

No. 1-12-0749

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ETHEL COLLIER,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	
)	
THE BOARD OF REVIEW OF THE ILLINOIS)	No. 11 L 50711
DEPARTMENT OF EMPLOYMENT)	
SECURITY, et al; and LAKE SHORE HEALTH)	
CARE LLC,)	The Honorable
)	Margaret Brennan
Defendants-Appellees.)	Judge Presiding.
)	

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* The Board of Review of the Illinois Department of Employment Security (Board) determined that plaintiff was ineligible for unemployment benefits after she was discharged due to misconduct related to her work. The circuit court of Cook County upheld the Board's decision, and this court affirmed the judgment because the evidence was sufficient to sustain the Board's decision.

¶ 2 Plaintiff Ethel Collier appeals from an order of the circuit court of Cook County, affirming the ruling of the Board of Review of the Illinois Department of Employment Security

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(Board) that she was ineligible for unemployment benefits under section 602(A) of the Illinois Unemployment Insurance Act (Act) (820 ILCS 405/602(A) (West 2010)) due to misconduct in connection with her work. On appeal, plaintiff contends that the Board erred as a matter of law in relying upon oral testimony regarding the contents of a surveillance video that was not presented to the agency. In addition, plaintiff essentially contends that the Board erred by relying on incredible testimony in determining that she engaged in misconduct. We affirm.

¶ 3

BACKGROUND

¶ 4 We recite only those facts necessary to understand the issues raised on appeal. The record shows that plaintiff was employed as a CNA for Lake Shore Health Care & Rehabilitation Centre ("Lake Shore") from January 1993 to December 2010. On December 9, 2010, she was discharged for falsely accusing her supervisor, Assistant Director of Nursing, Ronnie Alcantara, "of injuring her by grabbing her arm." The alleged incident took place on November 16, 2010, and, reportedly, plaintiff immediately thereafter filed a police report. She reported the incident to her union the following day and allegedly received medical care, but made no immediate report to Lake Shore. On November 24, 2010, Lake Shore became privy to the allegation and Rex Abad, the Human Resource Director, began an internal investigation, which included viewing the contents of a surveillance video that supposedly captured the incident, interviewing personnel and reviewing documents from the Chicago Police Department and Saint Mary and Elizabeth Medical Center. Neither party presented the documents or video to the administrative agency and, accordingly, they do not appear in the record on appeal.

¶ 5 After completing its investigation, Lake Shore sent plaintiff a termination letter dated December 10, 2010. Subsequently, plaintiff applied for unemployment insurance benefits, but a claims adjudicator denied plaintiff eligibility benefits under section 602(A) of the Act. 820 ILCS

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405/602(A) (West 2010). The claims adjudicator determined that plaintiff was correctly discharged for misconduct connected with her work, because falsifying information regarding the abuse of a coworker "was within the claimant's control to avoid." Plaintiff sought reconsideration, but the claims adjudicator affirmed his original decision, noting that Lake Shore found plaintiff's medical statement suspect and the union found her allegation against Alcantara to be a fabrication.

¶ 6 On February 7, 2011, a telephonic hearing was conducted by a departmental referee. At the hearing, Abad testified that plaintiff told him Alcantara "grabbed her arm causing bruising and swelling." Abad conducted an investigation for which discovery was made through documents, witnesses and the surveillance video. Abad testified that the surveillance video showed plaintiff waiting by the elevator on the third floor and Alcantara exiting the elevator. At that point, Alcantara asked plaintiff and another CNA to walk down the hall with him in order to show them an incident that had occurred with a dirty linen chute. Thereafter, all three returned to the elevator door, where plaintiff waited, while Alcantara went down the hall with the other CNA. Alcantara and the other CNA then walked back towards the elevator as plaintiff entered the elevator. Abad also testified to viewing the surveillance video twice with plaintiff. The first time plaintiff was silent, but the second time she said, "this is when he grabbed me." According to Abad, however, the surveillance video did not show any inappropriate touching by Alcantara. Abad also noted that the union representative viewed the surveillance video and withdrew its grievance.

¶ 7 Alcantara testified that he did not grab plaintiff's arm on the day in question or touch her in any other way. Alcantara testified that, while standing beside the elevator, he requested that plaintiff and the other CNA exit the elevator. Plaintiff was hesitant to get off, but she complied.

After showing them the dirty linen chute, Alcantara walked down the hall with the other CNA to give her more instructions, and when they returned to the elevator, plaintiff was gone. Alcantara also testified that, generally speaking, plaintiff was "not very compliant."

¶ 8 Plaintiff testified that Alcantara grabbed her arm when Alcantara came into the elevator and plaintiff was approaching the elevator. Plaintiff noted that she reported the incident to the police the same day and, the following day, she took pictures of her swollen arm and "people" took her to the hospital. Plaintiff also reported the incident to her union the following day and was told the union would file a grievance, but the union ultimately could not assist plaintiff because she failed to act in a timely manner.

¶ 9 The referee affirmed the claims adjudicator's determination that plaintiff was ineligible for benefits. He noted that Lake Shore conducted "an extensive investigation, including close examination of security videos" and discovered no evidence that Alcantara handled or mistreated plaintiff in any way. The referee found that plaintiff knowingly disregarded the policies of her employer for her own purposes, and determined that because her knowing actions greatly disrupted the work place environment, her subsequent discharge was for "misconduct" within the meaning of the Act. Plaintiff filed a notice of appeal to the Board and it subsequently affirmed the referee's decision. Plaintiff then filed a complaint for administrative review to the circuit court, and the court affirmed the Board's decision after hearing oral argument on February 22, 2012. Plaintiff now appeals.

¶ 10 ANALYSIS

¶ 11 Plaintiff first contends that the Board erred as a matter of law in relying upon oral testimony regarding the contents of a surveillance video that was neither presented at the hearing, nor included in the record on appeal. Our review of the administrative law proceeding is limited

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to the propriety of the Board's decision. *Oleszczuk v. Department of Employment Security*, 336 Ill. App. 3d 46, 50 (2002). The question of whether an employee was properly denied unemployment benefits involves a mixed question of law and fact to which we apply the "clearly erroneous" standard of review. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001). An agency decision may be deemed "clearly erroneous" only when a review of the record leaves the reviewing court with a definite and firm conviction that a mistake has been made. *Id.*

¶ 12 When reviewing the administrative agency's decision, the court presumes the agency's findings are *prima facie* true and correct, and will not reweigh the evidence or substitute its judgment for that of the agency. *Illinois Department of Human Services v. Porter*, 396 Ill. App. 3d 701, 722 (2009). It is the responsibility of the administrative agency to weigh the evidence, determine the credibility of witnesses and resolve conflicts in testimony. *Hurst v. Department of Employment Securities*, 393 Ill. App. 3d 323, 329 (2009). An administrative agency's decision is against the manifest weight of the evidence only when the court concludes that no rational trier of fact could agree with the Board's decision. *Village Discount Outlet v. Department of Employment Security*, 384 Ill. App. 3d 522, 526 (2008). For the reasons to follow, we find that this is not such a case.

¶ 13 Relying on *Village Discount Outlet*, Plaintiff first contends that Abad's testimony about the contents of the surveillance video violated the best evidence rule because the video was not produced at the hearing. We find plaintiff's reliance on *Village Discount Outlet* misplaced. In *Village Discount Outlet*, where no objection was lodged against testimony about a surveillance video not in evidence, the court specifically held that that testimony which violates the best evidence rule may still be considered for "its natural probative value." *Id.* Here, plaintiff made

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no objection to Abad's testimony about the surveillance video at the telephonic hearing and neither party made any effort to introduce the actual surveillance video into evidence. Thus, under *Village Discount Outlet*, the referee was free to consider video testimony for its probative value, and we may defer to the factual findings stemming from that testimony, which are discussed below.

¶ 14 In a related argument, plaintiff next contends that the evidence relied upon by the Board was not credible because Abad's testimony regarding the video contained a number of inconsistencies, including that (1) the surveillance video showed plaintiff waiting by the elevator and Alcantara exiting the elevator, while Alcantara testified he was standing outside the elevator and plaintiff was inside the elevator; (2) Abad recalled that on the surveillance video, when Alcantara and the other CNA walked back towards the elevator, plaintiff was getting on, while Alcantara testified she had already exited; and (3) Abad's testimony about plaintiff's response when viewing the surveillance video was inconsistent. As previously stated, it is the responsibility of the administrative agency to determine the credibility of witnesses and resolve conflicts in testimony, and we will not substitute our judgement for that of the Board. *Hurst*, 393 Ill. App. 3d at 329. Furthermore, we agree with the Board and Lake Shore that scrutiny of the record discloses no significant inconsistencies. Even assuming minor discrepancies existed, these are manifestly insufficient to contradict the competent testimony that nothing in the surveillance video shows Alcantara grabbing plaintiff's arm. Moreover, plaintiff ignores that Abad's testimony was substantially corroborated by Alcantara, who stated he had no physical contact with plaintiff, as well as the other evidence relied upon by the Board. Nothing in the record suggests that the referee or Board found Abad's testimony untruthful or deficient as plaintiff suggests. We cannot say that no rational trier of fact would have adopted the position of the Board. See *Village Discount Outlet*, 384 Ill. App. 3d at 526.

¶ 15 Plaintiff further contends that the Board erred by relying on incredible evidence in determining that she engaged in misconduct. Section 602(A) of the Act disqualifies a former employee from receiving unemployment benefits if her employment is terminated due to misconduct in connection with her work. 820 ILCS 405/602(A) (West 2010). Misconduct is defined as (1) a deliberate and willful violation of (2) the employer's reasonable rule or policy (3) that harms the employer or other employees or has been repeated by the former employee despite warning or other explicit instruction from the employer. *Id.*

¶ 16 Plaintiff argues that Lake Shore provided no extrinsic evidence for the Board to determine that plaintiff willfully and deliberately filed a false report. The record as a whole, however, provides sufficient evidence to support the Board's decision. As stated above, the Board found Abad and Alcantara's testimony credible, and we see no basis for disrupting that determination. Where the issue involves conflicting testimony and the credibility of the witnesses, the agency's determination should be sustained. *Carroll v. Board of Review*, 132 Ill. App. 3d 686, 691 (1985). Also, the Board considered the "extensive investigation" that Lake Shore conducted, including evidence that Lake Shore found plaintiff's medical statement suspect and the union found her allegation against Alcantara to be a fabrication. Plaintiff did not offer any contrary evidence and under the Act the burden of proving eligibility rests with the claimant. See *Childress v. The Department of Employment Security*, 405 Ill. App. 3d 939, 943. Based on the record as a whole, it appears that both the referee and Board found plaintiff's testimony incredible. Therefore, it would follow that she willfully filed a false report to Lake Shore about Alcantara and this clearly encompassed "misconduct" within the meaning of the Act.

¶ 17 Plaintiff, nonetheless, asserts that in order to disqualify an employee from receiving compensation, an employer must satisfy a higher burden of proof in establishing that a false statement was willfully and deliberately falsified. Plaintiff fails to cite any relevant legal

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authority for her argument, as required by Supreme Court Rule 341(h)(7) (eff. Sept. 1, 2006), and, accordingly, this court need not consider this matter further. See *TruServ Corp. v. Ernest & Young, LLP*, 376 Ill. App. 3d 218, 227 (2007). We reach the same conclusion regarding plaintiff's argument that the Board's credibility determinations should not be entitled to deference unless they are express and the Board has fully articulated its reasons for them. Illinois has no such requirement in administrative review or other civil cases. In fact, a judgment need not contain the facts upon which it is based, and regardless, in this case the credibility findings were explicitly implied in the Board's ruling. See *State Farm General Insurance Co. v. Best in the West Foods, Inc., No. 2*, 282 Ill. App. 3d 470, 478 (1996).

¶ 18 Finally, plaintiff contends that the Board's decision is inconsistent with Illinois workplace law and policy, citing the Victim's Economic Security and Safety Act (820 ILCS 180 5/(11) (West 2010)); the Health Care Workplace Violence Prevention Act (405 ILCS 90/15(a)(5) (West 2010)); and the Illinois WhistleBlower Act (740 ILCS 174/1 *et seq.* (West 2010)). None of these Acts, however, apply to the instant case involving unemployment compensation. In fact, the Board specifically found that plaintiff suffered no harm, and the record cites to no evidence of retaliation by Lake Shore. Therefore, the Acts are inapplicable to the situation at bar.

¶ 19 CONCLUSION

¶ 20 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 21 Affirmed.