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FIRST DIVISION
FILED: JUNE 27, 2011

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DESIREE HENRY,
Plaintiff-Appellant
v.
ILLINOIS DEPARTMENT OF EMPLOYMENT
SECURITY, DIRECTOR OF ILLINOIS
DEPARTMENT OF EMPLOYMENT SECURITY,
BOARD OF REVIEW, and RESTORATION HOME
HEALTH SERVICES,
Defendants-Appellees.

) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY
)
) No. 10 L 50382
)
)
)
) HONORABLE
) ELMER J. TOLMAIRE, III,
) JUDGE PRESIDING.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

Held: Department of Employment Security's determination that the plaintiff was terminated due to misconduct was clearly erroneous.

The plaintiff, Desiree Henry, appeals from the circuit court's judgment confirming the decision of the defendants, Illinois Department of Employment Security (the Department), Director of Illinois Department of Employment Security, and the Board of Review

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(Board), to deny her unemployment benefits after her termination from the employment of the defendant Restoration Home Health Services (Restoration). On appeal, the plaintiff argues that the Board's determination, that she was not entitled to benefits because she was terminated due to misconduct, was clearly erroneous. For the reasons that follow, we agree with the plaintiff, reverse the circuit court's decision, vacate the Board's decision, and remand the cause to the Board with instructions to award benefits to the plaintiff.

According to the documentary evidence included in the record, Restoration discharged the plaintiff from her position as a homemaker on June 16, 2009. When she filed for benefits pursuant to the Illinois Unemployment Insurance Act (Act) (820 ILCS 405/100 *et seq.* (West 2008)), Restoration protested on the ground that she had been discharged for misconduct, in that "[s]he exposed confidential business information to individuals who had no need to know" and thereby violated Restoration's code of conduct as well as the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

The Department's local office found that the claimant was discharged because she told a client that her paycheck had been delayed. The local office concluded that that information did not constitute confidential information and, accordingly, that the

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plaintiff did not violate any reasonable employment rule and was entitled to benefits. Restoration appealed that decision to a Department hearing referee.

At the ensuing hearing, Theresa Duhart, one of the plaintiff's supervisors at Restoration, testified that, after the plaintiff's paycheck was delayed, Restoration "got a call from the [Veterans' Administration (VA)] *** stating that [the plaintiff] called down there asking about [Restoration's] funding." Duhart said that she understood that the plaintiff also told a Restoration client about Restoration's funding problems. According to Duhart, Restoration did not "care what she talked about her paycheck because that's her paycheck; but the issue was that she talked about [Restoration's] funding being late, which she had no authority to make those conversations with the VA." Duhart testified that the plaintiff's actions violated Restoration's policy prohibiting employees from releasing "confidential information" and also violated HIPAA, which Duhart understood to require confidentiality "of all clients, all employees, and all company business." According to Duhart, the call to the VA caused Restoration to "almost [lose] [its] contract." Another of the plaintiff's supervisors, Jennifer Sykes, testified that "the big issue" was that the plaintiff, as well as other Restoration employees, called the VA.

In her testimony, the plaintiff agreed that she called the VA

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to ask why the funding, and thus her paycheck, had been delayed. The plaintiff denied having discussed the matter with any Restoration clients. She stated that she received no warnings prior to her termination and was not familiar with HIPAA or any code of conduct. In response, Duhart insisted that the plaintiff had been informed of her HIPAA obligations and of Restoration's policies.

After the hearing, the referee set aside the decision of the local office and found as follows, in pertinent part:

"[The plaintiff] was discharged *** for contacting the employer's client about her paycheck being delayed. *** [Restoration] had not yet received the necessary funding from the Veterans Administration (VA), its client. *** The VA contacted the employer and threatened to cancel its contract ***. No prior warnings were issued, but the employer concluded that the [plaintiff] violated its code of conduct and privacy laws.

* * *

*** She was not authorized to make this contact, and it was foreseeable that her call might jeopardize the employer relationship with the VA. Moreover, the [plaintiff] contended that she was unfamiliar with the employer's policies ***, but the employer's witness credibly testified to the contrary.

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The preponderance of the evidence supports the conclusion that the [plaintiff] acted in a manner that constituted misconduct connected with her work. Accordingly, she is disqualified for benefits under *** the Act."

The Board thereafter issued a decision affirming and incorporating the referee's ruling. The plaintiff filed a complaint for administrative review with the circuit court, which confirmed the Board's ruling. She now timely appeals.

Our role in an appeal of an administrative review action is to review the decision of the Board, not the order of the circuit court. *White v. Department of Employment Security*, 376 Ill. App. 3d 668, 671, 875 N.E.2d 1154 (2007). Our standard of review for any given issue, depends on whether the issue is one of fact, one of law, or a mixed question of law and fact within the agency's area of expertise. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill.2d 380, 390, 763 N.E.2d 272 (2001). A reviewing court will therefore consider *de novo* any legal issues raised in an administrative appeal, but it will defer to an agency's findings of fact unless those findings are against the manifest weight of the evidence. *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill.2d 191, 204-205, 692 N.E.2d 295 (1998). An agency's resolutions of mixed questions of law and fact--those issues for which the historical facts are established

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and the rule of law undisputed, so that the only question is whether the facts satisfy a statutory standard or whether as applied to the facts the rule of law is violated--will not be overturned on review unless clearly erroneous. *AFM Messenger*, 198 Ill.2d at 391. 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. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill.2d 380, 395, 763 N.E.2d 272 (2001).

The question of whether an employee is ineligible for benefits due to termination for misconduct in connection with her work involves just this type of mixed question of law and fact. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 327, 913 N.E.2d 1067 (2009). Accordingly, we apply the clearly erroneous standard of review to the Board's determination that the claimant was terminated due to misconduct.

The Act states that an individual "shall be ineligible for benefits for the week in which [she] has been discharged for misconduct connected with [her] work, and[] thereafter." 820 ILCS 405/602(A) (West 2008). For the purposes of this rule, "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 [her] work, provided such

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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 2008). This standard sets out three elements for a misconduct finding: misconduct is established where it is shown that (1) the employee undertook a deliberate and wilful violation of a work rule or policy; (2) the employer's rule or policy must be reasonable; and (3) the violation either harmed the employer or was repeated by the employee despite previous warnings. *Odie v. Department of Employment Security*, 377 Ill. App. 3d 710, 713, 881 N.E.2d 358 (2007).

Our first difficulty with the Department's decision is that we are not convinced that the plaintiff's conduct actually violated any Restoration policy. At the hearing on the plaintiff's claim, her Restoration supervisor testified emphatically that the only disclosure that concerned Restoration was the plaintiff's telling the VA that Restoration's funding had been delayed. As the plaintiff points out in her briefs, however, it can hardly be argued that this information was held in confidence from the VA, the very entity that had delayed the funding.

That problem aside, even if we were to assume that the first two prongs of the above test were met, so that the plaintiff's communicating the lack of funding to the VA constituted a willful

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breach of Restoration's reasonable policy, we see no nexus between that alleged violation and the harm or potential harm Restoration claims. The only Restoration policy described by the evidence was its policy barring employees from disclosing company business to outside entities. The Department found that the plaintiff violated this policy by disclosing company business--the delay in its funding--to the VA. However, on the third prong of the above test, which requires that the employee's violation have caused harm to her employer, the Department found harm based not on the disclosure of confidential information, but instead on the VA's agitation at being contacted by a Restoration employee. While the harm the Department and Restoration identify may indeed have been real, it is the result of the plaintiff's complaining to the VA, not a breach of any confidentiality policy.

For the foregoing reasons, we reverse the circuit court's decision confirming the Board's decision, vacate the Board's decision, and remand the cause to the Board with instructions to award benefits to the plaintiff under the Act.

Reversed and remanded with instructions.