

2013 IL App (2d) 121302-U
No. 2-12-1302
Order filed September 12, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

SANDRA M. FEW,)	Appeal from the Circuit Court
)	of Kane County.
Plaintiff-Appellee,)	
)	
v.)	No. 12-MR-239
)	
THE ILLINOIS DEPARTMENT OF)	
EMPLOYMENT SECURITY, THE)	
DIRECTOR OF THE ILLINOIS)	
DEPARTMENT OF EMPLOYMENT)	
SECURITY, and THE BOARD OF REVIEW)	
OF THE ILLINOIS DEPARTMENT)	
OF EMPLOYMENT SECURITY,)	
)	
Defendants-Appellants)	Honorable
)	Thomas E. Mueller,
(Grand Victoria Casino, Defendant).)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Burke and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* The Board’s decision that plaintiff was discharged for “misconduct” and thus was ineligible for unemployment insurance benefits was not clearly erroneous: the evidence supported the Board’s findings that plaintiff deliberately and willfully reported for work while under the influence of alcohol, in violation of a reasonable rule, and that the violation caused at least potential harm to the employer.

¶2 Defendants, the Department of Employment Security (Department), its director, and its Board of Review (Board), appeal from an adverse judgment in a proceeding for administrative review of the denial of the claim of plaintiff, Sandra Few, for unemployment insurance benefits. The denial was based on the Board's finding that Few—who had been employed by the Grand Victoria Casino (employer) as a dealer—was discharged from her employment because of misconduct. The Board found that Few had violated a rule prohibiting employees from being under the influence of alcohol while on duty. The trial court concluded that there was no evidence that the infraction caused any harm to the employer as would disqualify Few from receiving benefits. We disagree. We, therefore, reverse the judgment of the circuit court and affirm the Board's decision.

¶3 The Board's decision was based on evidence presented during a telephone hearing conducted by a referee. The Board reached its decision without hearing any additional evidence. At the hearing, a representative of the employer testified that, on October 5, 2011, Few failed to return to her workstation after a break. She was found in the break room, and had to be woken up. After a managerial employee noticed the odor of alcohol on Few's breath, two tests were conducted to determine Few's blood alcohol level. The first test showed a blood alcohol level of .0176. The second test, which was conducted about 20 minutes after the first, showed a blood alcohol level of 0.194.

¶4 Few testified that, before work, she had gone out with some girlfriends to celebrate her birthday and had been drinking. Although Few admitted that she had shown up for work intoxicated, she testified that, at the time, she did not realize that she was in that condition. Few also testified that she was unaware of the rule against being under the influence of alcohol while on duty.

However, she acknowledged that the rule appeared in the employee handbook she had received and that it was her responsibility to read the handbook.

¶ 5 We initially note that, although Few has not filed an appellee's brief, the record and the issues raised on appeal are simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, so that review of the merits is appropriate under *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 6 In an appeal from a judgment in an administrative review proceeding, the appellate court reviews the administrative agency's decision, not the trial court's. *Harroun v. Addison Police Pension Board*, 372 Ill. App. 3d 260, 261-62 (2007). At issue here is the Board's finding that Few was terminated for misconduct and that she was therefore ineligible to receive unemployment insurance benefits. Section 602A of the Unemployment Insurance Act (Act) (820 ILCS 405/602A (West 2010)) provides, in pertinent part, that "[a]n individual shall be ineligible for benefits for the week in which he has been discharged for misconduct connected with his work and, thereafter, until he has become reemployed and has had earnings equal to or in excess of his current weekly benefit amount in each of four calendar weeks which are either for services in employment, or have been or will be reported pursuant to the provisions of the Federal Insurance Contributions Act by each employing unit for which such services are performed." Whether an employee was properly terminated for misconduct is a mixed question of law and fact. *Hurst v. Department of Employment Security*, 393 Ill App. 3d 323, 327 (2009). An administrative agency's decision on a mixed question of law and fact will not be disturbed by a reviewing court unless the decision is clearly erroneous, *i.e.* "where the entire record leaves the reviewing court with the definite and firm conviction that a mistake has been made" (*id.*).

¶ 7 Section 602A of the Act defines “misconduct” as “the deliberate and willful violation of a reasonable rule or policy of the employing unit, governing the individual’s behavior in performance of his work, provided such violation has harmed the employing unit or other employees or has been repeated by the individual despite a warning or other explicit instruction from the employing unit.” 820 ILCS 405/602A (West 2010). The uncontradicted evidence establishes that Few reported for work while under the influence of alcohol and thereby violated a rule governing her behavior in the performance of her work. Moreover, it cannot be gainsaid that the rule in question is eminently reasonable. Although Few testified that she had been unaware that she was intoxicated, the Board rejected that testimony and relied on her extremely high blood alcohol level—more than twice the level at which it is legal to operate a motor vehicle (see 625 ILCS 5/11-501(a)(1) (West 2010))—as evidence that Few was aware that she had had too much to drink, and that her violation of the rule in question was therefore deliberate and willful. The finding is not clearly erroneous.

¶ 8 The remaining question is whether Few’s violation “has harmed the employing unit or other employees or has been repeated by the individual despite a warning or other explicit instruction from the employing unit.” 820 ILCS 405/602A (West 2010). The record does not indicate that there were any prior occasions on which Few had been under the influence of alcohol while on duty. Therefore, her eligibility for unemployment benefits depends on whether the rule violation harmed the employer or Few’s fellow employees. The trial court concluded that there was no evidence of harm. We disagree. Although Few’s violation might not have caused *actual* harm, it has been held that “harm can be established by showing potential harm.” *Pesoli v. Department of Employment Security*, 2012 IL App (1st) 111835, ¶ 32. In *Pesoli*, an employee of Advocate Lutheran General Hospital (Advocate) was discharged for accessing confidential patient information outside of her work

activities, thereby violating “Advocate’s confidentiality policy and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) [citation].” *Id.* ¶ 4. In affirming the Board’s decision that the employee was ineligible for unemployment insurance benefits, the *Pesoli* court reasoned as follows:

“Because Advocate is a hospital and federal law requires it to keep patients’ health information confidential, patients have a right to expect that their hospital records will be kept private and free from unauthorized access. Therefore, Advocate could experience potential harm from the loss of business or lawsuits, if potential patients discovered that their confidential health information is accessed by Advocate’s employees for reasons unrelated to their job responsibilities.” *Id.* ¶ 32.

¶ 9 Here, the Board offered a similar rationale for its conclusion that Few was discharged for misconduct, finding that “[t]he employer was harmed by the fact that an intoxicated employee is less safe in the performance for his or her duties and is less likely to function in a manner which brings good repute to the employer.” If casino patrons were to discover that personnel at gaming tables were handling wagers while inebriated, their confidence in the integrity of the casino’s operations could be severely eroded. Accordingly, the Board’s conclusion that potential harm had been shown is not clearly erroneous.

¶ 10 For the foregoing reasons, the judgment of the circuit court of Kane County is reversed.

¶ 11 Reversed.