

1-10-2171

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SBK SHAMROCK, LLC,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	
)	
BOARD OF REVIEW, STATE OF ILLINOIS,)	No. 10 L 50248
DEPARTMENT OF EMPLOYMENT SECURITY,)	
MAUREEN O'DONNELL, Director of the Illinois)	
Department of Employment Security and ARETHA)	
BROOKS,)	Honorable
)	Sanjay T. Tailor,
Defendants-Appellees.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Quinn and Justice Connors concurred in the judgment.

ORDER

- ¶ 1 *Held:* The Board's ruling that the plaintiff was entitled to unemployment benefits because she was discharged for reasons other than misconduct in connection with her work was not clearly erroneous.
- ¶ 2 Plaintiff SBK Shamrock, LLC (Shamrock) appeals from an order of the circuit court of Cook County affirming the ruling of the Illinois Department of Employment Security (Board) that Aretha Brooks was discharged for reasons other than misconduct, and thus not disqualified from receiving unemployment benefits under section 602A of the Illinois Unemployment Insurance Act (Act). 820 ILCS 405/602(A) (West 2008). On appeal, Shamrock contends that the Board's ruling was clearly erroneous and should be reversed.

¶ 3 The record shows, in relevant part, that Brooks was employed by Shamrock as a relief housekeeper at the "Shamrock Motel" in Cicero, Illinois, from January 2009, until her discharge in April 2009.¹ Brooks applied for unemployment benefits and claimed that she was discharged for arriving late to work. During her interview, she stated that she had informed Mr. Louie, a receptionist, that she would be late that day because her sister was late picking her up, and that he told her "no problem." However, when she arrived at 7:15 a.m., 15 minutes late for her shift, Mr. Wung, the owner, told her that she "may as well go back home" because he had found a replacement for her. When she arrived for work on time the next day at 7 a.m., he told her that she was terminated.

¶ 4 Shamrock protested the claim, contending that Brooks had been employed for less than 60 days, voluntarily left because a family member was sick, and would not show up for work due to "sickness." Tarzan Hurley, Shamrock Motel's manager, also maintained that he knew nothing about Brooks being replaced by the owner. The claims administrator found that Brooks was discharged because Shamrock found a replacement for her position, that the action resulting in her discharge was not deliberate and willful, and that she was eligible for unemployment benefits.

¶ 5 Shamrock appealed and a telephonic hearing was held by a Department referee on August 28, 2009. During that hearing, Hurley testified that Brooks was a part-time relief maid from January 2, 2009, until April 13, 2009, and that she was regularly scheduled for the afternoon shifts on Tuesdays through Thursdays, and the midnight shifts on Fridays and Saturdays. Shamrock does not have a written attendance policy, but Hurley instructs employees verbally that tardiness and absenteeism are grounds for termination, and that they must give 24 hours notice if they cannot make it to work so that he can find a replacement.

¹The record contains inconsistent dates for Brooks' employment, and the claim filed by Brooks refers to a discharge date of May 10, 2009. However, the parties' testimony at the hearing held in this matter reflect a discharge date in April 2009.

¶ 6 Hurley testified that Brooks was a no call, no show from February 26 to 28, 2009, was told that she could be terminated if it happened again, then missed work again on April 4, 2009. Hurley further testified that on Tuesday, April 14, 2009, Brooks missed her shift for the third time without calling in, and Hurley assumed that she had quit and hired someone else. She did not show up for work the following day and contacted Hurley on April 16, 2009, at which time she did not provide a reason for her failure to call in, and Hurley told her that she had been replaced. Hurley testified that when Brooks missed work, rooms at the motel would go uncleaned and could not be rented out, and that it was particularly difficult to find a last-minute replacement at midnight on a Saturday night.

¶ 7 In response to questions from Shamrock's representative, Hurley testified that when Brooks called on April 16, 2009, asking when she could come back to work, Hurley told her that he could not bring her back due to her excessive absenteeism. He testified that he informs all new employees of the policy regarding absenteeism, that Brooks was duly informed of that policy, and that she indicated that she understood the policy. Also, when Brooks failed to show up, they were unable to rent out five to six rooms, the charges for which were \$75 on Saturdays and \$59 during the week. Hurley testified that there was no owner named "Mr. Wung," and that Brooks had told him that she had no family in the Chicagoland area. In response to a question from Brooks, Hurley stated that she had not brought him an obituary to show that a family member had passed away when she returned from an absence of a few days.

¶ 8 Mr. Manzonello, a night clerk at the motel on Fridays through Tuesdays, testified that Hurley had instructed him of Shamrock's absenteeism policy when he began working there, that his only contact with Brooks was on weekends, and that he never received a call from her stating that she would be late for work. He also testified that Brooks told him that she does not have relatives in the Chicagoland area, and that he never saw her start work at 7 a.m.

¶ 9 Brooks testified that she missed work from February 26 to 28, 2009, because the lady who

had raised her since she was three, and who was "like a mother" to her, had passed away in Milwaukee. She called in her absence and provided an obituary to verify the reason for it, and did not receive a warning from Hurley for those absences, though a warning was mentioned to her by the receptionist. At this same time, her mother was also hospitalized at "West Suburban Hospital," and she testified, "But I still came in, even though I was late. I still showed up." Brooks acknowledged that she knew she had to be at work at her scheduled time, and that she needed to give 24 hours notice if she could not make it to work.

¶ 10 Brooks further testified that her discharge came about on a weekend night, which she once referred to in her testimony as a Saturday, and did not recall anything happening on April 14 and 15, 2009. On the Saturday in question, her sister was running late in driving her from her home in Bellwood, Illinois to the motel, and she called in to report her status. However, by the time she arrived, 30 minutes late, a replacement had been called in, and the receptionist told her to go home and come back the next day to see if she still had her job. She complied, and when she returned as instructed, Manzonello² told her that Hurley had replaced her and that she no longer had a job. She was never given a reason for her discharge and never spoke with Hurley about it.

¶ 11 In response to questions from Shamrock's representative, Brooks stated that she showed up for work late on Saturday, April 4, 2009, and had called in to say, "I'm on my way, but I'm running a little bit late." Brooks said that when she arrived another worker was already there and she was told to go home. She also stated that the lady who had raised her died in May 2009, that she did not know a "Mr. Wung," and that she never started work at 7 a.m.

¶ 12 In rebuttal, Manzonello testified that he never had a conversation with Brooks in which he told her to go home, and never received a phone call from her. Hurley testified that he was the one

²Brooks testified that "the guy that's talking now" told her that she had been replaced, and that his name was "Mr. Louie." We assume, under the circumstances, that Brooks was referring to Manzonello.

who spoke with Brooks each time she failed to show up.

¶ 13 The referee concluded that Brooks was not disqualified from receiving benefits under section 602A of the Act because she was discharged for reasons other than misconduct. The referee found that Shamrock had failed to meet its burden of proof in presenting sufficient evidence that Brooks had willfully and deliberately violated Shamrock's attendance policy, that her absences and tardiness were for legitimate reasons, and that the evidence did not support Shamrock's allegations that Brooks was a no call, no show on any days.

¶ 14 Shamrock appealed to the Board, and on January 22, 2010, the Board affirmed the referee's determination. The Board found that Brooks was discharged for excessive absenteeism on April 4, 2009, after arriving late for work that day because her ride to work was running late. Relying on *Wrobel v. Illinois Department of Employment Security*, 344 Ill. App. 3d 533 (2003), the Board found that the evidence failed to establish that she had made a "conscious act" to be late, and thus concluded that Brooks was discharged for reasons other than misconduct, and, therefore, was not disqualified from receiving benefits under section 602A of the Act.

¶ 15 On February 9, 2010, Shamrock filed a complaint seeking administrative review of the Board's decision. On July 21, 2010, the circuit court affirmed the decision of the Board, noting that the Board's finding that Shamrock failed to establish willful and deliberate conduct by Brooks was not against the manifest weight of the evidence. Shamrock now challenges the propriety of that order.

¶ 16 Our review of this administrative proceeding is limited to the decision of the Board, not that of the circuit court. *Kilpatrick v. Illinois Department of Employment Security*, 401 Ill. App. 3d 90, 92 (2010). In this case, the Board found that Brooks was not disqualified from receiving unemployment benefits because she was discharged for reasons other than misconduct in connection with her work. The question of whether an employee was properly discharged for misconduct under the Act is a mixed question of law and fact, to which we apply the clearly erroneous standard of

review. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 327 (2009). An agency's decision will only be deemed clearly erroneous where the record leaves the reviewing court with the definite and firm conviction that a mistake has been made. *Czajka v. Department of Employment Security*, 387 Ill. App. 3d 168, 173 (2008) (citing *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 393 (2001)).

¶ 17 Under the Act, an employee is ineligible for unemployment benefits if she was discharged for misconduct in connection with her work. 820 ILCS 405/602(A) (West 2008). Misconduct in this sense refers to the deliberate and willful violation of an employer's reasonable rule or policy that harmed the employer or was repeated by the employee despite previous warnings. *Czajka*, 387 Ill. App. 3d at 174. With respect to a violation of an employer's attendance policy, the employee must have deliberately and willfully violated that policy. *Wrobel*, 344 Ill. App. 3d at 538. Thus, an employer seeking to disqualify an employee from receiving unemployment benefits must satisfy a higher burden than merely showing that the employee should have been discharged. *Czajka*, 387 Ill. App. 3d at 176.

¶ 18 Here, the evidence adduced at the hearing showed that on Saturday, April 4, 2009, Brooks arrived 30 minutes late for work because her transportation to the motel was running late. However, by the time she arrived, the employer had already called in another worker to replace her, and she was told to go home and return the next day to see if she still had a job. When she returned as instructed, she was told that she had been replaced and no longer had a job at the motel. The record thus supports the Board's finding that Brooks was discharged for reasons other than misconduct because the late arrival for which she was discharged was not the product of a conscious choice, but rather, was the result of a circumstance beyond her immediate control, *i.e.*, her sister running late. *Wrobel*, 344 Ill. App. 3d at 538.

¶ 19 Shamrock disputes this conclusion by arguing, essentially, that the Board erroneously found that Brooks was discharged for her late arrival on Saturday, April 4, 2009, as opposed to her failure

to show up for work without calling in on April 14 and 15, 2009. The parties, however, presented conflicting evidence as to the date and reason for Brooks' discharge. Hurley testified that Brooks was discharged for failing to call or show up for work on Tuesday, April 14, 2009, and Wednesday, April 15, 2009. Brooks, on the other hand, testified that she was replaced on a Saturday after arriving 30 minutes late for work, acknowledged under questioning from Shamrock's representative that the date of that late arrival was Saturday, April 4, 2009, and also testified that she did not recall anything happening on April 14 and 15, 2009. Because the factual dispute raised by Shamrock is merely an issue of conflicting testimony and witness credibility, we defer to the Board's finding that Brooks was discharged for arriving late for work on Saturday, April 4, 2009. *Carroll v. Board of Review*, 132 Ill. App. 3d 686, 691 (1985).

¶ 20 We thus find that the Board's conclusion that Brooks was discharged for reasons other than misconduct was not clearly erroneous (*Czajka*, 387 Ill. App. 3d at 173); and, accordingly, we affirm the order of the circuit court of Cook County which, in turn, affirmed the ruling of the Board that Brooks is not disqualified from receiving unemployment benefits based on section 602A of the Act.

¶ 21 Affirmed.