

No. 1-12-1264

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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|---------------------------------------|---|----------------------|
| WILLOW ELECTRIC SUPPLY, INC., |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellant, |) | Cook County. |
| |) | |
| v. |) | No. 11 L 51090 |
| |) | |
| ILLINOIS DEPARTMENT OF |) | |
| EMPLOYMENT SECURITY, an |) | |
| administrative agency of the State of |) | |
| Illinois; DIRECTOR OF THE ILLINOIS |) | |
| DEPARTMENT OF EMPLOYMENT |) | |
| SECURITY; BOARD OF REVIEW, an |) | |
| administrative agency of the State of |) | Honorable |
| Illinois; and ARTHUR J. GIMINNE, |) | Robert Lopez-Cepero, |
| Defendants-Appellees. |) | Judge Presiding. |

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held:* Where plaintiff-employer unilaterally and substantially changed unemployment benefits claimant's job duties without offering additional compensation, and claimant refused to complete the additional duties, claimant did not engage in misconduct and was therefore eligible for unemployment benefits. The Board's determination was not clearly erroneous. We affirm.

¶ 2 Plaintiff Willow Electric Supply, Inc. appeals the decision of the Illinois Department of Employment Security Board of Review (the "Board") that claimant Artur Giminne was eligible

for unemployment insurance benefits under section 602(A) of the Illinois Unemployment Insurance Act ("Act") after Giminne refused employer's direction to clean facility areas, including bathrooms, which were outside of the warehouse area. Plaintiff sought administrative review and the circuit court of Cook County affirmed the Board's decision. On appeal, plaintiff contends that Giminne was disqualified from receiving unemployment benefits under the Act because he engaged in misconduct in twice refusing to perform cleaning duties. We uphold the Board's determination.

¶ 3 During a telephone hearing on January 24, 2011, plaintiff's witness Wesley Wardzala testified he is the president of plaintiff-company, Willow Electric Supply, Inc. Wardzala testified that Giminne was hired in 2007 as a general warehouse helper, Giminne voluntarily left his employment,¹ and his last day of work was August 4, 2010. Wardzala testified that the circumstances leading to Giminne's separation from employment were that Giminne was asked to empty the trash and clean the floors, and he refused to do the work. Giminne previously swept the floor in the warehouse using a floor sweeper machine and a broom and emptied the garbage in the back of the warehouse. Wardzala also testified he did not ask Giminne to clean the toilets but that cleaning toilets was one of Giminne's regular job duties. Another employee, Dario Perez, was responsible for cleaning the bathrooms. When Perez went on vacation, plaintiff asked other employees to clean the bathroom on a weekly rotation basis. No other employee had a problem with the request.

¶ 4 Giminne's primary job duties as a warehouse worker included filling orders, stocking shelves, and keeping the warehouse clean. On August 3, 2010, Giminne refused to perform his

¹ Although plaintiff alleged at the hearing that Giminne voluntarily terminated his employment, plaintiff abandons this contention on appeal. The Board did not make a determination regarding whether plaintiff's employment was voluntarily terminated, and instead limited its determination to whether misconduct disqualified Giminne from being eligible to receive unemployment benefits.

cleaning duties. Giminne told Wardzala that it was beneath him to carry away debris. Wardzala testified that Giminne had previously emptied garbage and swept floors when asked to do so by a warehouse supervisor. Wardzala told Giminne that he would be fired if he refused to perform his duties. He sent Giminne home to "rethink his position."

¶ 5 When Giminne reported to work on August 4, 2010, he began by filling orders in the warehouse. Giminne was again asked to perform cleaning duties and refused. The warehouse supervisor, Greg Kaczmarczyk, then sent Giminne to meet with Wardzala. Giminne again told Wardzala that it was beneath him to perform cleaning duties. Wardzala told him that cleaning was a part of his duties and then sent him home again to rethink his position. When Giminne refused to clean, Wardzala had to alter the rotation of employees so that the cleaning would be completed, which disrupted and inconvenienced plaintiff.

¶ 6 Plaintiff's second witness Greg Kaczmarczyk testified he is the warehouse supervisor for plaintiff. Kaczmarczyk testified that when he asked Giminne to take out the garbage in the counter area, Giminne replied that was not his job and that it was someone else's job. He had previously asked Giminne to complete this task. Kaczmarczyk was not present for any discussions Giminne had with Wardzala, so he did not know whether Wardzala asked Giminne to clean the bathrooms.

¶ 7 Giminne testified through an interpreter that he worked in the warehouse and that all he cleaned were wooden boards, cartons, and other things in the warehouse. He then received instruction that he and a few other employees would have to clean the entire store including the bathrooms. He had never cleaned bathrooms before. The new duties included cleaning the floors, kitchen, and bathrooms. He only cleaned the floors occasionally; there was another employee who agreed to clean the floors. He had only cleaned the kitchen floors and testified that if employees eat in the kitchen, they have to clean up after themselves. When Giminne was

asked to clean on August 3 and 4, he was given the new duty of thoroughly cleaning the toilets, which he had never done. He was not told that the new duties would be temporary.

¶ 8 On August 3, while preparing a customer order, his supervisor, Kaczmarczyk, told Giminne to empty the garbage from the entire facility, where previously, he only took out warehouse garbage. There were four or five offices and two office bathrooms. The warehouse bathroom is separate from the office bathrooms. When Giminne asked Wardzala why he should start cleaning, Wardzala replied that if cleaning was beneath Giminne's dignity, then Wardzala did not see a place for him at the job. Kaczmarczyk told Giminne that he needed to start cleaning and that it would be a complex, thorough cleaning. However, Giminne testified that such cleaning was another employee's job. Giminne knew that other employees were asked to do this level of cleaning but it was very infrequent and sporadic. Giminne further testified that he refused to do the complex, thorough cleaning asked of him because it was his coworker Perez's job. While Perez worked in the warehouse, he also spent two hours each day cleaning. Giminne knew that Perez was on vacation, but he did not know that the new cleaning duties would only be temporary. Giminne believed he would have to clean every week.

¶ 9 On February 8, 2011, the Department referee concluded that plaintiff's demands upon Giminne were unreasonable and Giminne's refusal to comply was not misconduct, thus finding Giminne eligible for benefits.

¶ 10 Plaintiff appealed to the Board, which affirmed Giminne's eligibility for benefits. In a decision dated August 23, 2011 the Board affirmed the referee's decision and determined that the parties agree that until August 3, 2011, another employee was doing the bathroom cleaning but he went on vacation. Plaintiff did not inform Giminne that claimant would be filling in for the absent co-work only temporarily. The board found that Giminne was employed as a warehouse worker, and that plaintiff's witness testified that in his job, Giminne was "mainly filling orders, filling shelves, putting away material and keeping the warehouse clean." The Board found that

Giminne testified that on August 3, he was told to clean the whole store including the bathrooms and that he had not previously cleaned the bathrooms. The new duties included removing trash from four or five bathrooms. The Board also found that Giminne primarily objected to cleaning toilets and concluded that the additional duties were different in kind from Giminne's job in the warehouse and were essentially janitorial duties. The Board stated, "[t]he employer unilaterally changed the conditions of the claimant's employment. They did not offer him any additional compensation." In affirming the referee's findings, the Board determined that the employer's demands that defendant clean toilets were unreasonable and Giminne's refusal to comply was not misconduct, thus he was found eligible for benefits.² Plaintiff filed a complaint for administrative review with the circuit court on September 26, 2011. On March 27, 2012, following briefing by the parties and a hearing, the circuit court affirmed the decision of the Board.

¶ 11 On appeal, plaintiff challenges the Board's determination that Giminne was not disqualified from receiving unemployment benefits due to misconduct. We initially observe that our review of plaintiff's challenge is limited to the propriety of the Board's decision, and not the circuit court or the referee. *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010). Further, although plaintiff requests this court strike a portion of the statement of facts in defendants' brief as hearsay evidence not adduced during the hearing, we decline to strike the portion. However, we will not rely on any evidence that was not adduced at the hearing.

¶ 12 Whether an employee is disqualified from eligibility for unemployment benefits due to misconduct in connection with his work involves a mixed question of law and fact, to which we apply the clearly erroneous standard of review. *Id.*; citing *AFM Messenger Service, Inc. v.*

² As noted *supra*, the Board's determination was limited solely to the issue of whether Giminne's actions in refusing to clean constituted misconduct such that he would be disqualified from receiving unemployment benefits. The Board's determination did not address whether Giminne voluntarily terminated his employment.

Department of Employment Security, 198 Ill. 2d 380, 395 (2001). An agency decision is clearly erroneous where a review of the entire record leaves the court with the definite and firm conviction that a mistake has been committed. *AFM Messenger Service*, 198 Ill. 2d at 395.

¶ 13 Section 602(A) of the Act provides that an employee discharged for misconduct connected with his work is disqualified from receiving unemployment benefits. 820 ILCS 405/602(A) (West 2010). Three elements of misconduct must be established: (1) the rule or policy must be deliberately and willfully violated; (2) the rule or policy of the employer must be reasonable; and (3) the violation must have harmed the employer or it must have been repeated by the employee despite previous warnings. 820 ILCS 405/602(A).

¶ 14 “A substantial and unilateral change in the employment may render the employment unsuitable so that good cause for voluntary termination is established.” *Jones v. Board of Review of the Department of Labor*, 136 Ill. App. 3d 64, 66 (1985). Although *Jones* involved an employee's voluntary termination of employment, this case is nevertheless instructive here because it discusses when changes in work conditions are sufficiently substantial such that an employee may properly object without his objection being deemed "misconduct."

¶ 15 Applying these principles, we find the Board's determination that Giminne was qualified to receive benefits under section 602(A) of the Act was not clearly erroneous. The evidence adduced at the hearing established that while Giminne twice refused to follow a work rule that he clean the facilities, this rule was unreasonable, as it was a substantial and unilateral change in Giminne's duties. Therefore, Giminne's refusal to complete the cleaning was not misconduct.

¶ 16 The record revealed that Giminne was employed as a warehouse worker and his primary duties were filling customer orders, stocking warehouse shelves, and keeping areas of the warehouse clean by taking out the trash in the back of the warehouse, sweeping the warehouse floors, and wiping the warehouse shelves. The new duties required of Giminne included cleaning the bathrooms, kitchen, and taking out the trash in the entire facility. Another

employee, Perez, had been responsible for these janitorial duties, including cleaning all of the bathrooms, the kitchen, and taking out the trash from the offices. Perez spent approximately two hours each day completing these janitorial duties. When Perez went on vacation, Wardzala testified that other employees needed to take on these duties on a weekly rotation basis.

Wardzala told Giminne to complete these janitorial duties without informing him that the new duties would only be temporary. Based on the evidence adduced at the hearing, it was not clear error for the Board to determine that Giminne did not engage in misconduct by refusing to perform new cleaning duties where the new duties constituted a substantial and unilateral change in employment, with no offer of additional compensation. See *Jones*, 136 Ill. App. 3d at 66-67 (employee hired as a carpenter/cabinet maker experienced a substantial and unilateral change in duties when he was assigned non-carpentry duties).

¶ 17 Plaintiff relies on *Nichols v. Department of Employment Security*, 218 Ill. App. 3d 803 (1991), as analogous to the case at bar; however, *Nichols* is distinguishable. In *Nichols*, this court found that although the claimant, a maintenance worker, had not been directed to cut grass that season, this did not mean that grass cutting was not one of the claimant's job duties, particularly because it had been for several years. *Id.* at 810. Here, Giminne had not previously been assigned the duties of thoroughly cleaning the kitchen and bathrooms, and emptying the trash in all of the offices. Giminne's work had been limited to the warehouse. Indeed, as Wardzala testified, the warehouse workers were responsible for keeping the warehouse clean and tidy. When Perez went on vacation, Giminne then became responsible for keeping the offices, kitchen, and bathrooms, including the toilets, clean. These new duties were outside the scope of his job duties and it was not misconduct to refuse to perform them. In sum, the Board's determination that Giminne was eligible for unemployment benefits was not clearly erroneous.

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¶ 18 Based on the foregoing, we find the ruling of the Illinois Department of Employment Security Board of Review was not clearly erroneous and affirm the judgment of the circuit court of Cook County.

¶ 19 Affirmed.