2015 IL App (2d) 140605-U
No. 2-14-0605
Order filed May 14, 2015

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| TIFFANY SUGGS,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>THE DEPARTMENT OF EMPLOYMENT SECURITY; THE DEPARTMENT OF EMPLOYMENT SECURITY BOARD OF REVIEW; THE DIRECTOR OF THE DEPARTMENT OF EMPLOYMENT SECURITY; and ROLLPRINT PACKAGING,<br><br>Defendants-Appellees. | ) | Appeal from the Circuit Court of Kendall County.<br><br>No. 13-MR-98<br><br>Honorable Bradley J. Waller, Judge, Presiding. |

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Burke concurred in the judgment.

**ORDER**

¶ 1 *Held*: The plaintiff's failure to report to work was not done willfully in violation of her employer's rules; therefore, she was entitled to unemployment benefits.

¶ 2 The plaintiff, Tiffany Suggs, worked for Rollprint Packaging Products, Inc. (Rollprint) for a little over eight months until July 2, 2012, when she was fired for failing to report to work. The plaintiff applied for benefits under the Unemployment Insurance Act (the Act) (820 ILCS 405/100 *et seq.* (West 2012)). However, the Illinois Department of Employment Security (the

Department) denied her claim, agreeing with Rollprint that the plaintiff was discharged due to misconduct connected with her work. 820 ILCS 405/602(A) (West 2012). The plaintiff continued to pursue benefits and requested a hearing before a referee. The referee affirmed the Department's denial of benefits. The plaintiff appealed the referee's decision to the Department's Board of Review (the Board). The Board adopted the factual findings and legal reasoning of the referee and sustained his decision. The plaintiff then filed a complaint for administrative review of the Board's decision in the circuit court of Kendall County. The circuit court affirmed the Board's decision and the plaintiff then appealed to this court. The plaintiff argues that her discharge was not for misconduct because her violation of her employer's attendance rules was not done willfully and deliberately. We agree and reverse.

¶ 3 BACKGROUND

¶ 4 The plaintiff was employed by Rollprint as a coordinator from October 24, 2011, to July 2, 2012, when she was discharged. Subsequently, she filed a claim for unemployment benefits with the Department. Rollprint filed a protest, asserting that the plaintiff was ineligible for benefits pursuant to section 602(A) of the Act (820 ILCS 405/602(A) (West 2012)). Rollprint alleged that, after the plaintiff failed to report to work on July 2, 2012, she was discharged due to her poor attendance record.

¶ 5 Rollprint explained that, under its attendance policy, employees would receive one point for being absent and a half-point for being tardy. The plaintiff had accumulated 16 points over just a little more than an 8-month period. On April 10, 2012, Rollprint gave the plaintiff an oral warning regarding her attendance. On June 21, 2012, it suspended the plaintiff three days due to her attendance record and gave her a written warning that she would be discharged if she

accumulated a half point more that year. Due to her failure to report to work on July 2, 2012, Rollprint discharged the plaintiff.

¶ 6 On August 1, 2012, a claims adjudicator for the Department determined that the plaintiff was ineligible for benefits pursuant to section 602(A) of the Act because she had been discharged for misconduct. The plaintiff appealed that order.

¶ 7 On February 11, 2013, a referee for the Department conducted a hearing on the plaintiff's appeal. Dwight McCoy, a human resources manager for Rollprint, testified that the plaintiff was discharged on July 2, 2012, due to attendance issues. Prior to that date, she had been given a written warning on December 9, 2011, an oral warning on April 10, 2012, and a three-day suspension in June 2012 for attendance issues. McCoy explained that, pursuant to Rollprint's policy, the plaintiff's next incident of tardiness after her suspension would result in her discharge. On July 2, 2012, the plaintiff was scheduled to work from 8:30 a.m. to 4:30 p.m. However, she never came into work. At 9:50 a.m., McCoy testified that the plaintiff sent an e-mail to Rollprint that she was on her way to work. The plaintiff indicated in her e-mail that she ran into traffic and then turned around and went home when she realized that she would be late to work.

¶ 8 The plaintiff testified that she lived in Oswego, which was 45 minutes away from Rollprint's office in Addison. She testified that on July 2, 2012, there was heavy traffic and the roads were "an absolute mess" because of storms. She stated that she turned around and went home instead of going to work because she believed she would be fired as soon as she reported to work after 8:30 a.m. She believed that extenuating circumstances were irrelevant. She testified that Rollprint had informed her that if she was going to be late to work, there was no point coming to work because "their hands were tied" and there was nothing that they could do.

She attempted to call into work on July 2, but the telephone lines and e-mail system were down due to the weekend storms. Upon returning home, she sent an e-mail to Rollprint indicating that she was on her way. However, she did not attempt to go to work after sending that e-mail.

¶ 9 McCoy further testified that Rollprint had waived the plaintiff's and other employees' tardiness that day because of the storm and because so many people were affected. Thus, had the plaintiff gone to work, the employer would have waived her tardiness.

¶ 10 On February 13, 2013, the referee affirmed the claim adjudicator's determination, concluding that the plaintiff was ineligible for benefits under section 602(A) of the Act because she was discharged for misconduct. The referee found that the plaintiff willfully violated a reasonable employment policy by failing to show up for work on July 2, 2012, and that her conduct harmed the employer. The referee noted that although the plaintiff sent an e-mail to Rollprint stating that she was going to be late, she made no further attempt to go to work and never arrived at her employer that day. The plaintiff thereafter appealed the referee's decision to the Board.

¶ 11 On July 24, 2013, the Board affirmed the referee's decision, concluding that the law and the record supported that decision. The Board incorporated the referee's ruling into its final administrative decision. On August 2, 2013, the plaintiff filed a complaint in the circuit court for judicial review of the Board's decision.

¶ 12 On May 19, 2014, the circuit court affirmed the Board's decision, finding that it was not clearly erroneous. The plaintiff thereafter filed a timely notice of appeal to this court.

¶ 13 ANALYSIS

¶ 14 The plaintiff argues that the Board's decision was clearly erroneous because the conduct that led to her discharge was not willful and deliberate. The plaintiff contends that she was not

able to get to work on time on the day she was fired because of storm-caused traffic delays. Based on her past failures to get to work on time, her employer had told her that if she was going to be late again, there would be no point for her to come in at all. Thus, the plaintiff insists that her failure to report to work on July 2, 2012, does not demonstrate a willful decision to violate a company rule but rather reflects her understanding that, once she realized that she was going to be late, that to continue on to work would have been a futile endeavor. Alternatively, the plaintiff argues that we should remand this case to the Board because its final decision does not contain sufficient findings or analysis to allow meaningful review by this court.

¶ 15 On administrative review, the appellate court reviews the decision of the Board, not the circuit court. *Abbott Industries, Inc. v. Department of Employment Security*, 2011 IL App (2d) 100610, ¶ 15. The question of whether an employee committed misconduct under the Act is a mixed question of fact and law subject to the "clearly erroneous standard." *Id.*, ¶ 16. This standard is between the manifest weight of the evidence standard applied to questions of fact and the *de novo* standard applied to the questions of law. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001). Under this standard, an agency decision will be deemed clearly erroneous only where the reviewing court, on the entire record, is left with the definite and firm conviction that a mistake has been committed. *Id.* That the clearly erroneous standard is largely deferential does not mean, however, that a reviewing court must blindly defer to the agency's decision. *Id.*

¶ 16 The primary purpose of the Act is to relieve the economic insecurity and hardship caused by involuntary unemployment. 820 ILCS 405/100 (West 2012). Thus, it is intended to benefit only those who become unemployed through no fault of their own. *White v. Department of Employment Security*, 376 Ill. App. 3d 668, 671 (2007). If an individual becomes unemployed

due to his own misconduct, then that "individual shall be ineligible for benefits for the week in which he has been discharged for misconduct connected with work and, thereafter, until he has become reemployed." 820 ILCS 405/602(A) (West 2012). The Act defines "misconduct" as

> "[T]he 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." *Id.*

Thus, based on section 602(A) of the Act, an employee is ineligible for benefits if (1) she violated a reasonable rule or policy of the employer; (2) the violation was willful; and (3) the violation either harmed the employer or was repeated by the employee despite prior warnings. *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 557 (2006).

¶ 17 The Act must be liberally construed in favor of awarding benefits. *Keifer v. Department of Employment Security*, 266 Ill. App. 3d 1057, 1061 (1994). It is the employer's burden to prove that the discharge was for misconduct. *Zuaznabar v. Board of Review*, 257 Ill. App. 3d 354, 356 (1993). The employer must satisfy a higher burden than merely proving that an employee should have been rightly discharged. *Id.* at 359.

¶ 18 Here, the plaintiff does not dispute that she violated a reasonable rule of her employer. See *Nichols v. Department of Employment Security*, 218 Ill. App. 3d 803, 811 (1991) (rules prohibiting excessive absenteeism and tardiness are reasonable under the Act). She also does not dispute that her violation of that rule harmed her employer. See 56 Ill. Admin Code § 2840.25(b) (absences and tardiness always harm employer because they "cause disruption to the general operations of any business"). However, she maintains that her violation of that rule was not willful.

¶ 19 Willful conduct is a conscious act made in violation of company rules, when the employee knows it is against the rules. *Wrobel v. Illinois Department of Employment Security*, 344 Ill. App. 3d 533, 538 (2003). Conversely, one's conduct will not be deemed willful if that employee is discharged for incapacity, inadvertence, negligence, or inability to perform assigned tasks. *Siler v. Department of Employment Security*, 192 Ill. App. 3d 971, 975 (1989). Being late to work does not in itself establish that one willfully violated her employer's rules. *London v. Illinois Department of Employment Security*, 177 Ill. App. 3d 276, 280 (1988); *Wright v. Department of Labor*, 166 Ill. App. 3d 438, 441 (1988).

¶ 20 In *London*, the employee was fired after being repeatedly late to work. *London*, 177 Ill. App. 3d at 278. The reviewing court found that the employee's actions did not rise to the level of willful conduct. *Id.* at 280-81. The reviewing court explained that the employee's final "tardiness was attributable to road repairs and traffic congestion on an expressway notorious for such problems, and was therefore for all practical purposes unavoidable." *Id.* at 280.

¶ 21 In *Wright*, the employee was fired after being repeatedly late to work. *Wright*, 166 Ill. App. 3d at 439. On the day she was fired, the employee's car would not start. She therefore took a bus, which ran late. *Id.* The reviewing court determined that the employee's actions could not be "construed as deliberate or as an act of misconduct." *Id.* at 441. Therefore, the reviewing court found that the employee was entitled to unemployment benefits. *Id.*

¶ 22 Here, the plaintiff explained that she was going to be late to work because the roads were "a mess." McCoy corroborated this when he explained that Rollprint's employees were being excused for being tardy on July 2, 2012 because recent storms had made travel difficult. Thus, like in *London* and *Wright*, the plaintiff's travel difficulties do not demonstrate that she was deliberately late to work.

¶ 23 We note that, unlike the employees in *London* and *Wright*, the plaintiff was not merely late to work. She did not show up to work at all. The defendants insist that the plaintiff's failure to report to work constitutes willful conduct done knowingly in violation of the company's rules.

¶ 24 In making this argument, the defendants disregard that, just 11 days prior to her being fired, Rollprint had warned the plaintiff in writing that if she were late to work again, she would be terminated. McCoy confirmed this fact, explaining that, pursuant to Rollprint's policy, the plaintiff's next incident of tardiness after her suspension would result in her discharge. The plaintiff testified consistently with this, explaining that she had been informed that if she was going to be late again, there would be no point in her coming to work.

¶ 25 Here, based on her recent suspension for tardiness and the warning she received from Rollprint, the plaintiff could reasonably believe that, once she realized that she was going to be late to work, it would have been pointless for her to go to work anyway. We note that our courts have consistently refused to impose obligations upon litigants that would have been pointless. See, *e.g.*, *In re Marriage of Lasky*, 176 Ill. 2d 75, 81 (1997) (once parties agreed that joint custody would not be feasible, it would be pointless and redundant to require the parties to prove by other clear and convincing evidence that joint custody was not feasible); *Glass v. Morgan Guarantee Trust Co.*, 238 Ill. App. 3d 355, 360 (1992) (refusing to impose duty on owners to post warning that stairs were dangerous because customer knew that stairs were potentially dangerous and therefore such warning would be pointless).

¶ 26 We further note that even under the Board's digest of precedent decisions, an employee is not required to embark on a futile endeavor in order to maintain her unemployment benefits.[1] In

[1] This court may consider the Board's digest of precedent decisions as persuasive authority. See *Garner v. Department of Employment Security*, 269 Ill. App. 3d 370, 376 (1995);

decision ABR 85-2543/9-20-85, an employee who was very ill with ptomaine poisoning and bladder disease was discharged for failing to call in to work every day of her absence, as was required by the employer's policy. Illinois Unemployment Insurance Law Handbook, Digest of Adjudication Precedents, ABR-2543/9-20-85. The Board found that, because the employer was aware of the very serious nature of the illness, the employee's calling every day "would serve no practical purpose." *Id.* Thus, the Board found that the employee's discharge was not for misconduct. *Id.*

¶ 27 Here, it is undisputed that Rollprint had informed the plaintiff that if she showed up to late work again, she would be fired. Thus, once the plaintiff realized that she would be late to work, it would have been pointless and served no practical purpose for her to continue to drive to work anyway. Accordingly, the plaintiff's failure to report to work on July 2, 2012, as opposed to just being late on that day, does not show that her violation of her employer's attendance rules was willfull.

¶ 28 The defendants point out that due to the difficult traffic situation on July 2, 2012, Rollprint excused tardiness for all of its employees. Thus, the plaintiff would not have been fired that day had she just shown up for work. Since she "willfully" did not report to work that day, that is why she was fired.

¶ 29 We find Rollprint's argument unpersuasive. McCoy testified that, due to the storm, neither his phone nor his e-mail was working. Thus, he was unable to inform the plaintiff that she would not be fired even if she showed up late to work. The plaintiff could not be expected to alter her actions based on Rollprint modifying its rules without informing her. See *Livingston v.*

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*Galaraza v. Department of Labor*, 167 Ill. App. 3d 163, 170 (1987).

*Department of Employment Security*, 375 Ill. App. 3d 710, 716 (2007) (plaintiff has to be aware of rule in order to willfully disregard it).

¶ 30 In sum, the plaintiff was unable to make it to work on time due to storm-caused traffic conditions. Her employer had essentially told her that if she was going to be late, it would be pointless for her to come in at all because she was going to be fired anyway. Although the employer decided to relax its admonition on the day in question, it never communicated its decision to the plaintiff. Thus, the plaintiff's failure to report to work on the day in question does not rise to the level of deliberate and willful misconduct. Accordingly, the Board's finding to the contrary was clearly erroneous. The circuit court therefore erred in affirming the Board's decision.

¶ 31 In so ruling, we need not address the plaintiff's alternative argument that Board's decision did not contain sufficient findings or analysis to allow meaningful review by this court.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, we reverse the decisions of the circuit court of Kendall County and the Board.

¶ 34 Reversed.