2015 IL App (3d) 130933-U

Order filed March 27, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

NICKIYA T. FRANCO,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois,
	)	
v.	)	
	)	
ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY,	)	
DIRECTOR, ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY and BOARD OF REVIEW,	)	Appeal No. 3-13-0933
	)	Circuit No. 13-MR-1593
	)	
Defendants-Appellants,	)	
	)	
and	)	
	)	
SXC HEALTH SOLUTIONS, INC.,	)	Honorable
	)	Barbara N. Petrungaro,
Defendant.	)	Judge, Presiding.

PRESIDING JUSTICE McDADE delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The Board of Review's determination that plaintiff had been discharged for misconduct was clearly erroneous.

¶ 2 Plaintiff, Nickiya T. Franco, was terminated from her position at SXC Health Solutions, Inc. (SXC)[1] after departing work early on five consecutive days. After applying for unemployment benefits, plaintiff's claim was denied. Her claim was subsequently denied by an administrative referee on the grounds that plaintiff had been terminated for misconduct. The Board of Review (the Board) of the Illinois Department of Employment Security (the Department) affirmed the decision. Plaintiff appealed to the circuit court, which reversed the decision of the Board. The Department, its director, and the Board (collectively defendants) now appeal, arguing that plaintiff was terminated for misconduct, and she was thus ineligible for unemployment benefits. We reverse the decision of the Board.

¶ 3 FACTS

¶ 4 Plaintiff was employed at SXC from February 7, 2011, until her discharge on September 5, 2012. Plaintiff worked Tuesday through Friday, from 10:30 a.m. to 9 p.m. On August 1, 2012, plaintiff filed a "New Schedule Request Form." She requested that she be allowed to work from home or, alternatively, that her shifts run from 8 a.m. to 4:30 p.m. Monday through Friday. Plaintiff explained that the change to her schedule was necessary so that she could pick her daughter up from school. SXC denied plaintiff's request, explaining that "[t]he schedules are in place to ensure that our business operations are running effectively—our client needs are top priority and we need to ensure that we are servicing them as best we can."

¶ 5 On Tuesday, August 28, 2012, plaintiff left work at 4:30 p.m., despite being scheduled to work until 9 p.m. She did the same for each of her next four scheduled work days. On September 5, 2012, plaintiff was terminated from her position at SXC.

¶ 6 Plaintiff subsequently applied to the Department for unemployment benefits. SXC

[1] SXC, a defendant, did not participate in this appeal.

contested plaintiff's claim, pointing out that plaintiff was discharged for misconduct. In a letter, SXC explained that "[plaintiff] had changed her schedule without informing anyone. This is unacceptable behavior, [of] which [led] to the management decision to terminate her employment." The claims adjudicator ultimately denied plaintiff's request for unemployment benefits, concluding that plaintiff left the job voluntarily, and thus was ineligible for benefits.

¶ 7 Plaintiff filed an administrative appeal contesting the claims adjudicator's decision. In the appeal, plaintiff argued that her discharge was not consistent with SXC's own attendance policy. Plaintiff explained that the SXC policy calls for an employee to be written up after 8 occurrences and for termination after 10 occurrences. Plaintiff claimed she only had 8½ such occurrences at the time of her discharge.

¶ 8 On November 30, 2012, a Department referee conducted an administrative hearing via telephone. Only plaintiff participated in the hearing, as SXC failed to appear. During the hearing, plaintiff elaborated further on SXC's attendance policy. Under the policy, an absence was counted as one occurrence. If an employee arrived late or departed early, that was counted as one-half of an occurrence. Plaintiff testified that she had accrued six occurrences prior to August 28, 2012, and would have accrued 2½ more for leaving early for 5 days, bringing her total under the attendance policy to 8½.

¶ 9 The referee concluded that plaintiff was not eligible for benefits, but reached that conclusion on different grounds than those of the claims adjudicator. The referee ruled that plaintiff did not voluntarily leave her job, but was discharged. In the section labeled "Findings of Fact," the referee found that SXC terminated plaintiff "for leaving early without permission." The referee found that plaintiff took leave without express approval from the employer, and was therefore terminated for misconduct. Accordingly, the referee concluded that plaintiff was not

eligible for unemployment benefits.

¶ 10 Plaintiff appealed the referee's decision to the Board. On appeal, plaintiff reiterated that she had not accrued enough occurrences to justify termination under the SXC attendance policy. She also claimed that she used the SXC call-in line each time she left early. In support of her contentions, plaintiff attached exhibits documenting the SXC attendance policy. The exhibits corroborate plaintiff's earlier testimony regarding the policy: late arrivals or early departures of less than one-half of a scheduled shift count as one-half of an occurrence; absences for more than one-half of a scheduled shift—or for an entire day—count as one occurrence. Under the policy, an employee receives a formal written warning upon accruing their eighth occurrence, a final written warning upon their ninth occurrence, and "[f]urther discipline up to and including termination of employment" upon the tenth occurrence. An additional exhibit showed that plaintiff had accrued six occurrences prior to the period of time at issue.

¶ 11 The Board affirmed the referee's decision, finding it to be supported by the record and the law. The Board incorporated the referee's decision into its own. Plaintiff subsequently filed a *pro se* complaint for administrative review in the circuit court.

¶ 12 The circuit court entered an order reversing the decision of the Board as "clearly erroneous." The court reasoned that no evidence was presented as to why SXC deviated from its own attendance policy. "As there has been no violation of policy established," the court concluded, "there has been no misconduct." The defendants filed a motion to reconsider, which the trial court denied on October 29, 2013. This appeal followed.

¶ 13 ANALYSIS

¶ 14 In a case involving administrative review, we review the decision of the agency (the Board), not that of the circuit court. Here, the Board held that plaintiff's actions met the statutory

definition of misconduct, rendering her ineligible for unemployment benefits. See *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 531 (2006). Because plaintiff's actions did not justify termination under defendants' unambiguous written policy, we hold the Board's decision to be clearly erroneous.

¶ 15 The present issue—whether plaintiff's actions met the statutory definition of misconduct, rendering her ineligible for unemployment benefits—is a mixed question of law and fact. A mixed question of law and fact is one in which "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard." *Murphy v. Board of Review of the Department of Employment Security*, 394 Ill. App. 3d 834, 836 (2009). Such questions are reviewed under the clearly erroneous standard. *Marconi*, 225 Ill. 2d at 532; see also *Walls v. Department of Employment Security*, 2013 IL App (5th) 130069, ¶ 14 (decision is clearly erroneous only where "a review of the record leaves the reviewing court with a definite and firm conviction that a mistake has been made").

¶ 16 Before proceeding further in our analysis, we note that plaintiff has failed to file an appellate brief. However, this is not fatal to plaintiff's case on appeal. Our supreme court has held that "if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal." *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). The principle discussed in *First Capitol* is also applicable in the administrative review context, where the appellate court does not strictly review the decision of the circuit court. *E.g. Williams v. Illinois Civil Service Comm'n*, 2012 IL App (1st) 101344, ¶ 1.

¶ 17 The Unemployment Insurance Act (820 ILCS 405/100 *et seq.* (West 2012)) is intended to "benefit individuals who are not at fault for their unemployment." *White v. Department of*

Employment Security, 376 Ill. App. 3d 668, 671 (2007). In turn, an employee who is discharged for work-related misconduct is ineligible for benefits. 820 ILCS 405/602(A) (West 2012). "Misconduct is defined as (1) a deliberate and willful violation of (2) a reasonable rule or policy (3) that harms the employer or other employees or has been repeated by the former employee despite a warning or the employer's explicit instructions." *Baker v. Department of Employment Security*, 2014 IL App (1st) 123669, ¶ 15.

¶ 18 The SXC attendance policy provides for the possibility of termination only after an employee has accrued 10 occurrences. An employee receives one-half of an occurrence for arriving at work late or departing early, provided the employee works more than one-half of his or her scheduled shift. Prior to the events in question, plaintiff had accumulated six occurrences. After leaving early for 5 days—working more than one-half of her shift each day—plaintiff would have accrued an additional 2½ occurrences, bringing her total to 8½. Though this total would warrant a written warning under the SXC policy, it would not warrant termination. Plaintiff plainly did not violate the SXC attendance policy, and defendants do not argue otherwise.

¶ 19 Defendants instead contend that plaintiff violated an implied rule against insubordination. See *deOliveira v. State Board of Education*, 158 Ill. App. 3d 111, 125 (1987) (defining "insubordination" as " 'a willful disregard of express or implied directions of the employer and refusal to obey reasonable orders' " (quoting Black's Law Dictionary 942 (4th ed. 1968))). Illinois courts do not require that a violated rule or policy be formalized; rather, such a rule or policy may be inferred. See *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 827 (2009). Such an inference may be made through a " 'commonsense realization that certain

conduct intentionally and substantially disregards an employer's interest.' " *Id*. (quoting *Greenlaw v. Department of Employment Security*, 299 Ill. App. 3d 446, 448 (1998)).

¶ 20 In support of their argument, defendants maintain that plaintiff was terminated not simply because she departed work early, but because plaintiff "deliberately and willfully violated SXC's implied policy against insubordination by refusing to comply with a direct order to maintain her current schedule." Defendants repeatedly maintain that plaintiff "changed her schedule."

¶ 21 SXC did not explicitly order plaintiff to work her entire shift, it merely denied her request for a schedule change. Likewise, though defendants contend that plaintiff "changed her schedule," the record does not show that plaintiff took any actual steps to officially change her schedule following her initial requests. She simply left work early, an action which, under the SXC attendance policy, plaintiff was entitled to take without being terminated. To find that this alone constituted insubordination would be to find that SXC's denial of plaintiff's schedule-change request served to make the company's existing attendance policy inapplicable to plaintiff from that point forward. Such a result would be absurd.

¶ 22 Further, the referee found that plaintiff was terminated "for leaving early without permission." The referee made no reference to insubordination. This finding of fact, incorporated into the Board's decision, will be overturned only if it is against the manifest weight of the evidence. *Marconi*, 225 Ill. 2d at 532. However, the evidence clearly supports that finding. For five consecutive days, plaintiff departed work early, having worked more than one-half of her scheduled shift. Under the SXC attendance policy, this would result in 2½ occurrences. The evidence shows that this would bring plaintiff's total occurrences to 8½, below the threshold of 10 required for termination under the policy. Though we may infer a policy against insubordination, we will not find that such an inferred policy trumps the actual, written

attendance policy to which plaintiff was at all times subject. We find that no violation of policy warranting termination occurred and we find, as did the circuit court, that the decision of the Board was clearly erroneous.

¶ 23 CONCLUSION

¶ 24 The judgment of the Board is reversed.

¶ 25 Reversed.