

unemployment benefits to Voll. On appeal, plaintiff contends the Board's decision that Voll committed misconduct in the course of his job was clearly erroneous. We affirm.

¶ 2 The record establishes that Voll worked as a server at Harry Caray's Restaurant¹ in Chicago for about 12 years before his employment was terminated on March 21, 2008. In May 2008, the Department informed Voll he was ineligible to receive unemployment benefits because he violated a company policy by reporting to work under the influence of alcohol.

¶ 3 On October 27, 2008, a Department referee conducted a telephone hearing with Voll, Voll's manager Brad Gorski and the restaurant's general manager, Lee Projansky. Gorski testified that when Voll arrived at the restaurant, he spoke to customers for about 20 minutes. Gorski personally observed Voll and did not smell alcohol but stated Voll's eyes were "glassed over." Gorski asked Voll to take a blood alcohol test as required by the employee manual, and Voll declined. On cross-examination, Gorski stated the customers did not complain about Voll's behavior or appearance.

¶ 4 Projansky testified Voll called the restaurant before his shift was scheduled to start to ask if someone else could take his shift. Projansky spoke to Voll and said his voice "seemed slurred." Projansky told a fellow manager his concerns about Voll based on the phone conversation. Projansky was notified when Voll arrived at the restaurant and was told by another employee that Voll was intoxicated and was interacting with customers.

¶ 5 Voll was taken to an office and Projansky asked if he had been drinking, which Voll denied. At the outset of the conversation, Projansky was concerned with Voll's well-

¹ Harry Caray's Restaurant is part of the Kinzie Restaurant Group, which is a party to this appeal, along with the Department. The restaurant's ownership and/or management also is referred to in the record as the Kinzie Limited Partnership. We refer to these entities collectively as "Harry Caray's."

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being. Projansky said Voll "appeared sweaty, flush, [and] glassy eyed" and his speech was slurred. Projansky told Voll he could not work in that condition. According to Projansky, Voll "thought he was in fit condition to work" and "ramble[d] on about other people who drink prior to work."

¶ 6 Projansky testified Harry Caray's had a "zero tolerance policy for people who show up to the restaurant under the influence of alcohol or drugs," which was stated in an employee manual and in memos that were circulated and posted in the restaurant. Projansky told Voll he would have to "submit to a blood test to show that he was not intoxicated, because I believed he was," and Voll refused to take the test. Projansky said at that point, he decided to terminate Voll's employment because Voll had "an addiction problem that he needed to seek help with."

¶ 7 Voll testified he was sick with the flu on the day in question, which was a Friday. He said during that week, he had been ill on his regular off-days of Tuesday and Wednesday and found someone to cover his scheduled shift on Thursday. Voll said he was "still feeling horrible" Friday and tried to find a replacement worker by calling the restaurant three times; however, he was nevertheless told to report for work. The referee asked Voll if he took medication that day, and Voll replied he had taken "a couple of swallows" of Robitussin that did not affect his behavior. Voll said he "probably did look a little roughed up" due to his illness.

¶ 8 Voll said a manager demanded he take a blood alcohol test and he refused because he was afraid of needles and did not like hospitals. Voll acknowledged he did not know how the test would be administered or request details about the test but called it a "trap" and said the restaurant managers had "abused" him.

¶ 9 On October 28, 2008, the referee issued an order disqualifying Voll from receiving unemployment benefits under section 602(A) of the Illinois Unemployment Insurance

Act (the Act) (820 ILCS 405/602(A) (West 2008)). The order stated Voll was terminated for refusing to take a blood alcohol test. Voll appealed to the Board, which affirmed the referee's decision.

¶ 10 Voll sought judicial review of the Board's decision in the circuit court. On April 9, 2009, the circuit court held a hearing and remanded the case to the Board instructing the Board or a referee:

"to conduct an additional hearing * * * on the sole issue of what is the policy of the employer regarding testing and to develop what that policy is through documentary evidence rather than solely testimonial evidence as it was the basis of the Referee's and the Board's determination of misconduct that there was a refusal based on policy, and issue a new decision after same."

The court dismissed Voll's complaint without prejudice.

¶ 11 A second hearing was conducted on August 24, 2009, in accordance with that order. Before that hearing, each party submitted documentary evidence of Harry Caray's employment policies. Voll submitted an employee handbook dated June 2001 which stated, in pertinent part:

"ALCOHOL AND DRUG USE

Reporting to work under the influence of alcohol or illegal drugs is a severe offense subject to disciplinary action and termination.

DRUG TESTING

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HC Restaurant Group reserves the right to do employee drug testing for matters involving reasonable suspicion."

¶ 12 Harry Caray's presented a 2007 employee handbook which included a similar provision that violating the company's drug and alcohol policy would result in immediate termination for the first offense. The policy stated that reporting to work under the influence of alcohol or drugs was a severe offense that could subject the employee to disciplinary action "up to and including termination."

¶ 13 The 2007 handbook further stated:
"Harry Caray's Restaurant Group reserves the right to conduct employee drug and/or alcohol testing for matters involving reasonable suspicion, or if the employee has been involved in a work-related accident or is returning to work after having violated the Alcohol and Drug Use Policy above. 'Reasonable suspicion' refers to observations concerning the appearance, behavior, speech or odors of the employee that are indicative of alcohol and/or drug use. Employees instructed to take a test under this policy must proceed immediately to the testing site. Failure to submit to such a test will subject the employee to termination of his/her employment."

¶ 14 In addition, Harry Caray's submitted a memo dated February 7, 2006, to employees and managers reminding them of the possibility of immediate termination for reporting to work under the influence of alcohol or illegal drugs.

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¶ 15 Regarding the 2001 handbook submitted by Voll, Harry Caray's asserted the 2007 handbook superceded the earlier version and the company memorialized "in writing in its 2007 Employee Handbook its longstanding policy of conducting drug/alcohol testing in a reasonable suspicion setting and terminating employees who refuse such a test."

¶ 16 Also submitted by Harry Caray's was a memo to the payroll department dated March 21, 2008, the date of Voll's termination, indicating that Voll was terminated for "use of alcohol/illegal drugs" and signed by Projansky. That memo was accompanied by typewritten statements by Projansky and Gorski consistent with their testimony about Voll's appearance and the conversation that resulted in Voll's termination. According to Gorski, after Voll was told his employment was terminated and he was escorted to the employee locker room, Voll "did admit to having a few drinks prior to his shift."

¶ 17 At the August 24, 2009, hearing, the Department referee noted its receipt of Harry Caray's documentation of its employment policies. Kerri Cech, director of operations for Harry Caray's, testified that any employee who came to work under the influence of drugs or alcohol, or who refused to take a drug or alcohol test, was subject to immediate termination. Those policies had been in place since Cech began working for the company in 2001. Cech had a signed acknowledgment from Voll that he received the 2001 handbook.

¶ 18 On cross-examination by Voll's counsel, Cech said the 2001 handbook did not state an employee could be terminated for refusing to take a drug test. Cech did not know if a memo was issued between 2001 and 2008 stating that an employee could be terminated for refusing to take an alcohol test. Cech said Voll was terminated for violating the policy against coming to work under the influence of alcohol and also because he refused to take an alcohol or drug test. Cech said the company had an arrangement with Northwestern University to complete that testing if necessary.

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¶ 19 Voll testified he received a copy of the 2001 handbook during his employment at Harry Caray's but never received the 2007 handbook. Voll said he was aware Harry Caray's had a zero tolerance policy about reporting to work under the influence of alcohol but said he "never showed up to work intoxicated so I never even thought about it." However, when presented with the language of the 2007 handbook, Voll said he was not aware of the termination policy for arriving at work under the influence of alcohol or drugs.

¶ 20 On August 25, 2009, the referee issued an order based on the second hearing. The referee determined Voll arrived at work while intoxicated and refused to take a drug and alcohol test as required by the 2007 handbook, and that Voll violated the employer's rules and was therefore disqualified from receiving unemployment benefits. Voll appealed to the Board, which affirmed the referee's decision. The Board stated the employer had a policy in place and that Voll was aware of the zero tolerance policy and was discharged for misconduct related to his work.

¶ 21 On January 15, 2010, Voll filed a motion to reinstate his case in the circuit court to challenge the Board's decision, asserting the absence of a written policy requiring him to submit to a blood test and asking the court to conduct a hearing on his entitlement to unemployment benefits. Voll died on February 6, 2010. The circuit court granted a motion to substitute plaintiff, who was Voll's wife, as special representative and granted the motion to reinstate the case. On June 22, 2010, the circuit court affirmed the decision of the Board. Plaintiff now appeals.

¶ 22 On appeal, plaintiff contends the Board's decision that Voll committed misconduct relating to his job was 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).

¶ 23 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). The Board and Harry Caray's have filed briefs responding to plaintiff's assertions on appeal, and they assert the Board's decision was not clearly erroneous and the evidence supported a finding of deliberate misconduct that resulted in harm to Harry Caray's.

¶ 24 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. 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.

¶ 25 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 or 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).

¶ 26 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. Plaintiff contends Harry Caray's failed to establish that Voll consciously disregarded a company

rule. Plaintiff argues the evidence presented to the Board showed Voll was not advised of the language in the 2007 employee handbook that he would be subject to alcohol testing (as well as the previous policy of drug testing in the 2001 handbook) upon his employer's reasonable suspicion. He also argues that if an employee is not advised of a rule, the rule is not reasonable.

¶ 27 The record supports the Board's determination that Voll's actions constituted misconduct under section 602(A) of the Act. The Board found that Voll was intoxicated when he arrived at the restaurant on the day his employment was terminated. We note that at the first hearing, Voll denied being inebriated, instead asserting he was ill. However, the Board is the trier of fact in unemployment compensation cases, and it is that agency's role to weigh the evidence, determine the credibility of witnesses, and resolve conflicts in testimony. *Hurst*, 393 Ill. App. 3d at 329.

¶ 28 The Board heard evidence that Voll's condition while at work violated a company rule or policy of which Voll was aware. Pursuant to the 2001 employee handbook, which Voll admittedly received, an employee was subject to disciplinary action and termination for reporting to work under the influence of alcohol or illegal drugs. That rule was repeated in the 2007 handbook. At the hearing on remand, Voll expressly acknowledged his awareness of Harry Caray's "zero tolerance" policy about employees reporting to work under the influence of alcohol. Voll therefore was aware of the rule and violated a known rule or policy.

¶ 29 It is incumbent upon this court to note that the Board also heard evidence, at the hearing on remand, of Harry Caray's policy on alcohol and drug testing. The 2001 and 2007 employee handbooks state that a worker suspected of reporting to his job while under the influence of alcohol or drugs was subject to testing for those substances. The 2007 handbook went on to state that a worker's failure to submit to such a test would "subject the employee to termination" of his employment. Voll refused to take a blood alcohol test upon his manager's

request but argues on appeal he was never informed of the company's policy that such tests must be administered on demand and his refusal would result in the termination of his employment. However, even if Voll was not unaware of the drug testing requirement, Harry Caray's had a separate basis for terminating his employment: his arrival at work while intoxicated.

¶ 30 The company's policies regarding alcohol and drug use were reasonable. A reasonable rule 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). Harry Caray's written policies that an employee could not report for work under the influence of alcohol or drugs, and that the existence of those substances could be confirmed by a mandatory test, are pertinent to the employee's performance in the workplace and to the safety of the company's employees and its customers. See *Neville v. Board of Review, Illinois Department of Labor*, 143 Ill. App. 3d 548, 550-51 (1986) (rules regulating employee's alcohol consumption "during and even before work hours" are reasonable when employee's appearance or conduct on job are affected).

¶ 31 The final requirement of misconduct is that the employee's violation of a rule or policy must have harmed the employer or been repeated by the employee despite previous warnings. 820 ILCS 405/602(A) (West 2008). 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). The potential harm to Harry Caray's caused by an intoxicated employee is evident. An employee who arrives for work under the influence of alcohol and without control of his faculties can cause harm to fellow employees and customers and also jeopardize the good will the restaurant has fostered with its patrons.

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¶ 32 In conclusion, the Board's determination that Voll's actions constituted misconduct such that he should be denied unemployment benefits was not clearly erroneous. Accordingly, the decisions of the Board and the circuit court are affirmed.

¶ 33 Affirmed.