

FOURTH DIVISION  
September 5, 2013

No. 1-12-3056

**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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ROBERTO C. MENDEZ,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	
ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY;	)	
DIRECTOR, ILLINOIS DEPARTMENT OF EMPLOYMENT	)	
SECURITY; and BOARD OF REVIEW,	)	No. 12 L 50668
	)	
Defendants-Appellants.	)	
	)	
and	)	
	)	
JEWEL FOOD STORES, INC. c/o UC EXPRESS,	)	Honorable
	)	Roberto Lopez Cepero,
Defendant.	)	Judge Presiding.

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PRESIDING JUSTICE HOWSE delivered the judgment of the court.  
Justices McBride and Palmer concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where plaintiff's willful violation of his employer's reasonable rule or policy for swiping in and out constituted misconduct in connection with his work and disqualified him from unemployment benefits, the circuit court's judgment was reversed.

¶ 2 The Board of Review of the Illinois Department of Employment Security (Board) found plaintiff, Roberto Mendez, ineligible to receive unemployment benefits under section 602A of the Illinois Unemployment Insurance Act (Act). 820 ILCS 405/602A (West 2010). The circuit court reversed the Board's decision. On appeal, defendants (the Board and the Illinois Department of Employment Security) contend that the Board's determination that plaintiff was discharged for misconduct was not clearly erroneous. We agree with defendants and uphold the Board's decision.

¶ 3 Although plaintiff has not filed a brief, we will proceed under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 4 The record shows that plaintiff was employed as a warehouse assembler for Jewel Food Stores, Inc. (Jewel) from July 14, 2003 until he was terminated on November 30, 2011. Plaintiff applied for unemployment benefits with the Illinois Department of Employment Security, and Jewel objected, claiming that plaintiff was discharged for violating a reasonable and known policy in that he failed to properly swipe his time card in and out of work. Jewel submitted part of its policy and procedure manual, which noted that failure to punch in and out from work at the start and end of each workday and authorized meal period was subject to a five-step discipline process that consisted of a verbal warning, two written warnings, a one-day suspension, and, lastly, discharge. Jewel also submitted an acknowledgment form for the manual which was dated August 2, 2011. Plaintiff's name was printed on the form, but the words "Refuse to Sign" were written above the line for the employee's signature.

¶ 5 In addition, Jewel submitted five written warning notices, dated March 2, 2011 (for failing to swipe in on February 28, 2011), May 7, 2011 (for failing to swipe in on May 2, 2011), June 2,

2011 (for swiping for a 24-minute lunch on May 28, 2011 when the required lunch break was between 25 and 35 minutes long), June 29, 2011 (for failing to swipe in on June 24, 2011, and November 29, 2011 (for failing to swipe in on August 30, 2011)).<sup>1</sup> Plaintiff had signed only the first warning notice, and refused to sign the four subsequent notices. The claims adjudicator found plaintiff ineligible for unemployment benefits because he was discharged for violating a known and reasonable company rule.

¶ 6 Plaintiff appealed, contending that in each instance, he informed his supervisors of problems he encountered with swiping in, but they did not take action. On February 28, when plaintiff told a supervisor that he was having problems with swiping in, and the clock had displayed an erroneous message that he was late, the supervisor responded that "there was nothing he [could] do about it." On May 2, plaintiff again informed a supervisor that the clock was malfunctioning and erroneously indicated that plaintiff was late. This time, plaintiff pressed override on the clock so that his swipe would be accepted. On May 28, when plaintiff informed a supervisor that the clock incorrectly showed that plaintiff took a 24-minute lunch, the supervisor responded that plaintiff "should have checked it out or counted [his] [minutes] right." On June 24, when plaintiff showed a supervisor a picture of the clock's erroneous message that plaintiff was late, the supervisor responded that nothing could be done until plaintiff reached the fifth step in the disciplinary process. Plaintiff did not know of his fifth swiping incident, which occurred on August 30, until he returned to work on November 21 following an absence. Plaintiff also contended that other employees had difficulties with swiping in and out.

¶ 7 On January 18, 2012, a telephone hearing was conducted by a referee. Fred Karier, the Jewel warehouse operations manager, testified that plaintiff was discharged because he violated a company

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<sup>1</sup> According to the record, due to a medical issue, plaintiff did not return to work until November 21, 2011.

policy by failing to swipe his card at the time clock. The final violation, in which plaintiff failed to swipe in for work, occurred on August 30, 2011. According to Jewel policy, employees who failed to properly swipe in and out, including plaintiff, were subject to a five-step process, and employees received multiple warnings before they were terminated. Prior to the final incident, plaintiff had been most recently warned on June 24. Karier further testified that all activity on the time clock was downloaded to a report, and swiping kept track of whether employees were on time, late, or left early, as well as determined how much employees were paid. Karier denied that plaintiff had reported any problems with the clock, that there were mechanical issues with the clock on August 30, or that plaintiff had given a reason for his failure to swipe.

¶ 8 Dennis Dwyer, an associate relations manager for Jewel, testified that Jewel only had a grievance from plaintiff from his last day, when he was discharged. Dwyer did not know of allegations from other individuals that the clock was not operating properly.

¶ 9 Plaintiff testified that he had been warned four times about his failure to swipe properly. When asked why plaintiff did not swipe in on August 30, plaintiff responded:

"I forgot or like I said\*\*\*when I [was] going in, my clock [gives] me, even though I'm on time because I have to go through\*\*\*doors and two gates to get in\*\*\* to the company. They\*\*\*know I'm there\*\*\*[W]hen I was punching in on the clock always [gives] me the message I was late and I was not late because I always get on like 30 or 20 minutes before my shift [starts]\*\*\*I even showed Frank pictures and—when they would give me the warnings, the clock\*\*\*was not working.\*\*\*"

Additionally, plaintiff explained:

"[T]hat's the first thing I would do when I go to the company[,] I swipe my card and then the clock, when the clock [gave] me the wrong message that [says] that\*\*\*you're too late\*\*\*probably I was not paying attention. I swiped my card and when you [swipe] your card and the\*\*\*clock says too late, then [gives] you a message that\*\*\*see a supervisor or press enter to override. So probably I don't pass, I just swipe in and I noted that I was on time, not\*\*\*late because they would give me the message in the past and I was [paying] attention so I\*\*\*[pressed] enter to override it.\*\*\*I don't see they would not [accept] my override.\*\*\*I know it was my job that was on the line so I tried to [swipe in] on\*\*\*time."

Plaintiff maintained that he informed his supervisors of his problems with the time clock several times, but they responded that they could not take action until plaintiff reached the fifth step in the disciplinary process. Plaintiff contended that he filed a grievance twice, and that another employee had also encountered problems swiping in. When asked whether his testimony reflected that plaintiff either forgot or overlooked the need to swipe in on August 30, plaintiff responded, "[I] don't remember right now.\*\*\*[B]ut like I [said] I tried to punch in every time\*\*\*"

¶ 10 In affirming the local office determination that plaintiff was ineligible for benefits, the referee found that Jewel had a policy which required employees to swipe in on a time-keeping machine. Plaintiff had a history of violating this policy, had received multiple warnings and a suspension, and when he again entered his workplace without swiping in, he was discharged. The referee further found that plaintiff violated a known company rule, and because plaintiff was aware that his actions were inappropriate, and he had the ability to refrain from the inappropriate conduct,

his actions "must be termed willful and deliberate." The referee concluded that plaintiff's actions constituted misconduct, and therefore, he was not eligible for benefits.

¶ 11 Plaintiff appealed the referee's decision to the Board, arguing that his employer was "well aware of the problem with the time clock." Plaintiff submitted additional evidence, consisting of a letter from a union steward that described the problems with the time clock that had been discussed with supervisors and a letter from himself about changes made to the time clock since his discharge.

¶ 12 The Board affirmed the referee's decision, and noted that it had not considered plaintiff's request to submit additional evidence because plaintiff had not certified in writing that this request was served on the employer and had not included an explanation showing that, for reasons not his fault and out of his control, he had been unable to introduce the evidence at the hearing. The Board further found that the referee's decision was supported by the record and the law, incorporated it as part of its decision, and affirmed the denial of benefits. On September 13, 2012, the circuit court reversed the Board's decision. This appeal follows.

¶ 13 We review the decision of the Board, rather than the circuit court or the referee. *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010). The applicable standard of review depends on the issue raised. This court reviews questions of law *de novo* (*Village Discount Outlet v. Department of Employment Security*, 384 Ill. App. 3d 522, 525 (2008)), but the Board's factual findings will be affirmed unless they are against the manifest weight of the evidence (*Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 819 (2009)). If there is any evidence in the record to support the Board's decision, that decision is not contrary to the manifest weight of the evidence, and must be sustained on review. *Woods v. Illinois Department of Employment Security*, 2012 IL App (1st) 101639, ¶ 16. The question of whether an employee was disqualified from unemployment benefits for misconduct presents a mixed question of law and fact, which is subject to the "clearly erroneous" standard of review. *AFM Messenger Service, Inc. v. Department*

*of Employment Security*, 198 Ill. 2d 380, 395 (2001). An agency's decision is clearly erroneous when the entire record leaves the reviewing court with the definite and firm conviction that a mistake has been made. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 327 (2009). For the reasons below, we find that this is not such a case.

¶ 14 It is clear from its decision that the Board credited Jewel's version of the events, in which the employer was not aware of problems with the time clock. Karier testified that although plaintiff had been warned, plaintiff again failed to swipe in for work on August 30. Karier was not aware of any mechanical issues with the clock or any record of other employees' complaints. Further, plaintiff had not provided a reason for his failure to swipe and had not reported any problems. Dwyer testified that he did not know of other individuals' allegations that the clock was not working. Plaintiff, who agreed that he had received four warnings before he was discharged, testified that he had previously informed his supervisors about problems he experienced with the clock. However, plaintiff also admitted at one point during the hearing that he "probably\*\*\*was not paying attention," that he did not remember whether he forgot to swipe in on August 30, and had pressed override when the clock displayed an incorrect message that he was late.

¶ 15 We note that the Board is the ultimate fact finder, and the Board is responsible for weighing the evidence, evaluating the credibility of witnesses, and resolving conflicts in testimony. *Pelosi v. Department of Employment Security*, 2012 IL App (1st) 111835, ¶ 26. The Board's purely factual findings are *prima facie* true and correct. *Livingston v. Department of Employment Security*, 375 Ill. App. 3d 710, 714 (2007). While the Board is not required to document its credibility findings (*Alternative Staffing, Inc. v. Illinois Department of Employment Security*, 2012 IL App (1st) 113332, ¶ 36), the Board's decision suggests that it believed the employer's version of the events. As there is evidence to support a finding that the employer was not aware of problems with the time clock, it is not against the manifest weight of the evidence.

¶ 16 In addition, the Board's conclusion that plaintiff was discharged for misconduct, and therefore ineligible for benefits, is not clearly erroneous. Under section 602A of the Act, misconduct is established by three elements. 820 ILCS 405/602A (West 2010). First, there must be a deliberate and willful violation of a rule or policy. 820 ILCS 405/602A (West 2010). An employee's act of misconduct is willful if he is aware of a company rule and disregards it. *Sudzus*, 393 Ill. App. 3d at 826. Second, the rule or policy must be reasonable (820 ILCS 405/602A (West 2010)), meaning that it concerns standards of behavior which an employer has a right to expect from an employee (*Livingston* 375 Ill. App. 3d at 716). Third, the violation must have either harmed the employer or other employees, or have been repeated despite a warning or other explicit instruction. 820 ILCS 405/602A (West 2010). Harm to the employer includes actual and potential harm. *Pelosi*, 2012 IL App (1st) 111835 at ¶ 32.

¶ 17 All three elements of misconduct were met. The record demonstrates that plaintiff was aware he needed to swipe in, but did not. In spite of prior warnings, which he acknowledged, plaintiff failed to swipe in for work on multiple occasions. There were no reports that the clock was malfunctioning on August 30. Even according to his version of the events, plaintiff consciously disregarded the proper procedure when he pressed override rather than immediately reporting the problem he encountered with the time clock. Plaintiff's actions amounted to a willful and deliberate violation of the swiping policy. This result is consistent with *Alternative Staffing, Inc.*, 2012 IL App (1st) 113332 at ¶ 33 (willful misconduct found where cumulative incidents of arriving late for work demonstrated a "complete and conscious disregard" for the employer's policy that required employees to be on time) and *Odie v. Department of Employment Security*, 377 Ill. App. 3d 710, 714-15 (2007) (the plaintiff's actions were willful and deliberate where, in spite of knowing that taking Tylenol would cause drowsiness, the plaintiff voluntarily took it during her shift without telling anyone she was going to do so, and then fell asleep on the job). Further, it was reasonable

for Jewel to expect its employees to follow the swiping policy because it allowed Jewel to keep track of its employees' time and pay them accordingly. Finally, plaintiff repeated his violation despite four previous warnings. 820 ILCS 405/602A (West 2010). Additionally, plaintiff's actions could cause harm in the form of financial loss to Jewel, as it would not have an accurate record of how much plaintiff should be paid. See *Phistry*, 405 Ill. App. 3d at 608 (noting financial loss as a form of harm to the employer). Plaintiff's actions would also interfere with Jewel's ability to maintain accurate records. See 56 Ill. Admin. Code § 2840.25(b) (2010) (harm includes damage to the employer's operations). Under these circumstances, the Board's conclusion that plaintiff was discharged for misconduct was not clearly erroneous.

¶ 18 For the foregoing reasons, we reverse the judgment of the circuit court.

¶ 19 Reversed.