SECOND DIVISION
July 21, 2015

No. 1-14-1871

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MICHAEL J. HAYNES, Plaintiff-Appellant, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; DIRECTOR OF ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; BOARD OF REVIEW; and HELP AT HOME, INC. c/o EMPLOYER'S EDGE ANGIE SAMOY, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 14 L 50129 Honorable Edward S. Harmening, Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Simon concurred in the judgment.
Justice Liu specially concurred in the judgment.

O R D E R

¶ 1 *Held*: Where employee made hostile phone calls accusing supervisor of sexual relations with clients, Board's determination that employee committed misconduct making him ineligible for unemployment benefits was not clearly erroneous; the decision of the Board was affirmed.

¶ 2 Michael J. Haynes, the plaintiff, appeals *pro se* from the circuit court's order affirming the decision of the Board of Review (the Board) of the Illinois Department of Employment

Security (the Department) finding him ineligible for unemployment benefits because he was discharged from his job due to misconduct. On appeal, plaintiff seeks reversal of that order. We affirm the decision of the Board.

¶ 3 The record establishes that plaintiff worked as a home care aide for Help At Home, Inc., from 2011 until August 2013, when he was discharged following a dispute with his supervisor, Sade Frazier. On August 18, 2013, plaintiff applied for unemployment benefits with the Department. Help At Home, Inc., filed a timely protest of plaintiff's claim for benefits, stating his employment had been terminated because he violated a company policy.

¶ 4 On September 25, 2013, a Department claims adjudicator determined that plaintiff was ineligible for benefits because he was discharged for misconduct under section 602(A) of the Unemployment Insurance Act (the Act) (820 ILCS 405/602(A) (West 2012)). The claims adjudicator found plaintiff's employment had been terminated for conduct that "adversely affected the employer's interest." The record of the claims adjudicator's decision contains a copy of an exit review completed by Frazier, his supervisor, on August 13, 2013. That document indicated plaintiff had been discharged for unacceptable conduct. The notes, handwritten by Frazier, describe five phone calls on August 9 initiated by plaintiff in which he accused Frazier of having an affair with a client of the company. Plaintiff also left Frazier two voice mail messages on that date. Frazier also wrote that plaintiff was upset because he was not receiving 40 hours of work per week. Plaintiff appealed the claims adjudicator's ruling.

¶ 5 On October 28, 2013, a Department referee conducted a telephone hearing with plaintiff. Frazier and Lisa Thompson, the personnel director of Help At Home, Inc., also took part in the

hearing. Frazier testified that plaintiff began working at Help At Home, Inc., as a home care aide on December 28, 2011. On August 13, 2013, plaintiff was discharged by Thompson.

¶ 6 Thompson testified plaintiff called Frazier on the phone and left "voice messages stating that [Frazier] was having sex with her clients." The conduct began on August 9 and lasted about two days. Thompson listened to some of the voice mail messages and asked plaintiff about them, and plaintiff admitted his conduct. She testified that plaintiff was provided with written policies and procedures upon beginning his employment with Help At Home, Inc., and that plaintiff signed a statement acknowledging the receipt of that information. Those written policies and procedures are not contained in the record on appeal.

¶ 7 Thompson acknowledged that plaintiff had not received prior warnings about any behavior and that no rule existed that prohibited harassment of a supervisor. However, she stated defendant "cannot call into the office and harass his supervisor and leave the type of messages that he was leaving."

¶ 8 Frazier testified that she received a phone call from plaintiff on August 9. She further testified:

> "As soon as I picked up the phone and said hello, he was just very belligerent accusing me of not giving him extra clients. Accusing me that I was purposely keeping his schedule short so he could leave and so that I could [go] up to the homes of these participants [*sic*] and then he would hang up the phone. I called back, I wouldn't get an answer. Ten minutes later he would call again being very disrespectful and insubordinate. I was trying to cut him off so I could see what exactly he was upset about. He just kept yelling out and then he would hang up. And this pretty much went on for the next two

> days. And if I didn't answer then he left me several voice mails claiming the same thing. *** [W]hen I finally did get in contact with him, I told him that he needs to come to the office for a meeting. He said, 'Okay, well I'll be down with your baby shower gift because I do know that you're pregnant by the participant [*sic*]. You're having sexual encounters with him for money. You should be ashamed of yourself. You should find someone your own age.' And he just would not listen."

¶ 9 Frazier testified plaintiff contacted her again on August 10 and 11 but she was "not able to get a word in." Frazier stated that prior to those exchanges, plaintiff was involved in one minor incident in which he did not follow the proper "check-in" procedure for about one week. She stated plaintiff was aware of the system in which Frazier would call him randomly to check in but that plaintiff initiated those "check-in" calls even after being told by Frazier to stop.

¶ 10 Plaintiff testified that he worked at Help At Home, Inc., from December 2011 until August 8, 2013, and acknowledged receiving written policies and procedures. After working for the company for one year, he requested 40 hours per week but was not given that amount of work. When asked about Frazier's testimony, he apologized and said he knew his conduct was inappropriate but maintained the truth of his allegations. Plaintiff said he knew he could be terminated for his remarks to Frazier.

¶ 11 On October 31, 2013, the referee issued an order disqualifying plaintiff from receiving unemployment benefits under section 602(A) of the Act. The order stated the employer had provided sufficient credible evidence that plaintiff's behavior was a "deliberate and improper course of conduct" reflecting an "intentional and willful disregard for the employer's interest."

The Department referee concluded that because plaintiff engaged in misconduct related to his work, he was not eligible for benefits.

¶ 12 Plaintiff appealed to the Board, which affirmed the referee's decision. The Board stated that by calling Frazier and leaving voice mail messages accusing her of sexual relations with the employer's clients, plaintiff "repeatedly and inappropriately harassed his supervisor, despite being told to stop" and that Frazier was "distressed" by those actions.

¶ 13 On February 6, 2014, plaintiff filed a *pro se* complaint for administrative review in the circuit court. On May 21, 2014, the circuit court affirmed the Board's decision as not clearly erroneous. Plaintiff filed a timely notice of appeal to this court.

¶ 14 On appeal, plaintiff essentially challenges the decisions of the Board and the circuit court. We note that plaintiff's *pro se* brief to this court lacks any cogent legal argument or citation to legal authority. *Pro se* litigants are not excused from following rules that dictate the form and content of appellate briefs. *Lewis v. Heartland Food Corp.*, 2014 IL App (1st) 123303, ¶ 5. Plaintiff is the appellant in this case, and as a reviewing court, we are entitled to have the issues clearly defined, with relevant authority cited and a cohesive legal argument presented. *Id*. (citing Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013)). Nevertheless, plaintiff's appeal represents a general disagreement with the decision of the administrative agency and with the circuit court's finding that plaintiff is ineligible for unemployment benefits.

¶ 15 The main purpose of the Act is to alleviate the economic insecurity and burden caused by involuntary unemployment, and the Act "is intended to benefit only those persons who become unemployed through no fault of their own." 820 ILCS 405/100 (West 2012); *Jones v. Department of Employment Security*, 276 Ill. App. 3d 281, 284 (1995). The individual claiming

unemployment insurance benefits has the burden of establishing his eligibility, and an employee discharged for misconduct is ineligible to receive those benefits. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 327 (2009).

¶ 16 The Board is the trier of fact in cases involving claims for unemployment compensation, and we review the findings of the Board, rather than the findings of the Department's referee or the findings of the circuit court. *Village Discount Outlet v. Department of Employment Security*, 384 Ill. App. 3d 522, 524-25 (2008). Whether an employee was properly terminated for misconduct in connection with his work involves a mixed question of law and fact, to which we apply the clearly erroneous standard of review. *Hurst*, 393 Ill. App. 3d at 327. An agency decision is clearly erroneous where a review of the entire record leaves the court with the definite and firm conviction that a mistake has been committed. *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010).

¶ 17 In Illinois, employers have a right to expect a certain standard of conduct from employees in matters that directly concern their employment. *Selch v. Columbia Management*, 2012 IL App (1st) 111434, ¶ 43. Misconduct under the Act has been defined as the deliberate and willful violation of a reasonable rule or policy governing the individual's behavior in the performance of his work. 820 ILCS 405/602(A) (West 2010). Three elements of misconduct must be proven to establish misconduct under the Act: (1) that there was a "deliberate and willful violation" of a rule or policy; (2) that the rule or policy of the employing unit was reasonable; and (3) that the violation either has harmed the employer or was repeated by the employee despite previous warnings. 820 ILCS 405/602(A) (West 2010).

¶ 18 As to the first element, an employee's conduct is willful if it is a conscious act made in violation of company rules, when the employee knows it is against the rules. *Czajka v. Department of Employment Security*, 387 Ill. App. 3d 168, 176 (2008). In contrast, an employee's conduct will not be deemed willful if he or she is discharged for incapacity, inadvertence, negligence or the inability to perform assigned tasks. *Siler v. Department of Employment Security*, 192 Ill. App. 3d 971, 975 (1989). When plaintiff testified before the Department referee, he admitted that he made the phone calls to Frazier and left the voice mail messages as described in Frazier's testimony and acknowledged that he knew his actions were inappropriate. According to Frazier's written notes, plaintiff made at least five phone calls to Frazier, and Frazier testified that plaintiff would not let her speak when she attempted to determine what he was describing and he hung up on her on at least one occasion.

¶ 19 The second element of misconduct under the Act is that the rule or policy of the employing unit was reasonable. *Czajka*, 387 Ill. App. 3d at 173-74. An employer is not required to prove the existence of a rule by direct evidence, and a court may find the existence of a reasonable rule "by a commonsense realization that certain conduct intentionally and substantially disregards an employer's interests." *Greenlaw v. Department of Employment Security*, 299 Ill. App. 3d 446, 448 (1998); see also *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 827 (2009). A standard of behavior that an employer has a right to expect can constitute a reasonable rule or policy, and such a rule or policy need not be written or otherwise formalized. *Petrovic v. Department of Employment Security*, 2014 IL App (1st) 131813, ¶ 29.

¶ 20 Misconduct under section 602(A) has been found when an individual commits insubordination by abusive language because the use of such language has been deemed to intentionally and substantially disregard an employer's interests. *Greenlaw*, 299 Ill. App. 3d at 448-49 (claimant violated standard of behavior that an employer has a right to expect where she told her supervisor to "kiss my grits"). An employee need not use profanity for his language to be insubordinate. *Greenlaw*, 299 Ill. App. 3d at 449. Here, plaintiff made repeated phone calls to Frazier accusing her of having sexual relations with clients of Help At Home, Inc. Plaintiff accused Frazier of adjusting his work hours to accommodate those alleged liaisons and of becoming pregnant as a result of those encounters. Plaintiff's allegations regarding Frazier were of a hostile, abusive and insubordinate nature. Because plaintiff's accusation involved the amount of work he was being assigned and plaintiff alleged that his work hours were affected by Frazier's alleged behavior, his messages clearly affected his ability to cooperate with Frazier.

¶ 21 The third and final requirement of misconduct under the Act is that the violation either has harmed the employer or was repeated by the employee despite previous warnings. *Czajka*, 387 Ill. App. 3d at 173-74. In determining whether an employer was harmed, an analysis of the employee's conduct encompasses potential harm to the employer as well as actual harm. *Wise v. Department of Employment Security*, 2015 IL App (5th) 130306, ¶ 18. Incidents of hostile and abusive exchanges relating to the work environment have the potential to affect the morale and cooperation of the parties and ultimately result in harm to the employer. *Greenlaw*, 299 Ill. App. 3d at 448-49.

¶ 22 A hostile voice mail message left by a claimant has been found to inflict the harm contemplated by the Act. *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553,

554-55 (2006). In *Manning*, the claimant was terminated and denied unemployment benefits because she left a hostile and expletive-laced message on the personal cell phone of a co-worker who had failed to give the claimant a ride home from work as they had previously arranged. *Manning*, 365 Ill. App. 3d 554-56. This court concluded that although the hostile phone message did not directly harm the employer, "it was potentially harmful to [the employer's] interests because the use of hostile and intimidating language to a coworker could adversely affect the work environment." *Manning*, 365 Ill. App. 3d at 558. In this case, plaintiff directed his tirade at his supervisor as opposed to a co-worker, and accused her of having inappropriate sexual relations with a client, thus increasing the risk of potential harm.

¶ 23 In conclusion, the Board's determination that plaintiff's actions constituted misconduct and that he should be denied unemployment benefits, was not clearly erroneous. Accordingly, the judgment of the Board is affirmed.

¶ 24 Affirmed.

¶ 25 Justice Liu, specially concurring.

¶ 26 I join in the court's decision to uphold the Board's determination that plaintiff is ineligible for unemployment benefits under the Act because he was discharged for willful misconduct. I write separately, however, to point out the distinction that may exist between a reasonable confrontation that does not warrant a denial of benefits and insubordination that justifies a denial. This distinction is relevant in disputes involving a denial of benefits under the Act, where “an employer must satisfy a higher burden than merely proving that an employee should have been discharged.” *Czajka v. Department of Employment Security*, 387 Ill. App. 3d 168, 176 (2008).

¶ 27 We have previously noted that "[a] single flurry of temper between a worker and a supervisor may be enough to warrant discharge in an at-will relationship. But it is not enough to deny unemployment benefits." *Oleszczuk v. Department of Employment Security*, 336 Ill. App. 3d 46, 52 (2002). For example, an employee who suspects that he is being treated unfairly because of a supervisor's wrongful conduct has every right to confront the supervisor, in private or through appropriate channels, and make known his grievance. Therefore, not all confrontations in the workplace warrant a discharge and denial of benefits under the Act. To that end, I would be wary of characterizing all such confrontations as "misconduct." If we liberally construe any and all heated disagreement between a manager and a subordinate employee, or between co-workers, as workplace misconduct, we may unintentionally discourage employees from rightfully asserting or reporting valid grievances related to their employment.

¶ 28 In explaining the application of the second and third elements of misconduct under the Act, the majority cites *Greenlaw v. Department of Employment Security* (299 Ill. App. 3d 446 (1998)), which held that an employer's expected standard of behavior in the workplace may constitute a "reasonable rule or policy" under the Act, and such rule or policy need not be in writing. Additionally, in illustrating how an employee's violation of the standard of behavior harms the employer, the majority cites *Manning v. Department of Employment Security* (365 Ill. App. 3d 554 (2006)). In *Manning*, the plaintiff created conflict in the examination room of her employer's medical office and left a "hostile and expletive-laced message on the personal cell phone of a co-worker." I do not believe that the instant case, which involves plaintiff's repeated voicemail messages to his supervisor accusing her of acting improperly with the employer's client, fits squarely within the frameworks of *Greenlaw* or *Manning.*

¶ 29 We have previously held that arguing with a supervisor, absent the use of abusive language or threats, is not sufficient to establish discharge for misconduct under the Act. See, *Gee v. Board of Review of Dept. of Labor*, 136 Ill. App. 3d 889, 896 (1985) (finding that denial of unemployment benefits was unjustified where plaintiff "merely argued with her supervisor in his office without using abusive language or threatening to disobey a work order."); *Scheff v. Board of Review*, 128 Ill. App. 3d 347, 350 (1984) (finding no misconduct under the Act where plaintiff "raised his voice in the privacy of the manager's office" because he did not resort to any "abusive language or vilification of the manager" and the manager was not threatened "either physically or verbally."). Moreover, mere evidence that an employee became "angry and upset" during a confrontation or that he "raised his voice in disagreement to twice his normal speaking voice," does not warrant a denial of unemployment benefits under the Act. *Scheff*, 128 Ill. App. 3d at 350. Both *Gee* and *Scheff* recognize that not all conflicts in the workplace constitute, or rise to the level of, insubordination that violates an employer's standard of behavior or unwritten policy regarding the same. This allowance is necessary to avoid a situation in which an employee is denied his unemployment benefits simply because he was discharged for having differing views or opinions that conflicted with his employer's.

¶ 30 Here, plaintiff accused Ms. Frazier of inappropriate sexual relations with one of the employer's clients and indicated that it was the client who reported the behavior to plaintiff. He maintained that Ms. Frazier's behavior was the motivating factor for her refusal to assign him 40 hours of work a week. He called her and left voicemail messages that did not contain expletives or vulgar language; in contrast, the plaintiff in *Manning* left a message repeating an expletive ten times and verbally condemning the physician employer and other staff members in the office.

365 Ill. App. 3d at 554-55. Also, unlike the claimant in *Greenlaw*, who told her supervisor to "kiss my grits," plaintiff did not use vulgar language referring to any body parts when he called and left voicemail messages accusing Ms. Frazier of allegedly inappropriate behavior with the employer's client. Thus, I would not characterize the content of the messages as abusive.

¶ 31 However, the manner in which plaintiff repeatedly called, and then either hung up or failed to pick up his phone when Ms. Frazier called him, crossed the line. These acts could only have been intended to harass Ms. Frazier, since plaintiff had already communicated his grievance to her before repeatedly calling her. The motivation for his confrontational conduct shifted from the professional to the personal when he stated to Ms. Frazier that "between him and his lawyer they can figure out what to get [her] and the baby [she is] expecting with the [client]." At this point, plaintiff no longer intended to air and resolve any legitimate grievance—that is, to the extent plaintiff truly believed that his supervisor was engaging in inappropriate conduct. What was also highly troubling was plaintiff's warning to Ms. Frazier—that she was "wrong" to do what she was allegedly "doing" because she was "too much of a pretty girl," was "too young," and "need[ed] to find someone [her] own age." Plaintiff also accused her of "bringing other Help At Home employees" with her to the client's home. All of these statements, taken together, amount to an unrestrained confrontation in which plaintiff (1) threatened Ms. Frazier with legal consequences while alluding to a purported pregnancy; (2) made inappropriate remarks about her age, gender, attractiveness, and personal relationship preferences; and (3) accused her of causing other employees to behave inappropriately with clients. In my opinion, it is the combination of these acts—*i.e.*, inflammatory statements about Ms. Frazier being impregnated by a client, commentary on her age and gender, and accusations about third-party employees—not merely

the phone calls and messages to Ms. Frazier about an alleged inappropriate relationship with a client, that created a hostile environment which, under *Greenlaw*, impaired the stability and morale in his employer's workplace. 299 Ill. App. 3d at 448-49. For these reasons, I specially concur.