

No. 1-11-2511

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EMP EXCLUSIVE, INC.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	
)	No. 11 L 50295
ILLINOIS DEPARTMENT OF EMPLOYMENT)	
SECURITY; DIRECTOR, ILLINOIS DEPARTMENT OF)	
EMPLOYMENT SECURITY; BOARD OF REVIEW;)	
and MEGHAN L. HICKEY,)	Honorable
)	Alexander P. White,
Defendants-Appellees.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Epstein and Justice J. Gordon concurred in the judgment.

ORDER

- ¶ 1 *Held:* Board of Review's determination that claimant was eligible for unemployment benefits was not clearly erroneous where evidence established that claimant acted reasonably when confronted with conflicting orders from her employer. Circuit court's order affirming Board of Review's determination was affirmed.
- ¶ 2 The plaintiff-appellant, EMP EXCLUSIVE, Inc. (EMP), appeals from an order of the circuit court of Cook County affirming the decision of the Board of Review of the Department of Employment Security (Board) to grant unemployment insurance benefits to claimant Meghan L.

Hickey, who had been discharged by her employer, EMP. It is EMP's contention that claimant was justifiably discharged for misconduct connected with her work in that she was insubordinate to her supervisor by disobeying a direct order of that supervisor. The Illinois Department of Employment Security (Department), its Director, its Board, and claimant contend that the Board correctly found that claimant acted reasonably when confronted with conflicting orders from her supervisor.

¶ 3 Claimant worked for EMP as the manager of a hair salon from January 8, 2009, until she was discharged on February 21, 2010, for allegedly refusing to follow a directive of the hair salon's owner, Paula Salouras. Claimant's application for unemployment benefits was initially granted by a claims adjudicator. EMP appealed this decision and a telephonic evidentiary hearing was held before a Department referee. Apparently the referee could not reach claimant by telephone and the hearing was held without her participation. The referee determined that claimant was ineligible for benefits. But when claimant appealed this determination, the Board set aside the referee's decision and remanded the matter to be heard *de novo* before another referee at a hearing in which claimant would also be permitted to participate.

¶ 4 At that hearing, Salouras testified that as the owner of the franchise where claimant worked, she was claimant's supervisor. Claimant was discharged for insubordination because on February 20, 2010, she did not follow a directive from Salouras to send home an employee whom Salouras observed on security cameras to be using her cell phone on company time, in derogation of a company policy. Salouras asserted that she had given claimant this same directive one week earlier, but claimant denied that this occurred and the referee never made a factual finding as to the alleged earlier directive. On February 20, Salouras texted claimant and instructed her to send home the employee who was using a cell phone. Claimant failed to do so and also did not call

Salouras back when Salouras called the salon and asked that claimant or the employee call her back when they were not busy. The following day Salouras fired claimant.

¶ 5 Claimant testified that she did not send the employee home because the salon was shorthanded, as an employee failed to come to work that day. It was a very busy day, with the salon handling 108 customers. Claimant testified that by keeping the employee working at the store she was attempting to follow the salon's policy of keeping it profitable and functioning in the manner that it should. Claimant testified that this was the directive given to her from the time she began working at the salon. She elaborated that the directive was to keep the store functioning to its maximum capacity. If she had sent this employee home the salon would have fallen behind and lost customers. Accordingly, claimant argued at the hearing that she had acted in the best interests of the salon, following Salouras' direction that their "main goal" was to give great customer service and be profitable.

¶ 6 The referee issued a written decision, finding that claimant had refused to follow a reasonable directive, constituting insubordination amounting to misconduct. For that reason the referee found that claimant was disqualified from receiving unemployment benefits.

¶ 7 This decision was appealed by claimant to the Board, which held that claimant was unable to perform her job within the parameters set by her employer, Salouras. The Board also found that claimant had not engaged in deliberate, wilful misconduct and that negligence or inability to perform assigned tasks did not disqualify employees from receiving unemployment benefits. Accordingly, because the employer had failed to meet her burden of proving that claimant was discharged for misconduct connected with her work, claimant was found to be eligible for unemployment benefits beginning February 21, 2010. EMP appealed this determination to the circuit court of Cook County, which affirmed the Board's determination of eligibility for unemployment benefits, and EMP then brought this appeal.

¶ 8 In these cases the Board is the trier of fact, and therefore 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). Pursuant to section 602(A) of the Unemployment Insurance Act (Act), an individual is disqualified 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).

¶ 9 We find that this record does not create a definite and firm conviction that the Board erred in granting unemployment benefits to claimant. Two contrary directives were at issue here. The overriding directive, according to claimant's testimony, which the Board clearly credited, was to keep the salon running smoothly and profitably. The more limited directive was for claimant to send home an employee for using a cell phone while she was working. Claimant testified that the salon was particularly busy that day. She believed that sending the employee home would be contrary to the overall company policy of maximizing profits while keeping the salon running smoothly. For this reason, the Board clearly found that claimant did not commit a deliberate or willful violation of a reasonable rule of EMP. Claimant was faced with two contradictory directives or policies and she could not have followed both of them. Thus the Board did not err in finding that claimant's violation of one of these directives, the more narrow one concerning use of cell phones, did not amount to a deliberate violation of a reasonable EMP

1-11-2511

rule. For these reasons, we affirm the order of the circuit court of Cook County which affirmed the decision of the Board.

¶ 10 Affirmed.