



¶ 2 The defendants-appellants, the Illinois Department of Employment Security (Department), its Director, and its Board of Review (Board), appeal from an order of the circuit court of Cook County reversing the Board's decision to deny unemployment insurance benefits to plaintiff Sharon Smiley (plaintiff), who had been discharged by her employer, defendant MHC Operating Limited Partnership c/o Employers Edge (MHC). Defendants-appellants contend that plaintiff was justifiably discharged for misconduct connected with her work in that she was insubordinate to her supervisors.

¶ 3 A claims adjudicator initially denied plaintiff's application for unemployment benefits. This decision was protested and a telephonic evidentiary hearing was held before a Department referee. At the hearing, MHC's director of human resources, Barbara Itter, testified that plaintiff worked for MHC as a receptionist from April 3, 2000, until January 28, 2010, when she was discharged in a meeting with Itter and plaintiff's direct supervisor, Angela Kurbyun. Plaintiff had been directed by Kurbyun to leave her desk to take her lunch break and she refused. She was called into a meeting with Itter and Kurbyun, where she became very defensive and argumentative when Itter explained that she should follow the direction given to her by Kurbyun, as her supervisor. As Itter tried to continue explaining this, plaintiff kept interrupting, even when Itter asked her to stop doing so. Plaintiff also refused to go to lunch and refused to hear Itter's explanation of the policy. According to Itter the meeting, which only took four minutes, became very heated and plaintiff would not allow Itter to speak. Based on plaintiff's insubordination and her prior history of behavior, Itter terminated her employment.

¶ 4 Itter explained that MHC's employee handbook stated that hourly non-exempt employees such as plaintiff were required to take a 30-minute lunch break. This was also a daily practice which plaintiff had performed up until that day. Itter also stated that employees were not permitted to eat lunch at their work stations, a policy which was in the handbook and which had been the practice for the past 10 years. The position of plaintiff's desk, which was directly at the

front door of the office, made this particularly important for her. According to Itter, they had many discussions with plaintiff over her eating breakfast at her desk. In addition to this conduct, Itter stated that there had been problems with plaintiff's customer service attitude and she had received complaints about the manner in which plaintiff dealt with individuals at the front desk and over the phone. Itter explained that by not adhering to the 30-minute lunch break requirement, plaintiff was placing the company in violation of Illinois labor laws. Also, plaintiff's failure to follow her supervisor's direction injured the reputation of the organization.

¶ 5 Angela Kurbyun gave further details concerning the incident on January 28, 2010. When Kurbyun saw plaintiff remaining at her desk during her lunch hour, she told plaintiff that it was time for her to go to lunch. Plaintiff expressed a concern that students should not be answering phone calls for executives, but Kurbyun told her that she would be taking plaintiff's calls in plaintiff's absence. Despite this reassurance plaintiff insisted on staying at her desk, saying she did not have to eat if she did not want to. Kurbyun told her that she still needed to step away from her desk for the break, but plaintiff refused. At this point visitors entered the reception area so Kurbyun stepped away so as "not to create a scene." Kurbyun informed Itter of what had occurred and Itter told Kurbyun to tell plaintiff to punch out and take her lunch. If plaintiff refused, Kurbyun was to bring plaintiff to Itter's office for a meeting on this matter. When Kurbyun returned to plaintiff's desk, plaintiff claimed that she had already punched out and taken her lunch, although Kurbyun had observed plaintiff working on a spread sheet on her computer, answering the phone, and responding to questions by people who approached her desk during this time period. Kurbyun then brought plaintiff to Itter's office for the meeting, in which Kurbyun confirmed that plaintiff became very argumentative and kept interrupting Itter, not allowing her to finish her sentences.

¶ 6 Kurbyun also testified to previous instances when she had issued warnings to plaintiff. One of these occurred several weeks before plaintiff's termination. There had been a conflict in

scheduling of a conference room and Kurbyun informed plaintiff that she should be aware of such scheduling and take the initiative to relocate parties when necessary. Plaintiff responded that she did not have to do that; she would only do what she was asked to do. Kurbyun explained to plaintiff that part of her job was scheduling conference rooms and she should be able to work out scheduling conflicts, but plaintiff repeated that she would only do what she was asked to do. When Kurbyun told her they were trying to provide a higher level of service by avoiding such conflicts in the future, plaintiff stated that she did not have to do that.

¶ 7 Kurbyun also related an instance in December when plaintiff failed to follow a new procedure for making sure that boxes were ready for vendors to pick up. The new policy, which had been explained to plaintiff verbally and in writing, required plaintiff to schedule such pickups and to notify the mail room attendant to have the boxes waiting by the freight elevator. On this occasion plaintiff had failed to follow the policy and the office was disrupted when the vendor came and found that the boxes were not ready. When Kurbyun tried to explain the process again, plaintiff asked Kurbyun how much she expected the mail room person to do. Kurbyun told her that the issue was plaintiff's failure to follow procedures which had been explained to her verbally and in writing, but plaintiff walked away from Kurbyun and went into Itter's office to speak to her.

¶ 8 MHC's director of risk management, Mary Jo Kucera, testified that plaintiff's behavior on January 28 was not an isolated incident, but was part of a pattern of behavior over several years in which she had difficulty performing customer service tasks. According to Kucera they had spoken to plaintiff about this, but plaintiff did not wish to perform those tasks and said she was uncomfortable with them. According to Kucera it was not uncommon that they would have to "talk [plaintiff] down" to get her comfortable enough to perform a task she did not wish to perform.

¶ 9 Plaintiff testified that she was told that if she did not like the changes being made throughout the company she should resign but she refused because she had been with the company for 10 years and wanted her job. She also testified that Kurbyun became her manager as of December 17, 2009, and she began to have problems with her on the "respect" side. When plaintiff went to Itter to complain about the way Kurbyun would say things to her, plaintiff claimed that Itter told her to just deal with it because Itter and Kurbyun were friends. Plaintiff asserted that on January 28<sup>th</sup> she did punch out but remained at her desk to perform a work assignment from another employee because she did not plan to eat that day. When asked by the referee why she did not follow the directive of her manager, plaintiff said she assumed she could do what she wanted to do with her time once she had punched out. However plaintiff also admitted that she was aware of labor laws requiring her employer to give her a rest break after working a certain number of hours. Plaintiff denied interrupting Itter during the meeting she had on January 28 with Itter and Kurbyun. She did admit that she had been given several verbal warnings in the past, including in her performance review but she was also told that she was doing better. Kucera had also advised her that as part of her duties in answering the switchboard she was to take complaint calls as well. According to plaintiff this became so stressful for her that she suffered a stroke and was off work for almost three months beginning on July 13, 2009.

¶ 10 At the close of the testimony, Itter asked the referee whether she would also be considering a number of documents concerning plaintiff's past behavior. These documents had apparently been faxed to the referee, and they have been made part of the record on appeal. However, the referee refused to consider them, saying they had not been put into the record and the hearing was closed. Accordingly we will not consider them for purposes of this appeal.

¶ 11 Based upon the testimony we have summarized, the referee determined that plaintiff had refused her manager's directive to leave her work station and take a lunch break, even though plaintiff knew that company policy and labor laws required her to take such a break. The referee

also placed credence in the testimony of Kurbyun and Itter that in their meeting with her, plaintiff refused to listen and repeatedly interrupted Itter. The referee also found that plaintiff had received prior warnings for her behavior and attitude at work. Accordingly, the referee found that plaintiff was ineligible for unemployment benefits because she had been discharged for misconduct connected with her work. Plaintiff appealed this decision to the Board, which incorporated the referee's decision as part of its decision and affirmed the denial of benefits. Plaintiff then filed a complaint for administrative review with the circuit court of Cook County, which reversed the decision of the Board, finding that plaintiff's actions "did not r[i]se to the level of misconduct." This appeal ensued.

¶ 12 Although plaintiff has failed to file a brief on appeal, we will consider the merits of the appeal under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-133 (1976). The Board is the trier of fact, and it is the decision of the Board which we review. *Caterpillar, Inc. v. Department of Employment Security*, 313 Ill. App. 3d 645, 653 (2000). We will not overturn the Board's determination unless the record creates a definite and firm conviction that a mistake has been made. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001). Section 602(A) of the Unemployment Insurance Act (Act) disqualifies an individual from receiving unemployment benefits if that person was discharged for misconduct connected with his or her work. 820 ILCS 405/602(A) (West 2008); *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010). Misconduct is found where there has been (1) a deliberate and willful violation of (2) a reasonable rule or policy (3) which harms plaintiff's employer or fellow employees. 820 ILCS 405/602(A) (West 2008); *Phistry*, 405 Ill. App. 3d at 607; *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 826 (2009).

¶ 13 Here, the Board adopted the referee's findings, which focused primarily on one instance of insubordination in almost 10 years of employment. That insubordination arose from plaintiff's

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efforts to perform additional work for MHC, beyond what was required of her. The insubordination occurred in a meeting with her superiors which lasted only four minutes. Balanced against this was evidence that plaintiff had found recent job changes to be so stressful that she suffered a stroke and was off work for nearly three months. There was also evidence that in the past, managers had been able to work with plaintiff to get her to perform new tasks with which she was not comfortable.

¶ 14 Based on this evidence, we find clearly erroneous the Board's determination that plaintiff was ineligible for unemployment benefits because of misconduct related to her work. We reverse the Board's determination and affirming the ruling of the circuit court that plaintiff was eligible for such benefits.

¶ 15 Affirmed.