2012 IL App (1st) 113392-U

SIXTH DIVISION
December 21, 2012

No. 1-11-3392

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CAROLINE STEPHENSON, Plaintiff-Appellant, v. THE DEPARTMENT OF EMPLOYMENT SECURITY, DIRECTOR OF THE DEPARTMENT OF EMPLOYMENT SECURITY, and THE BOARD OF REVIEW, Defendants-Appellees, and CENTRUM PROPERTIES, INC., Defendant.	)	Appeal from the Circuit Court of Cook County. No. 11 L 50798 The Honorable Margaret Ann Brennan, Judge Presiding.

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Robert E. Gordon concurred in the judgment.

O R D E R

¶ 1 *Held*: Board's decision that plaintiff, a legal assistant, was discharged for misconduct

connected with work and was disqualified from receiving unemployment insurance benefits was not clearly erroneous where evidence showed that plaintiff was excessively tardy in violation of the employer's reasonable rules after warnings.

¶ 2 Defendant Centrum Properties, Inc., the employer, discharged plaintiff, Caroline Stephenson, from her job as a legal assistant because of alleged misconduct connected with work within the meaning of section 602A of the Unemployment Insurance Act (Act). The alleged misconduct was excessive tardiness and excessive personal use of the Internet and telephones. There were two administrative hearings. After the first administrative hearing, the defendant Board of Review of the Department of Employment Security (Board) remanded for a *de novo* hearing. After a second administrative hearing before a different referee who found that plaintiff had been discharged for disqualifying misconduct under section 602A of the Act, the Board affirmed the referee's decision, and the circuit court affirmed the Board's decision.

¶ 3 Plaintiff appeals *pro se*, contending that the Board's decision should be reversed because she did not engage in misconduct and was discharged instead due to a personality conflict with her supervisor, Stephanie Bengtsson.

¶ 4 The adjudication summary reflected that plaintiff worked for the employer from May 14, 2009, until July 14, 2010, and earned $30,000 annually. Her work hours were 8:30 a.m. to 5 p.m. The employer discharged her for excessive tardiness, insubordination, misuse of company property and time, and failure to perform job duties. Plaintiff contended that she had been discharged because Bengtsson was a friend of her mother and did not like her (plaintiff). Plaintiff acknowledged that she had received a prior warning about similar conduct.

¶ 5 The adjudication summary reflected further that plaintiff was discharged for excessive use of the Internet, excessive private cell phone use, personal calls, and excessive tardiness. There were 20 work days in May 2010. Plaintiff was out of the office 3 days, she was late 12 days, and she arrived on time 5 days. There were 22 work days in June 2010. Plaintiff was out of the office 1 day, she was late 14 days, and she was on time 7 days. There were 5 work days in July 2010. Plaintiff was out of the office 1 day, she was late 4 days, and she was not on time any day. Plaintiff consistently showed a lack of respect for authority and failed to follow up with clients. There was a company rule that the computer equipment was for business use only, and plaintiff had been made aware of that through the hiring packet on May 14, 2009. Plaintiff's actions affected the employer's business. Plaintiff was discharged for "deliberate poor work performance," as demonstrated by continuous use of the company Internet, tardiness, and absenteeism. The reason plaintiff was discharged was within her control to avoid; therefore, plaintiff was discharged for work-related misconduct.

¶ 6 After the first administrative hearing, the Board found that the record was not adequate, that the referee had deprived the parties of due process in a number of ways, and that she had applied the wrong legal standard. The Board remanded for a *de novo* hearing.

¶ 7 The second administrative hearing was held before a different referee, and the parties were represented by counsel. At that hearing, the witnesses who testified were Bengtsson, plaintiff's mother Linda Stephenson, and plaintiff. Bengtsson essentially testified that plaintiff was chronically tardy to work, and engaged in excessive Internet use, cell telephone use for

texting and calls, and office telephone use for personal calls. On more than one occasion, Bengtsson saw an entire chat conversation on plaintiff's computer screen. When asked how plaintiff's tardiness affected the employer's operations, Bengtsson testified:

> "Well the legal department, we're the glue that holds that company together. Um *** we have to be there because the owners of the company may be traveling, they need to call for information, um *** you know it's a huge impact."

¶ 8 After July 7, 2010, plaintiff was late on all five occasions prior to her discharge on July 14. At a meeting on July 14, the day of plaintiff's discharge, plaintiff was told that she was being discharged because she had received formal notice and was not able to arrive at work on time. Nothing was said about a personality conflict between Bengtsson and plaintiff.

¶ 9 Sol Barket, a principal of the employer, corroborated in an affidavit that plaintiff was discharged because she violated the employer's policies. Barket stated further that he never characterized plaintiff's misconduct as that of a personal nature between her and Bengtsson, that he was never presented with examples of degrading behavior directed toward plaintiff, and that his decision to discharge plaintiff was based solely on her work-related misconduct.

¶ 10 At the administrative hearing, plaintiff acknowledged that she had received a written warning issued on July 8, but she also testified that Bengtsson harassed her and had a personal vendetta against her. Plaintiff testified that she called her mother every day when she arrived at work to verify that she was arriving by 8:30. When plaintiff arrived at work, Bengtsson was

using Facebook, was playing computer games, or was making coffee in the kitchen. Plaintiff testified that Bengtsson told other employees that she was plaintiff's babysitter. Plaintiff did not use the Internet for personal reasons other than to use the links that Bengtsson sent to her. Plaintiff made personal calls to her father after he had a stroke and Bengtsson refused to allow plaintiff to leave to be with him.

¶ 11 Linda Stephenson testified that plaintiff was her daughter and that Bengtsson was her (Linda's) longtime friend. Bengtsson repeatedly called Linda and discussed plaintiff's work performance a few times. Bengtsson said that plaintiff was maybe only five minutes late but that she was sick of it. Linda never caught plaintiff on the Internet but she did see Bengtsson on it quite frequently.

¶ 12 The referee found that plaintiff had been discharged for misconduct connected with her work, and that her chronic tardiness had a disruptive impact on the employer's business operations.

¶ 13 In its second decision, the Board found that the record was adequate. The Board also found as follows. The preponderance of the evidence established that the employer had reasonable, known rules regarding Internet use, personal telephone conversations, and attendance. Despite repeated warnings and the notice of a probationary period, plaintiff continued to be tardy. Bengtsson's testimony was consistent with the written record and was supported by the employer's exhibits. Plaintiff was evasive in her responses to questions at the hearing. Plaintiff rarely answered a question in a direct manner, and instead testified that

Bengtsson used the Internet or the telephone. A supervisor might have more privileges than plaintiff, and that does not excuse plaintiff's failure to follow the employer's rules. Plaintiff's attorney referred to the employer's exhibits and did not request a continuance or object to the exhibits. Plaintiff's mother testified that plaintiff called her a few times a week and Bengtsson called and complained about plaintiff, which contradicted plaintiff's testimony that plaintiff called her mother every day. Plaintiff's behavior reflected a pattern of tardiness almost every day and chronic insubordination. The Board affirmed the referee's decision denying unemployment benefits to plaintiff.

¶ 14 On administrative review (see 735 ILCS 5/3-101 *et seq*. (West 2010)), the circuit court affirmed the Board's decision.

¶ 15 On appeal, plaintiff contends *pro se* that the Board's decision that she was not eligible for unemployment insurance benefits must be reversed because she was discharged due to a personality conflict between herself and Bengtsson and Bengtsson's refusal to try to work it out. She argues that the attendance records submitted into evidence were not the official attendance records maintained by the employer and that there was no credible evidence that she was tardy.

¶ 16 Section 602A of the Act states in part:

> "An individual shall be ineligible for benefits for the week in which he has been discharged for misconduct connected with his work and, thereafter, until he has become reemployed ***. For purposes of this subsection, the term 'misconduct' means 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 405/602A (West 2010); see also *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 557 (2006).

¶ 17 A reasonable rule concerns "standards of behavior which an employer has a right to expect" from an employee. *Bandemer v. Department of Employment Security*, 204 Ill. App. 3d 192, 195 (1990). Willful conduct stems from an employee's awareness of, and conscious disregard for, a company rule. *Wrobel v. Illinois Department of Employment Security*, 344 Ill. App. 3d 533, 538 (2003); *Lachenmyer v. Didrickson*, 263 Ill. App. 3d 382, 389 (1994). Harm need not be actual harm and can consist instead of potential harm. *Greenlaw v. Department of Employment Security*, 299 Ill. App. 3d 446, 448 (1998); *Brodde v. Didrickson*, 269 Ill. App. 3d 309, 311 (1995).

¶ 18 This court reviews the Board's decision, not the decision of the referee or the circuit court. *Village Discount Outlet v. Department of Employment Security*, 384 Ill. App. 3d 522, 524-25 (2008); *Perto v. Board of Review*, 274 Ill. App. 3d 485, 491-92 (1995); 820 ILCS 405/1100 (West 2010); 735 ILCS 5/3-102 (West 2010). The Board is the trier of fact. *Nykaza v.*

Department of Employment Security, 364 Ill. App. 3d 624, 628 (2006). The Board's purely factual findings are "prima facie true and correct" (see *Horton v. Department of Employment Security*, 335 Ill. App. 3d 537, 540 (2002); 735 ILCS 5/3-110 (West 2010); 820 ILCS 405/1100 (West 2010)), and will not be reversed unless they are against the manifest weight of the evidence (*In re Austin W.*, 214 Ill. 2d 31, 56 (2005)). The issue of misconduct is a mixed question of law and fact. *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 826 (2009). The Board's decision on a mixed question of law and fact will not be disturbed unless it was clearly erroneous. *Id.*; *Livingston v. Department of Employment Security*, 375 Ill. App. 3d 710, 715 (2007). The Board's decision is clearly erroneous only if the appellate court "definitely and firmly believes that a mistake has occurred." *Livingston* at 715.

¶ 19 Here, it was neither against the manifest weight of the evidence nor clearly erroneous for the Board to have found that plaintiff had engaged in a pattern of tardiness and chronic insubordination in violation of reasonable rules and despite repeated warnings. Plaintiff's conduct was willful and deliberate because she admitted she knew what the employer's rules and policies were. Given the circumstances, it was not against the manifest weight of the evidence for the Board to conclude that plaintiff had been tardy after warnings. The next issue is whether plaintiff's actions constituted misconduct that disqualified her from receiving unemployment insurance benefits.

¶ 20 It was not clearly erroneous for the Board to have found that plaintiff had engaged in misconduct and was not eligible for unemployment insurance benefits. Plaintiff engaged in

disqualifying misconduct because she was aware of, and consciously disregarded, reasonable rules not to be tardy to work, and not to use the company computer or telephone for personal internet use. The rule was reasonable because the violation of a company rule concerning tardiness by plaintiff, a legal assistant, could result in the inability of a traveling principal of the company to obtain necessary information from the legal department and could have had a disruptive impact on the employer's business operations. Although plaintiff alleges that her supervisor also used the Internet and made personal calls, she does not contend that those activities made her unaware of the above rule or caused her to be unable to comply with it. To the contrary, she provided multiple, other reasons why she acted the way she did. Plaintiff also alleges that the evidence of her tardiness was not credible. However, Bengtsson testified that she observed plaintiff arrive late, and plaintiff continued to arrive late after having been warned and placed on probation for her tardiness. In addition, plaintiff's flagrant unlawful use of the company computer and telephone were reasons that also had a disruptive impact on the employer's business operations. Under the circumstances, it was not clearly erroneous for the Board to conclude that plaintiff acted deliberately and willfully in violating the company rule regarding tardiness.

¶ 21 For the foregoing reasons, we affirm the judgment of the circuit court and find that plaintiff was not entitled to unemployment insurance benefits.

¶ 22 Affirmed.