

2012 IL App (1st) 112398-U

FOURTH DIVISION
AUGUST 30, 2012

No. 1-11-2398

NOTICE: This order was filed under 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

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|---|---|---------------------------|
| AMY BRAUN, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellant, |) | Cook County. |
| |) | |
| v. |) | |
| |) | |
| ILLINOIS DEPARTMENT OF EMPLOYMENT |) | No. 11 L 50515 |
| SECURITY; DIRECTOR OF ILLINOIS DEPARTMENT |) | |
| OF EMPLOYMENT SECURITY; BOARD OF |) | |
| REVIEW; and NORTHWESTERN MEMORIAL |) | |
| HOSPITAL, c/o MCHC, |) | Honorable |
| |) | Elmer James Tolmaire III, |
| Defendants-Appellees. |) | Judge Presiding. |

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

ORDER

- ¶ 1 *Held:* Plaintiff's willful violation of a known attendance policy constituted misconduct in connection with her work and disqualified her from unemployment benefits.
- ¶ 2 Plaintiff Amy Braun appeals *pro se* from the circuit court's order that affirmed the decision of the Board of Review of the Illinois Department of Employment Security (Board), finding that she was discharged for misconduct and thus ineligible to receive unemployment

benefits under section 602A of the Illinois Unemployment Insurance Act (Act). 820 ILCS 405/602A (West 2010). Plaintiff appeals *pro se*, contending that she was terminated based on her disability. We affirm the Board's decision.

¶ 3 The record shows that plaintiff was employed as a psychiatric registered nurse with her employer, Northwestern Memorial Hospital (Northwestern) from October 2004 until she was terminated on August 25, 2010. Plaintiff applied for unemployment benefits with the Illinois Department of Employment Security (Department), and the employer objected claiming that plaintiff was discharged for "unavailability for work." The employer submitted, among other items, a human resources policy entitled "Rules For Personal Conduct," which included its policy regarding tardiness. The employer also submitted a May 18, 2010 written order showing that plaintiff received a verbal warning on April 1, 2010, for tardiness, and that she was tardy on numerous dates in April and May 2010. A July 2010 pre-termination final warning was also included, listing several additional attendance violations by plaintiff in May, June, and July 2010. Both documents were signed by plaintiff. Finally, the employer attached the August 25, 2010 termination report, which indicated further attendance violations by plaintiff in July and August 2010. On September 28, 2010, a claims adjudicator found plaintiff ineligible for benefits because she was discharged due to tardiness.

¶ 4 Plaintiff appealed, and on February 1, 2011, a telephone hearing was conducted by a Department referee. At this hearing, Evelyn Perkins, one of plaintiff's managers at Northwestern, testified that plaintiff was a full time nurse who worked Monday through Friday from 3:30 p.m. until midnight. Plaintiff was discharged for violating Northwestern's attendance policy for tardiness, and the last day she was present at work was August 25, 2010. The final date plaintiff was tardy was August 20, 2010, which was the third time she was late in August. Plaintiff did not call her employer to notify her manager of her absence, even though the attendance policy

stated that an employee must call her employer every day she is going to be late or absent. The purpose of this policy was for staffing and safety concerns, especially for the "highly acute unit" where plaintiff worked. Plaintiff was previously warned about her attendance violations through a written warning on May 18, 2010, and a pre-termination warning on July 7, 2010. The pre-termination warning indicated that if plaintiff continued to violate the attendance policy, further disciplinary action may be taken, up to and including discharge. Plaintiff's tardiness affected the department because the off-going and oncoming shift nurses would not be in place. Perkins indicated that other individuals within the department who were in violation of the attendance policy received the same disciplinary action as plaintiff.

¶ 5 Plaintiff testified that she was late on August 20, 2010, because she had to pick up her son. She also admitted that she was late on August 6 and 12, 2010, and that she received prior warnings due to her tardiness at work, including a pre-termination warning advising her that future infractions may warrant her termination. Plaintiff indicated that she did not call her employer to say that she would be late because "it *** did not have an impact on the work." Although plaintiff repeatedly denied that the policies required her to call the employer to report she was running late, she later admitted having such policies, which she read into the record.

¶ 6 In affirming the local office determination that plaintiff was ineligible for benefits, the referee found that plaintiff had been given a final warning in July 2010, and was eight minutes late in violation of the employer's attendance policy on August 20, 2010, which led to her discharge. The referee also indicated that the employer had a policy that required its employees to call in whenever they were tardy or absent, and plaintiff did not call to inform her employer that she was late. He further found that plaintiff's conduct amounted to misconduct under section 602A of the Act (820 ILCS 405/602A (West 2010)), because her failure to notify Northwestern of her tardiness was a violation of a reasonable policy of the employer.

¶ 7 Plaintiff appealed the referee's decision to the Board. She essentially argued that the attendance policy was not being applied to all employees equally, and that her tardiness did not affect her employer. Plaintiff also attached to her appeal copies of attendance violation reports that had not been previously submitted. In affirming the referee's decision, the Board found that, after reviewing the entire record, the referee's decision was supported by the record and the law. Plaintiff filed a complaint for administrative review of the Board's decision in the circuit court. On July 21, 2011, the circuit court affirmed the Board's decision. This appeal follows.

¶ 8 We review the final decision of the administrative agency and not the decision of the circuit court. *Village Discount Outlet v. Department of Employment Security*, 384 Ill. App. 3d 522, 524-25 (2008). The applicable standard of review depends on the issue raised. This court reviews pure questions of law *de novo* (*Village Discount Outlet*, 384 Ill. App. 3d at 525), but the Board's findings of fact are governed by a different standard of review, *i.e.*, they are entitled to great deference and will be affirmed unless they are against the manifest weight of the evidence (*Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008)).

¶ 9 The question of whether an employee was disqualified from unemployment benefits for misconduct presents a mixed question of law and fact and is subject to the "clearly erroneous" standard of review. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001). An agency's decision may be deemed clearly erroneous only where the reviewing court is left with the definite and firm conviction that a mistake has been made based on the entire record. *AFM Messenger Service*, 198 Ill. 2d at 395. For the reasons which follow, we find that this is not such a case.

¶ 10 To be ineligible for unemployment benefits under section 602A of the Act, a claimant's cause of discharge must be related to work misconduct, which deliberately and willfully violates a reasonable work rule or policy governing work-related behavior. 820 ILCS 405/602A (West

2010). Further, such violation must harm the employer or other employees, or must be repeated after a warning from the employer. 820 ILCS 405/602A (West 2010).

¶ 11 At the hearing, Perkins testified that plaintiff was discharged for violating Northwestern's attendance policy for tardiness. The final incident occurred on August 20, 2010, when plaintiff was late for the start of her shift and failed to call her employer. In addition to plaintiff's late arrival on August 20, Perkins' indicated, and plaintiff conceded in her testimony, that she was tardy twice before in August. Moreover, Perkins testified, and the record revealed, that plaintiff was previously warned about her attendance violations through a written warning on May 18, 2010, and a pre-termination warning on July 7, 2010. The pre-termination warning indicated that if plaintiff continued to violate the attendance policy she could be discharged. Plaintiff admitted to receiving warnings regarding her attendance prior to being terminated. Perkins further testified that the attendance policies were in place for staffing and safety concerns, and plaintiff's tardiness negatively affected the department. Plaintiff, however, testified that her tardiness did not have an impact on her work.

¶ 12 It is the responsibility of the administrative agency to weigh the evidence, determine the credibility of witnesses, and resolve conflicting testimony. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 329 (2009). Here, after considering the testimony of Perkins and plaintiff during the telephone hearing, the Board determined that plaintiff's poor attendance caused a disruption at work, settled this issue in favor of the employer, and affirmed the referee's decision. In doing so, the Board found that plaintiff was discharged for misconduct when she chose not to notify the employer of her tardiness because she thought it was insignificant. After reviewing the record in this case, and deferring to the Board's assessment, we cannot say that this conclusion was against the manifest weight of the evidence. *Caterpillar, Inc., v. Doherty*, 299 Ill. App. 3d 338, 344 (1998).

¶ 13 Plaintiff attempts to cast doubt on the Board's decision by detailing in her brief that the transcripts from the telephone hearing were falsified, her tardiness was not willful and deliberate, and Perkins discriminated against her because she had a disability, *i.e.*, an anxiety order and "ADHD." Throughout her brief, plaintiff refers to events and matters outside of the record on appeal, including materials attached to her brief detailing her finances and disability. We disregard the portions of plaintiff's brief referring to events outside the record on appeal, and the aforementioned attachments to her brief. See *Keener v. City of Herrin*, 235 Ill. 2d 338, 346 (2009) (stating that the consideration of a case is restricted to matters of record, and inappropriate materials may be disregarded).

¶ 14 Furthermore, to the extent that plaintiff's contentions in her brief on appeal involve matters of record, we again note that it is the responsibility of the administrative agency to weigh the evidence and determine the credibility of witnesses. *Hurst*, 393 Ill. App. 3d at 329. Here, the record discloses prior warnings for plaintiff's attendance violations, and a final violation by her on August 20, 2010, which resulted in her discharge. The record thus supports the Board's decision, and plaintiff's arguments relating to her disability provide no cause for reversal.

¶ 15 Considering the Board's findings as *prima facie* true and correct (*Horton v. Department of Employment Security*, 335 Ill. App. 3d 537, 540 (2002)), we find that the Board's determination that plaintiff was ineligible for unemployment benefits was not clearly erroneous (*AFM Messenger Service*, 198 Ill. 2d at 391). Plaintiff knowingly violated a reasonable work rule by arriving late and failing to call to her employer. Furthermore, plaintiff's tardiness injured the interests of the employer because the outgoing shift could not leave until the oncoming shift was in place.

¶ 16 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 17 Affirmed.

1-11-2398