

No. 1-10-1281

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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LANITA L. GUENO,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	
THE DEPARTMENT OF EMPLOYMENT SECURITY;	)	No. 10 L 50025
DIRECTOR, THE DEPARTMENT OF EMPLOYMENT	)	
SECURITY; and BOARD OF REVIEW,	)	
	)	
Defendants-Appellants	)	
	)	
(WCZ, LLC c/o UC EXPRESS,	)	Honorable
	)	James C. Murray,
Defendant).	)	Judge Presiding.

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PRESIDING JUSTICE STEELE delivered the judgment of the court.

Justices Murphy and Salone concurred in the judgment.

**ORDER**

*Held:* Claimant was not entitled to unemployment benefits where she repeatedly violated her employer's reasonable attendance policy, despite the fact that her violations were the result of car trouble, when claimant failed to take adequate action to find alternative transportation to work.

¶ 1 This administrative review action arises from a claim for unemployment benefits. After

plaintiff Lanita L. Gueno was terminated from her position as a receptionist, she applied for unemployment benefits. She was initially granted benefits, but her employer, WCZ, LLC (WCZ), appealed, arguing that she had committed misconduct through repeated absenteeism. The Board of Review of the Illinois Department of Employment Security (the Board) reversed the decision and found her ineligible for benefits. Plaintiff appealed to the circuit court, which found the Board's decision clearly erroneous and reversed the decision. The Board appealed. We reverse the circuit court's decision and affirm the decision of the Board.

¶ 2 The relevant facts are not in dispute. Plaintiff was employed as a receptionist by WCZ from March 2008, until August 2009. In January 2009, she received a warning about her attendance during December 2008. WCZ asserted that plaintiff had accumulated 16 tardies during the month of December. Plaintiff did not dispute her attendance record, but claimed that her attendance difficulties were the result of trouble with her automobile.

¶ 3 In March 2009, plaintiff was again counseled about her attendance and warned that she could not take vacation days unless they were scheduled in advance.

¶ 4 On July 19, 2009, plaintiff's car broke down. She called in, and did not work on July 20 and July 21. On July 22, she worked but was approximately 30 minutes late. She also worked on July 23 and July 24. Plaintiff worked the week of July 27, but arrived late each day.

¶ 5 On August 3, 2009, plaintiff called and informed WCZ that she would be unable to work because she did not have a ride. On August 4, 2009, plaintiff called and again stated that she did not have a ride to work. That day, WCZ sent plaintiff a letter informing her that she had a history of unexcused absences and stating, "We expect you to be able to work out a transportation solution and continue to work your regular schedule of 8:00 am – 5:00 pm by no later than Thursday, August 6, 2009." The letter warned that if she did not resolve her attendance issues, she would be terminated effective August 6. Plaintiff did not report for work

and was terminated. On August 6, 2009, she applied for unemployment benefits.

¶ 6 Initially, we note that plaintiff has not filed an appellee's brief. However the record is simple and the issue presented is the type that can be considered without the aid of an appellee's brief. Therefore, we may consider this appeal in accordance with the standards stated in *First Capital Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d. 128 (1976).

¶ 7 The Board contends that its determination that plaintiff's failure to remedy her tardiness and absenteeism rose to the level of misconduct was not clearly erroneous. In an administrative review proceeding, we review the decision of the Board rather than the circuit court. *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 819 (2009). Here, the historical facts are not in dispute, and the relevant law is not in need of interpretation. The question before the Board therefore was whether plaintiff's conduct satisfied the statutory standard for misconduct. Accordingly, we will review the issue against a clearly erroneous standard of review. See *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 211 (2008). In other words we can reverse only if we are left with the " ' "definite and firm conviction that a mistake has been committed." ' " *Cinkus*, 228 Ill. 2d at 211 (quoting *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 391-95 (2002) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948))).

¶ 8 Under section 602(A) of the Unemployment Insurance Act (820 ILCS 405/602(A) (West 2008)), an employee is ineligible for benefits if she was discharged for misconduct. Illinois courts have adopted a three-part test for determining if the claimant's action constituted misconduct, which requires the Board to find: "(1) a deliberate and wilful violation of a work rule or policy occurs; (2) the employer's rule or policy is reasonable; and (3) the violation either harms the employer or was repeated by the employee despite previous warnings." *Odie v. Department of Employment Security*, 377 Ill. App. 3d 710, 713 (2007).

¶ 9 Here, there can be little doubt that the Board properly found that the second and third prongs of this test were satisfied. A work rule that requires employees to be present during their regularly scheduled work hours is clearly reasonable. The Board cites the administrative code and argues that we can presume harm results from absences and tardiness because such actions cause a disruption of the general operations of a business. See 56 Ill. Admin. Code §2840.25(b)(3). However, in this case, even without such a presumption, we would be forced to conclude that plaintiff was repeatedly warned about her conduct. Accordingly, the only question before us is whether plaintiff's conduct was deliberate and wilful.

¶ 10 We are not unsympathetic to plaintiff's plight. If this had been an isolated or infrequent occurrence, we might be inclined to find a lack of misconduct. For example, in *Wrobel v. Department of Employment Security*, 344 Ill. App. 3d 535, 538 (2003), this court held that a claimant who missed work because he overslept when he failed to set his alarm clock had not committed misconduct, but was merely negligent. However, in this case, we are not dealing with an isolated incident. Plaintiff had been repeatedly late because of car trouble in December 2008, and had been warned that the conduct was unacceptable. Plaintiff, nevertheless made no contingency plans that would allow her to arrive at work on time should her apparently unreliable vehicle prove to be just that. Similarly, the July occurrences were not an isolated incident. Plaintiff was not simply late the first day her car failed. Rather, she was tardy day after day during the week of July 27, even after being warned that this conduct was unacceptable and her job was in jeopardy. We must, of course, be mindful of our standard of review in this case. Reasonable minds could differ on whether the number of absences were sufficient to infer conscious disregard of WCZ's attendance policies or whether the actions plaintiff took to remedy her situation amounted to more than mere negligence. Nevertheless, although we might not necessarily reach the same conclusion as the Board, we can not say that, under these

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circumstances, its decision leaves us with the definite and firm conviction that a mistake was made. See *Cinkus*, 228 Ill. 2d at 211.

¶ 11 Therefore, for the reasons discussed above, we reverse the decision of the circuit court of Cook County and affirm the decision of the Board.

¶ 12 Reversed.