

No. 1-15-0011

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

CARLOS J. DELGADO,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 14 L 50393
)	
ILLINOIS DEPARTMENT OF EMPLOYMENT)	
SECURITY, DIRECTOR OF ILLINOIS)	
DEPARTMENT OF EMPLOYMENT SECURITY,)	
BOARD OF REVIEW,)	
)	
Defendants-Appellants,)	
and)	
)	
HEARTLAND MIDWEST LLC c/o uc express,)	Honorable
)	Robert Lopez Cepero,
Defendant.)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of the circuit court is reversed where the plaintiff's willful violation of his employer's reasonable rule or policy constituted misconduct and disqualified him from unemployment benefits.

¶ 2 The plaintiff, Carlos Delgado, initiated this action against his former employer, Heartland Midwest, LLC (Heartland), seeking unemployment benefits under section 602(A) of the Illinois Unemployment Insurance Act (Act) (820 ILCS 405/602(A) (West 2012)). Following a hearing, the Board of Review of the Illinois Department of Employment Security (Board) found that the plaintiff failed to qualify for benefits under the Act because he had been discharged from his employment at Heartland due to his misconduct. The circuit court reversed the Board's decision and the Board now appeals, arguing that its decision was not clearly erroneous. For the reasons that follow, we reverse the circuit court's judgment and reinstate the Board's decision.

¶ 3 The record shows that Heartland is a franchisee of approximately 400 Burger King restaurants. Michael Johnson, a district manager at Heartland, testified that the plaintiff was employed as an assistant manager for Heartland. Initially, the plaintiff worked at Heartland's restaurant located at 5211 South Cicero Avenue in Chicago (Cicero); however, he was later transferred to 7222 South Stony Island in Chicago (Stony Island).

¶ 4 On October 9, 2013, Johnson left a message on the plaintiff's cell phone, telling him to work his regularly-scheduled shift at Cicero instead of Stony Island, because Cicero was understaffed. It was Heartland's regular practice to assign salaried assistant managers like the plaintiff to cover shifts at understaffed restaurants. The plaintiff responded to Johnson's voicemail through a text message, stating "I don't wanna work at [Cicero] *** I'll go to any other store but that one." Johnson replied, "[a]s an [assistant manager,] you are expected to go to the store that has the need." Heartland had no other assistant managers to work the shift at Cicero besides the plaintiff. The plaintiff told Johnson that he did not want to work at Cicero because he had issues with some of the employees there and that, as a result, his reputation was tarnished. Johnson assured the plaintiff that the employees with whom he had issues were no longer

working at Cicero; nonetheless, the plaintiff refused to relocate to Cicero. Accordingly, Johnson warned the plaintiff by stating, "If you don't go [to Cicero] you will not have a job." The plaintiff still refused to comply with the work reassignment, and asked Johnson to provide: (1) documentation for his termination; (2) proof that he returned his work equipment; and (3) a copy of his employment contract. Because the plaintiff did not work his shift at Cicero, Heartland discharged him on October 10, 2013.

¶ 5 On October 13, 2013, the plaintiff filed a claim for unemployment insurance benefits. On October 30, 2013, an Illinois Department of Employment Security (Department) claims adjudicator determined that the plaintiff was entitled to benefits.

¶ 6 Following the claims adjudicator's determination, Heartland appealed, and a telephonic hearing was held before a Department referee on January 14, 2014. During the hearing, Johnson described his October 9, 2013, text message exchange with the plaintiff, and the text messages were submitted as evidence. A portion of the employee handbook was submitted as evidence, which prohibited insubordination, and defined such behavior as, "refusing to obey a reasonable work request or instruction of a manager[.]" Heartland also submitted a document that it claimed was the plaintiff's acknowledgment of receipt of the employee handbook. The handbook was acknowledged electronically by checking a box and was not signed by the plaintiff. The plaintiff did not object to the October 9, 2013, text conversation and admitted that he did not comply with Johnson's direct order to work at Cicero. The plaintiff testified that he did not receive an employee handbook from Heartland and that he was unaware of Heartland's rule or policy regarding work reassignments.

¶ 7 The referee issued a decision on January 17, 2014, setting aside the claims adjudicator's determination and finding the plaintiff ineligible for unemployment benefits. The referee found

that the plaintiff was discharged for misconduct in connection with his work and the plaintiff harmed Heartland when he refused Johnson's reasonable direct order.

¶ 8 On February 3, 2014, the plaintiff appealed the judgment of the referee to the Board, arguing that he could not call his witness during the hearing and that Johnson's direct order regarding work reassignment was unreasonable. On April 9, 2014, the Board affirmed and incorporated the referee's decision, finding that the decision was supported by the record and the law. The Board found no merit in the plaintiff's claim that he was not allowed to call a witness because, at the hearing, the referee gave him three opportunities to add anything helpful, but he failed to mention a witness. The Board further added:

"[the plaintiff] testified that he knew, at the time that he refused to work at the Cicero location, that the manager with whom he did not get along was no longer working at the Cicero location, and *** that the order to work at the Cicero location was for only one day."

¶ 9 The plaintiff filed a complaint for administrative review of the Board's decision in the circuit court, and on December 4, 2014, the court reversed the Board's decision. This appeal followed.

¶ 10 On appeal, the Board argues its determination that the plaintiff committed misconduct is not clearly erroneous because the plaintiff deliberately and wilfully violated Heartland's reasonable rule against insubordination and caused harm to Heartland when he refused to follow Jonson's instruction that he work at Cicero.

¶ 11 Initially, we note that the plaintiff did not file a response brief in this matter. However, reversal is not automatic where an appellee fails to file a response brief. Because the record in this case is straight forward and the claimed error can be easily decided without the benefit of an

appellee brief, we address the issues raised in the defendants' appeal. *In re Marriage of Earlywine*, 2013 IL 114779, ¶ 13.

¶ 12 In administrative review cases, we evaluate the decision of the Board, rather than the decisions of the circuit court or the referee. *Petrovic v. Department of Employment Security*, 2016 IL 118562, ¶ 22. 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)). "An administrative agency decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident." *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992). 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). The Board's decision is clearly erroneous where 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).

¶ 13 The Act's main purpose is to relieve the economic insecurity caused by involuntary unemployment. 820 ILCS 405/100 (West 2012); *AFM Messenger Service*, 198 Ill. 2d at 396. It is the employee's burden to establish his eligibility for unemployment benefits. *White v. Department of Employment Security*, 376 Ill. App. 3d 668, 671 (2007). Although, the Board is the ultimate fact finder, courts liberally construe the Act to avoid the loss of benefits. *Petrovic*, 2016 IL 118562, ¶ 23.

¶ 14 Section 602(A) of the Act states that an employee is ineligible for unemployment benefits if he is discharged for "misconduct" in connection with his work. 820 ILCS 405/602(A) (West 2012); *Petrovic*, 2016 IL 118562, ¶ 25. An employee's actions constitute misconduct under the Act if the evidence satisfies the following three elements: "(1) a deliberate and willful violation (2) of a reasonable rule or policy of the employer governing the individual's behavior in the performance of her work, that (3) either (a) harmed the employer or a fellow employee or (b) was repeated despite a warning or explicit instruction from the employer." *Id.* ¶ 26.

¶ 15 We first address the Board's argument that Heartland's rule or policy was reasonable. A policy is reasonable if it contains behavioral standards that the employer expects from an employee. *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 557 (2006). Here, Heartland had a rule against insubordination which the employee handbook defined as "refusing to obey a reasonable work request or instruction of a manager[.]" It is reasonable for an employer to expect its employees, like the plaintiff, to follow a request or instruction of a district manager, especially where those instructions require the employee to perform his regular job duties. Accordingly, the Board's finding that Heartland had a reasonable rule or policy is not against the manifest weight of the evidence.

¶ 16 We next address whether the plaintiff deliberately and willfully violated Heartland's reasonable rule. It is well settled that deliberate and willful conduct is a conscious act by an employee in violation of a company rule or policy, that the employee knows about. *Wrobel v. Department of Employment Security*, 344 Ill. App. 3d 533, 538 (2003). A rule or policy need not be written or formalized (*Caterpillar, Inc. v. Department of Employment Security*, 313 Ill. App. 3d 645, 654 (2000)), but the employee must have notice of it if the employer wishes to terminate him for violating it (see *Hoffmann v. Lyon Metal Products, Inc.*, 217 Ill. App. 3d 490, 498-99

(1991)). Direct evidence of a rule or policy is not necessary; instead, a reviewing court may make a commonsense determination that certain conduct deliberately and willfully disregards an employer's interest. *Greenlaw v. Department of Employment Security*, 299 Ill. App. 3d 446, 448 (1998).

¶ 17 In this case, although the plaintiff asserted that he was not aware of Heartland's reassignment or insubordination policy, the Board, after weighing the evidence and evaluating the credibility of the witnesses, found that the plaintiff was on notice. The plaintiff's electronic acknowledgment that he received the employee handbook, and his text messages with Johnson, establish that Heartland informed him that termination was possible if he refused to comply with the reassignment policy. The plaintiff broke that policy and was insubordinate when he failed and refused to work at Cicero. Johnson directed the plaintiff to work at Cicero, a location where the plaintiff had previously worked, for only one shift because that restaurant was understaffed. Therefore, the Board's determination is not against the manifest weight of the evidence when it found that the plaintiff acted deliberately and willfully when he refused his reassignment to Cicero.

¶ 18 Finally, the plaintiff's noncompliance caused Heartland a potential harm. *Pelosi*, 2012 IL App (1st) 111835, ¶ 32 (harm to an employer includes actual and potential harm). Johnson testified that, the plaintiff was the only available assistant manager in Heartland's network to work the shift at Cicero. As a result of the plaintiff's actions, Cicero was deprived of an assistant manager, which led to a disruption of the understaffed restaurant's operations and could have caused Heartland a potential financial loss. See *Bandemer v. Department of Employment Security*, 204 Ill. App. 3d 192, 195 (1990) (where a potential financial loss constituted harm). Therefore, the Board's findings are not contrary to the manifest weight of the evidence when it

found that the plaintiff's refusal to comply with Johnson's reasonable order for a temporary work reassignment to Cicero constitutes misconduct, and because of the Board's determination, the plaintiff was not entitled to unemployment benefits.

¶ 19 The Board's determination that the plaintiff's actions constitute misconduct is not clearly erroneous, because the plaintiff deliberately and wilfully violated Heartland's reasonable rule or policy for the plaintiff to work one shift at a different location, which was a direct order to him, and as a result Heartland was harmed.

¶ 20 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and reinstate the Board's decision.

¶ 21 Circuit court reversed; Board's decision reinstated.