Dated and Mailed on OCT 03 2007 at Chicago, Illinois

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(ESTE ES UN AVISO IMPORTANTE RESPECTO A SUS DERECHOS A REPASAR POR LOS CORTES. SI NO LO ENTIENDE, BUSQUE UN INTERPRETE.)

If you are aggrieved by this decision and want to appeal, you must file a complaint for administrative review and have summons issued in circuit court **within 35 days** from the above mailing date.

You may only file your complaint in the circuit court of the county in which you reside or in which your principal place of business is located. If you neither reside nor have a place of business within Illinois, then you must file your complaint in the Circuit Court of Cook County.

- Legal references:**
- **Illinois Unemployment Insurance Act, 820 Illinois Compiled Statutes 405/1100**
 - **Administrative Review Law, 735 Illinois Compiled Statutes 5/3-101 et seq.**