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FIRST DIVISION  
FILED: May 9, 2011

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IN THE APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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MELINDA McELRATH,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee	)	COOK COUNTY
	)	
v.	)	No. 10 L 50183
	)	
ILLINOIS DEPARTMENT OF EMPLOYMENT	)	
SECURITY, DIRECTOR OF ILLINOIS	)	
DEPARTMENT OF EMPLOYMENT SECURITY, and	)	
BOARD OF REVIEW,	)	
	)	
Defendants-Appellants,	)	
	)	
and	)	
	)	
ACS, State and Local Solutions, Inc.,	)	
	)	HONORABLE
Defendant.	)	SANJAY TAYLOR,
	)	JUDGE PRESIDING.

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JUSTICE HOFFMAN delivered the judgment of the court.  
Presiding Justice Hall and Justice Rochford concurred in the judgment.

**ORDER**

*Held:* Department of Employment Security's determination that the plaintiff was terminated due to misconduct was not clearly erroneous.

The defendants-appellants, Illinois Department of Employment Security (the Department), Director of Illinois Department of Employment Security, and the Board of Review (Board), appeal from

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the circuit court's judgment setting aside the Board's decision to deny unemployment benefits to the plaintiff, Melinda McElrath, after her termination from the employment of the defendant ACS, State and Local Solutions, Inc. (ACS). On appeal, the appellants argue that the Board's decision, that the plaintiff was not entitled to benefits because she was terminated due to misconduct, was not clearly erroneous. For the reasons that follow, we agree with the Board, and we reverse the judgment of the circuit court.

According to the documentary evidence included in the record, the plaintiff began work for ACS in April 2006. Her December 2008 performance review indicates that she was given a verbal warning for four tardy arrivals over the preceding six months. That performance review states that tardiness might "give the appearance that [she was] not committed to her role at ACS" and that deviation from her work schedule "significantly impacts the workflow and puts additional burden on [her] team and coworkers, putting [ACS's] commitments with [its] client at risk." The review contained a warning that further corrective action could include termination of the plaintiff's employment. ACS thereafter approved a change in the claimant's work schedule, so that she could begin work at 8:30 each morning instead of 8:00. In January 2009, the plaintiff received a written warning for another tardy arrival. In March 2009, the plaintiff received a "final warning" for two more tardy arrivals. ACS terminated the plaintiff's employment on May 1, 2009, after she again arrived late to work.

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The plaintiff filed a claim with the Department for benefits pursuant to the Illinois Unemployment Insurance Act (Act) (820 ILCS 405/100 *et seq.* (West 2008)), and the Department's local office initially granted her benefits. ACS appealed that decision to a Department hearing referee. At the ensuing hearing, when asked to explain the cause of her final tardy, the plaintiff stated, "I guess the late start, wasn't prepared for the traffic that it took to get from Chicago to Carol Stream." After the hearing, the referee concluded that the plaintiff was discharged for tardiness and that her tardiness was a willful and deliberate problem that she had the power to avoid. The referee thus set aside the Department's earlier decision and found that the plaintiff was not qualified for benefits.

On January 6, 2010, the Board issued a decision affirming and incorporating the referee's ruling. The plaintiff thereafter filed a *pro se* complaint for administrative review with the circuit court, which set aside the Board's ruling. The appellants now timely appeal.

Initially, we note that the plaintiff has not filed an appellee's brief. However, we deem the issues presented in this appeal sufficiently straightforward to allow our review under the principles articulated in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill.2d 128, 133, 345 N.E.2d 493 (1976).

Our role in an appeal of an administrative review action is to review the decision of the Board, not the order of the circuit

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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 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*

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*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.

As the appellants observe in their brief, 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 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). The record plainly establishes that the plaintiff was given previous warnings about her tardiness. Further, as the appellants observe in their brief, the plaintiff cannot dispute that ACS's no-tardy policy was reasonable. See

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*Nichols v. Department of Employment Security*, 218 Ill. App. 3d 803, 811, 578 N.E.2d 1121 (1991) ("Plaintiff does not and cannot validly argue that rules prohibiting excessive absenteeism and tardiness are not reasonable under the Act"). That leaves only one element of misconduct--the willfulness element--to be considered.

"Wilful misconduct stems from an employee being aware of, and consciously disregarding, a company rule." *Odie*, 377 Ill. App. 3d at 713. Here, as the appellants observe in their briefs, the record demonstrates that the plaintiff was aware of ACS's tardy policy, had received an accommodation in her work hours to help her adhere to the policy, yet still violated it after receiving her final warning. Although, in her hearing testimony, she attributed her final violation to traffic problems presumably beyond her control, the appellants note that she also admitted having gotten a "late start" on the morning of her final tardy, and they argue that she could have avoided those problems by departing for work in a more timely fashion. Thus, the appellants argue, the Board was correct when it concluded that the plaintiff's late departure for work was a willful decision entirely within her control. Given the facts of this case, we cannot say that the Board's decision on this point was clearly erroneous. We therefore defer to the Board's decision that the plaintiff was not entitled to benefits because she was terminated for misconduct.

For the foregoing reasons, we reverse the judgment of the circuit court, which set aside the Board's decision to deny the

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plaintiff benefits under the Act.

Reversed.