SECOND DIVISION
June 14, 2001

No. 1-10-3028

Notice: This order was filed under Illinois Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALICE L. SCOTT, Plaintiff-Appellee, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, DIRECTOR OF ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY and BOARD OF REVIEW, Defendants-Appellants (CHICAGO CLERGY ASSOCIATION FOR HOMELESS PERSONS, Defendant).	)	Appeal from the Circuit Court of Cook County No. 10 L 50064 Honorable Elmer James Tolmaire, III, Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Connors concurred in the judgment.

HELD: Circuit court erred in reversing decision of the Board of Review of the Illinois Department of Employment Security finding plaintiff ineligible for unemployment benefits pursuant to section 602(A) of the Unemployment Insurance Act (Act) (820 ILCS 405/602(A)) (West 2008)) where plaintiff, a counselor working at a jail, was fired for suggesting to a jailed client that she strike another, and the client did.

ORDER

This appeal arises from an order of the circuit court reversing a decision of the Board of Review (Board) of the Illinois Department of Employment Security

(Department) finding plaintiff Alice L. Scott ineligible for unemployment benefits. The Department, the Department's director and the Board (defendants) argue that the court erred in reversing the Board's decision because the Board properly found Scott committed misconduct within the meaning of section 602(A) of the Unemployment Insurance Act (Act) (820 ILCS 405/602(A)) (West 2008)) such that denial of unemployment benefits was warranted. We reverse.

BACKGROUND

Scott was a substance abuse counselor employed by Chicago Clergy Association for Homeless People, Haymarket Center (Haymarket). She worked as a counselor in the Department of Women and Justice program at the Cook County jail from January 2006 until her termination in June 2009. Haymarket fired Scott when Scott told a jail detainee, Jerri Winters, that Winters could get out of the program if she hit someone and Winters then hit another detainee.

Scott had gone to one of the jail cell blocks to take roll for her program. Winters peppered Scott with questions, including a question regarding how she could get out of the program. Scott responded "well, hit me or hit another client." Winters then reached over and hit another of the detainees in the room. Scott later stated she was being sarcastic when she made the statement and did not think Winters would actually do it. Scott applied for unemployment insurance benefits after her termination.

Haymarket protested Scott's benefits claim. It asserted Scott was not eligible for benefits pursuant to section 602(A) of the Act because she was fired for unprofessional

conduct in violation of her employer's work rules. Section 602(A) provides that an employee discharged for misconduct in connection with her work is ineligible for unemployment benefits. 820 ILCS 405/602(A) (West 2008).

The Department's claim adjudicator denied Scott's eligibility for unemployment insurance benefits. The adjudicator found Scott's statement gave Winters "bad information that could have created a hostile situation, and it did." The adjudicator held that, although Scott's statement was not a deliberate and willful act, it should not have been said under the circumstances. Scott appealed the adjudicator's determination.

A Department referee conducted a telephone hearing on Scott's appeal. Clark Roberts, the Human Resource Recruiter for Scott's employer, testified that Scott was terminated for violation of company policy having to do with her professional behavior at the jail. Asked regarding any employment policy ever given to Scott, he responded that all staff go through some training, she was "a seasoned counselor" who had been with the agency for approximately four years "[a]nd they do have information." He stated there was a policy handbook available and the counselors have "training sessions where they talk about professional behavior. And part of that would be that that behavior would be classified as unprofessional."

Gina Sherly, Scott's supervisor, testified that Scott was terminated because she instructed a participant in her program to strike another participant. Sherly had not witnessed the incident but learned about it when Scott sent the inmate who had been hit to get her. Sherly and assorted jail personnel were required to restore order in the

cellblock. Scott told Sherly the statement just came out of her mouth, that she had not been thinking and had no idea that Winters would do as she said. Sherly investigated, talking to the other nine or ten detainees present. They all told her they thought Winters knew Scott was [not] serious but Winters "did it anyway." Sherly stated it was not common practice to tell a program participant to hit another participant. She stated Scott would have known this type of behavior was inappropriate because,

> "being a counselor, the program that we're demonstrating and trying to give to our clients, first of all * * * everything is non-violent. We have ways to cope, talking out. Instructing anyone, anyone, another peer, another counselor, to hit someone [inaudible] just totally inappropriate. So ethically as a counselor we wouldn't do that, playing or otherwise."

Scott testified regarding the incident, stating she was startled when Winters hit the other inmate. She stated her statement to Winters was inappropriate but was facetious and joking. She had heard other counselors make the same statement with no ramifications, that it had never been acted on before.

The referee affirmed the adjudicator's decision, finding Scott ineligible for unemployment benefits under section 602(A) because her employer proved misconduct by a preponderance of the evidence. He found Scott "knew that her behavior was inconsistent with the interests of the employer. Therefore, she is ineligible for benefits under the Act." Scott appealed the referee's decision to the Board. The Board upheld the referee's decision for the reasons stated in that decision.

Scott filed a complaint for administrative review in the Circuit Court of Cook County. On September 9, 2010, the court reversed the Board's decision, finding it clearly erroneous. The Board, Department and director timely appealed.

ANALYSIS

Defendants argue the court erred in reversing the Board's denial of Scott's unemployment claim. They assert Scott was properly disqualified from receiving unemployment benefits because her conduct constituted misconduct within the meaning of section 602(A). Pursuant to section 602(A), an individual claiming unemployment insurance benefits, who is discharged for misconduct connected with work, is ineligible to receive those benefits. 820 ILCS 405/602(A) (West 2008); *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 557 (2006).

On appeal from a decision to deny unemployment benefits, it is the duty of this court to review the decision of the Board, rather than the circuit court, the referee or the adjudicator. *Messer & Stilp, Ltd. v. Department of Employment Security*, 392 Ill. App. 3d 849, 854-855 (2009); *Phistry v. Department of Employment Security*, 405 Ill.App.3d 604, 607 (2010). It is the responsibility of an agency, here the Board, to weigh evidence, determine the credibility of witnesses and resolve conflicts in testimony and we defer to such findings of fact. *Hurst v. Department of Employment Security*, 393 Ill.App.3d 323, 329 (2009). The question of whether an employee was terminated for misconduct in connection with her 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;

Manning, 365 Ill. App. 3d at 557. We will not reverse an agency finding on such a question unless, based on the entirety of the record, we are left with the definite and firm conviction that a mistake has been made. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001). The Board did not make a mistake here.

It is undisputed that Scott was terminated for an act done in connection with her work. The question is whether that act constitutes "misconduct" under section 602(A). Section 602(A) defines misconduct as "the 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." 820 ILCS 405/602(A); *Hurst*, 393 Ill. App. 3d at 327. To establish statutory misconduct, besides finding that the act was committed by the claimant in connection with her work, the Board must determine three elements: (1) there was a deliberate and willful violation of a rule or policy; (2) the rule or policy of the employing unit was reasonable; and (3) the violation either harmed the employer or was repeated by the employee despite previous warnings or explicit instructions from the employer. *Hurst*, 393 Ill. App. 3d at 327; *Manning*, 365 Ill. App. 3d at 557.

The first element focuses on whether Scott deliberately and willfully violated a company rule or policy. "An employee's act of misconduct is willful if he is aware of a

company rule and then disregards that rule." *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 826 (2009), quoting *Caterpillar, Inc. v. Department of Employment Security*, 313 Ill. App. 3d, 645, 653 (2000). We need not find direct evidence of a rule or policy and, instead, may make a commonsense determination that certain conduct intentionally and substantially disregards an employer's interest. *Phistry*, 405 Ill.App.3d at 608.

As Sherly testified, the program Haymarket is demonstrating and trying to provide to its jailed client is of non-violence, that there are ways of coping and talking out differences rather than resorting to violence. Scott was at the jail as a representative of Haymarket, as the counselor in a position of authority over the clients in her program. Scott's suggestion that Winters hit another person, no matter how she may have intended the remark, was the antithesis of what the Haymarket program stood for.

Scott's remark to Winters cannot be blamed on a temporary lack of impulse control. As Roberts testified, Scott was a counselor of many years experience and had received training in the professional behavior Haymarket required of its counselors, including the information that telling a client to act violently toward another was unprofessional. Scott was trained to model and advocate a nonviolent solution to disputes, and had been working in that position full-time for over three years. She knew what Haymarket stood for and what was expected of her in dealing with a difficult clientele and adhered to those requirements for many years. She clearly knew the

comment to Winters went against what she was trained to do but made it anyway. The evidence supports a finding that Scott's conduct intentionally disregarded Haymarket's interests in a major way.

The second element of section 602(A) misconduct requires a showing that the rule or policy of the employer was reasonable. 820 ILCS 405/602(A); *Sudzus*, 393 Ill. App. 3d at 827. A reasonable rule concerns standards of behavior which an employer has a right to expect from an employee. *Livingston v. Department of Employment Security,* 375 Ill. App. 3d 710, 716 (2008). Haymarket's rule that its counselors act professionally and model Haymarket's nonviolent approach to coping is entirely reasonable given the jailed population from which it draw its clients. Moreover, common sense dictates that making a suggestion to a detainee participating in a substance abuse program that she hit someone is unacceptable conduct under any circumstances. The evidence supports a finding that the employer's policy was reasonable.

The final element to establish section 602(A) misconduct requires that either the violation caused harm to the employer or the employee repeated an action despite a warning by the employer. 820 ILCS 405/602(A); *Sudzus*, 393 Ill. App. 3d at 827. Harm to the employer can be established by potential harm and is not limited to actual harm. *Hurst*, 393 Ill. App. 3d at 329; *Manning*, 365 Ill. App. 3d at 557; *Livingston*, 375 Ill. App. 3d at 717. The reviewing court may make a commonsense determination that certain conduct intentionally and substantially disregards an employer's interest. *Greenlaw v.*

Department of Employment Security, 299 Ill. App. 3d 446, 448 (1998). There is no question Haymarket was harmed by Scott's behavior and its aftermath. The cellblock was disrupted by the altercation, multiple resources were required to restore order and investigate the incident and, perhaps most importantly, Haymarket's advocacy for nonviolence and the efficacy of its program was called into question. Overall, there is evidence to support the Board's finding that Scott's actions meet the section 602(A) requirements for misconduct in connection with work and that she is ineligible for unemployment benefits.

For the reasons stated above, we reverse the decision of the circuit court reversing the decision of the Board denying Scott unemployment insurance benefits.

Reversed.