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**O R D E R**

*HELD:* Where evidence established that employee violated store's policy on cashing checks, Board's determination that employee committed misconduct making her ineligible for unemployment benefits was not clearly erroneous; circuit court's decision was reversed and Board's decision was affirmed.

¶ 1 Defendant, the Board of Review (the Board) of the Illinois Department of Employment Security, appeals the order of the circuit court reversing the Board's decision to deny unemployment benefits to plaintiff Marcella Gielbaga, a former employee at an Ultra Foods supermarket. On appeal, the Board contends its determination that plaintiff committed misconduct in the course of her job was not clearly erroneous. We reverse the judgment of the circuit court and affirm the decision of the Board.

¶ 2 The record establishes that plaintiff worked as a "front-end" manager at the Ultra Foods location in Lombard from December 2006 until her employment was terminated on May 6, 2008. Plaintiff cashed several personal checks written to the Ultra Foods store by Gary Jumper, the store's manager. Jumper's checks were returned for insufficient funds. Plaintiff's employment was terminated because she failed to follow the store's check-cashing procedures.

¶ 3 Plaintiff's claim for unemployment benefits was challenged by her employer, SVT.<sup>1</sup> The defendants in this action are the Board and its chairman, and the Illinois Department of Employment Security (the Department) and its director.

¶ 4 In July 2008, the Department referee found plaintiff had not deliberately or willfully violated a rule or policy of her employer and therefore was eligible for unemployment benefits. SVT appealed that determination and requested a hearing, asserting that plaintiff violated a known company procedure.

¶ 5 In January 2009, a hearing was held after which plaintiff was found ineligible for unemployment benefits. Plaintiff sought review of the Board's decision in the circuit court, asserting that Ultra's challenge to her claim for unemployment benefits was not timely filed and also arguing her conduct was not deliberate or willful.

¶ 6 In an agreed order entered on July 1, 2009, the circuit court dismissed the action without prejudice and remanded to the Board for a new hearing at which the Board was to consider the timeliness of both SVT's objection to plaintiff's claim of benefits and Ultra Foods' appeal of the awarding of benefits. Pursuant to the order, if the Board determined those actions by

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<sup>1</sup> SVT, LLC, doing business as Ultra Foods, was a defendant but is not a party to this appeal.

Ultra Foods were timely, the Board was to address the merits of the issue of plaintiff's misconduct.

¶ 7 On August 24, 2009, a Department referee conducted a telephone hearing with plaintiff, plaintiff's counsel, SVT representative Nora Knapp, Lombard store supervisor Larry Moore and loss prevention director John Mowery. Before hearing testimony, the referee stated that both the employer's protest to plaintiff's claim for unemployment benefits and the employer's appeal of the award of benefits were timely.

¶ 8 Mowery described two store policies on cashing checks relevant to plaintiff's actions. First, an employee who cashes a check must run the check through the Telecheck system, which provides an automatic transfer of funds to the store's bank account. Mowery stated that when plaintiff cashed checks for Jumper, she "took them as \*\*\* a paper check outside of the system," meaning she did not use Telecheck and instead submitted the check to the store office for deposit into the store's bank account.

¶ 9 Mowery testified that under a second store policy, a personal check can be cashed only for not more than \$40 over a store purchase. Jumper's checks were cashed without a store purchase and for amounts greater than \$40. When Mowery asked plaintiff about cashing Jumper's checks, she said she knew it was against store policy but she did it because he was the manager.

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Mowery said three other employees said plaintiff had authorized checks for Jumper or directed them to cash checks for Jumper. Mowery said the store policy did not specifically address cashing the personal check of a store employee.

¶ 10 Moore, the Lombard store supervisor, testified the policy for cashing a check only for \$40 over a purchase amount was the same for an employee or a customer, and that all checks were to be processed through Telecheck. Moore stated that upon plaintiff's hiring, she received a cashier manual explaining the store's policies and procedures. Moore also said plaintiff trained the store's cashiers in those procedures, including Telecheck.

¶ 11 Mowery and Moore both interviewed plaintiff about Jumper's checks on May 6, 2008, the day on which her employment was terminated. Moore testified that Mowery spoke to plaintiff first, and that when Moore interviewed her, she was upset. Moore said plaintiff told him she "knew she was wrong" and "knew it was against policy."

¶ 12 Plaintiff testified she cashed three or four personal checks for Jumper for between \$300 and \$500 each. Plaintiff said she was aware of the policy that checks could only be written for \$40 over the amount of a purchase. To cash the checks for Jumper, plaintiff did not use Telecheck. Plaintiff said a manager could override Telecheck by entering a personalized code;

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however, plaintiff said she lacked the authority to bypass the Telecheck system.

¶ 13 Plaintiff said she became aware her actions violated store policy only after Mowery and Moore informed her of the violation on the day her employment was terminated. She acknowledged the standard procedure for cashing a check was to use Telecheck and that she did not do so in cashing the checks for Jumper. Mowery asked plaintiff to write a statement.

¶ 14 Plaintiff testified that it was not standard procedure to use Telecheck on each check transaction. She stated that if a customer was a "good customer" and Telecheck did not accept the check, a manager could override Telecheck's request for more information. She also stated she overrode the Telecheck system once for an employee who wrote a check for between \$40 and \$100 without making a purchase. Plaintiff said she was never told she could not cash checks for employees. Moore acknowledged that managers deviated from the check-cashing policies occasionally for longstanding customers.

¶ 15 The referee admitted into evidence plaintiff's one-page written statement dated May 6, 2008. In the statement, which is signed by plaintiff, Mowery and Moore, plaintiff stated that Jumper asked her to cash several checks because he was having trouble with his ATM card. The statement continued:

"[Jumper] would give me a check and tell me to put it in an envelope and put it on his desk. I would put the check through as a paper check and not in as a [T]elecheck. He said he closed one account and reopened another. I questioned why the check number was so high and he said that he started the checks with the number that his other [account] ended with. It all started about a month and a half ago and the first check was for I think was [\$500] and then after that [it] was [\$800]. \* \* \* I knew it was against the policy but I didn't think it was wrong because he was the store manager."

¶ 16 On August 25, 2009, the referee issued an order disqualifying plaintiff from unemployment benefits under section 602(A) of the Illinois Unemployment Insurance Act (the Act) (820 ILCS 405/602(A) (West 2008)). The order stated that plaintiff violated the employer's reasonable check-cashing policies by processing Jumper's checks and that the employer lost more than

\$12,000 from cashing those checks. Plaintiff appealed to the Board, which affirmed the referee's decision.

¶ 17 On December 14, 2009, plaintiff filed a complaint for judicial review of that decision. Plaintiff argued that at the August 2009 hearing, the Department referee erred in considering evidence from the January hearing. Plaintiff also asserted the referee did not determine whether Ultra's appeal was timely filed and no evidence established that she knew she was violating a store policy. On April 28, 2010, the circuit court entered an order reversing the Board's decision. The Board now appeals.

¶ 18 On appeal, the Board contends its determination that plaintiff was discharged from her employment for misconduct was not clearly erroneous. The individual claiming unemployment insurance benefits has the burden of establishing his eligibility, and an employee discharged for misconduct is ineligible to receive those benefits. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 327 (2009). Whether an employee was properly terminated for misconduct in connection with his work involves a mixed question of law and fact, to which we apply the clearly erroneous standard of review. *Hurst*, 393 Ill. App. 3d at 327.

¶ 19 Misconduct under the Act involves the deliberate and willful violation of a reasonable rule or policy governing the individual's behavior in performance of his work. Three elements

of misconduct must be established: (1) the rule or policy must be deliberately and willfully violated; (2) the rule or policy of the employer must be reasonable; and (3) the violation must have harmed the employer or it must have been repeated by the employee despite previous warnings. 820 ILCS 405/602(A) (West 2008); *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 557 (2006). The Board argues that its decisions that plaintiff violated Ultra Foods' check-cashing policy, which constituted a reasonable work rule, and that plaintiff's actions resulted in a detriment to the store, were not clearly erroneous.

¶ 20 The Board is the trier of fact in cases involving claims for unemployment compensation, and we review the findings of the Board, rather than the findings of the Department referee or of the circuit court. *Village Discount Outlet v. Department of Employment Security*, 384 Ill. App. 3d 522, 524-25 (2008). An agency decision is clearly erroneous where the entire record leaves the reviewing court with the definite and firm conviction that a mistake has been made. *Hurst*, 393 Ill. App. 3d at 327.

¶ 21 An employee willfully or deliberately violates a work rule or policy by being aware of, and consciously disregarding, that rule or policy. *Hurst*, 393 Ill. App. 3d at 328-29. The rule or policy of the employer also must be reasonable, meaning that the rule or policy concerns "standards of behavior which an employer has a right to expect" from an employee. *Sudzus v.*

*Department of Employment Security*, 393 Ill. App. 3d 814, 827 (2009), quoting *Bandemer v. Department of Employment Security*, 204 Ill. App. 3d 192, 195 (1990).

¶ 22 The record supports the Board's determination that plaintiff's actions constituted misconduct under section 602(A) of the Act. Mowery testified as to the existence of the two store policies in question: the use of the Telecheck system and the prohibition against cashing checks without a store purchase and only for \$40 above that amount. Plaintiff indicated in her statement that she knew her cashing of Jumper's checks was "against the policy."

¶ 23 Plaintiff argues evidence was presented that her conduct was not deliberate or willful. She asserts she was unaware of a policy against cashing checks for fellow employees and she points out she was following orders from Jumper, her supervisor. Plaintiff also contends that in the administrative proceeding, Ultra did not present a written copy of the store's check-cashing policies.

¶ 24 An employer is not required to prove the existence of a reasonable rule by direct evidence. *Manning*, 365 Ill. App. 3d at 557. Ultra presented sufficient proof of its written policy on check-cashing. Moore testified that at the start of plaintiff's employment at Ultra, plaintiff received a manual of store policies and procedures. That testimony was not disputed by

plaintiff. Even if no testimony was presented as to the existence of a store policy manual, a rule or policy does not need to be written down or otherwise formalized. *Sudzus*, 393 Ill. App. 3d at 827. The existence of the store policies and plaintiff's knowledge of the rule were questions of fact resolved by the Board as the trier of fact. The Board's decision that plaintiff had knowledge of the store's check-cashing policy and consciously disregarded those rules was supported by plaintiff's statements to Mowery and Moore and her written admission that her actions violated the store's policy.

¶ 25 Moreover, Ultra's check-cashing policy was reasonable. The rules regarding the Telecheck system and the limit on the amount of cash to be given in exchange for a personal check were intended to prevent the store employees from unknowingly accepting fraudulent checks in return for cash of more than a nominal amount of \$40. The rules and policies were intended to prevent Ultra from losing money that would be difficult and costly to recoup.

¶ 26 Lastly, plaintiff contends no evidence was presented that Ultra was harmed by her actions of cashing checks for Jumper. She asserts that no checks were entered into evidence and that Ultra may have recouped some of the money from Jumper through a lawsuit.

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¶ 27 Numerous cases have held that in the context of this analysis, harm to an employer can be established by potential harm and is not limited to actual harm. *Hurst*, 393 Ill. App. 3d at 329 (and cases cited therein). It is clear that there is potential harm to a retail business such as Ultra Foods when an employee cashes checks for large amounts of money without determining the sufficiency of funds in an account.

¶ 28 In conclusion, the Board's determination that plaintiff's actions constituted misconduct such that she should be denied unemployment benefits was not clearly erroneous. Accordingly, the judgment of the circuit court is reversed, and the Board's decision denying unemployment benefits to plaintiff is affirmed.

¶ 29 Circuit court reversed; Board's decision affirmed.

¶ 30 PRESIDING JUSTICE HALL, dissenting:

¶ 31 I respectfully dissent. In order for an employee to be found guilty of misconduct under section 602(A) of the Act, the employer must establish three elements: (1) that the employee engaged in deliberate and willful conduct, (2) in violation of a reasonable rule or policy of the employer, that (3) harmed the employer or another employee or was repeated despite previous warnings. *Garner v. Department of Employment Security*, 269 Ill. App. 3d 370, 374, 646 N.E.2d 3 (1995). All three elements must be established in order for an employee to be discharged for misconduct. *Garner*, 269 Ill. App. 3d at 374. The employer has the burden of proving misconduct by a preponderance of the evidence. See *Messer & Stilp, Ltd. v. Department of Employment Security*, 392 Ill. App. 3d 849, 853, 910 N.E.2d 1223 (2009).

¶ 32 Under the particular circumstances of this case, I do not believe that any of the elements were proven by a preponderance of the evidence.

¶ 33 First, I do not believe that the plaintiff's conduct in cashing her manager's personal checks outside of the Telecheck system amounted to misconduct rendering her ineligible to receive unemployment benefits. Even if an employee's conduct justifies her termination, it does not necessarily disqualify her from receiving unemployment benefits. *London v. Department of Employment Security*, 177 Ill. App. 3d 276, 280, 532 N.E.2d 294

(1988).

¶ 34 An employee's conduct is considered willful misconduct warranting denial of unemployment benefits only where the employee intentionally disregards the employer's interests or knowingly violates a reasonable rule or policy of the employer. See *Washington v. Board of Review*, 211 Ill. App. 3d 663, 669, 570 N.E.2d 566 (1991) ("the Act limits misconduct to those acts that are intentional"); see also *Farmers State Bank of McNabb, v. Department of Employment Security*, 216 Ill. App. 3d 633, 637, 576 N.E.2d 532 (1991); *Wrobel v. Illinois Department of Employment Security*, 344 Ill. App. 3d 533, 536-37, 801 N.E.2d 29 (2003).

¶ 35 In this case, plaintiff repeatedly denied having any knowledge that it was improper for her to cash her manager's personal checks outside of the Telecheck system. I believe her testimony was credible in light of the following: no evidence was presented showing the existence of a rule or policy, written or otherwise, governing or prohibiting the practice; no evidence was presented showing that plaintiff was ever warned to stop the practice; and the employer admitted that exceptions to the check-cashing policy were occasionally made for certain customers. In addition, on each occasion plaintiff cashed a check for her manager or for another employee outside of the Telecheck system, she used her own security password ensuring that her employer knew she had cashed the checks.

¶ 36 Plaintiff did not attempt to hide or conceal her role in cashing the checks and there is nothing in the record indicating that she personally benefitted from cashing the checks. She may not have used sound judgment, but the failure to use sound judgment is not the same as a willful disregard for an employer's interests. See *Messer & Stilp, Ltd.*, 392 Ill. App. 3d at 537 (carelessness and poor job performance may justify termination, but standing alone they do not render an employee ineligible to receive unemployment benefits).

¶ 37 And finally, a review of the record shows that the employer failed to present evidence showing how it was harmed by plaintiff's conduct in cashing her manager's personal checks outside of the Telecheck system. The employer had the burden of proving the element of harm.

¶ 38 In the instant case, the employer never offered a single check, cashed by plaintiff or anyone else, into evidence. Other than uncorroborated testimony, unsupported by any documentation, the employer presented no evidence of harm.

¶ 39 For the foregoing reasons, I believe that plaintiff is entitled to unemployment benefits under the Act. I would affirm the judgment of the circuit court reversing the Board's decision denying unemployment benefits to plaintiff.