2013 IL App (1st) 121359-U

FIFTH DIVISION
March 15, 2013

No. 1-12-1359

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SHEILA M. LUMPKIN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 11 L 50922
	)	
ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, DIRECTOR OF ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, BOARD OF REVIEW, and WALMART ASSOCIATES INC. c/o UC EXPRESS,	)	Honorable
	)	Margaret Brennan,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

O R D E R

¶ 1 *Held:* Where the record shows that plaintiff was dismissed from her job for violating her employer's attendance policy, she was discharged for misconduct, and the Board of Review's final administrative decision denying her unemployment insurance benefits is affirmed.

¶ 2 Plaintiff Sheila Lumpkin appeals from an order of the circuit court affirming a final administrative decision by defendant, the Board of Review of the Illinois Department of Employment Security (the Board). The Board found that plaintiff was discharged for misconduct

connected with her work, and thus, ineligible for unemployment insurance benefits because she violated her employer's attendance policy. On appeal, plaintiff contends that she did not engage in misconduct because her failure to report to work was not deliberate and willful, but instead, was a mistake due to her misreading of the work schedule. We affirm.

¶ 3 The record shows that plaintiff worked as a sales associate for Wal-Mart Associates, Inc., from October 9, 1999, until February 28, 2011, when she was discharged for failing to report to work on February 19, 2011. Plaintiff applied to the Illinois Department of Employment Security (IDES) for unemployment insurance benefits. Wal-Mart protested plaintiff's claim for benefits stating that plaintiff was discharged for misconduct after violating a company policy.

¶ 4 Plaintiff informed the IDES claims adjudicator that she was fired by an assistant manager, Sheila Walker, because she had three recent occasions where she did not report to work and did not call in to say she was going to be absent. Plaintiff stated that she was absent one day in January 2011, February 8, 2011, and February 19, 2011. Plaintiff told the claims adjudicator that she did not call in on any of those three dates because she misread the schedule. Plaintiff explained that there was another employee with the last name of Lumpkin, and said "I must have read the schedule wrong." Plaintiff acknowledged that she was aware of the company policy, contained in the employee handbook, that employees must call in if they are going to be absent. Plaintiff also acknowledged that in January 2011, a store manager issued her a written warning. Plaintiff said that she was "put on a decision day in January for absences and attendance" and explained "this is like a final warning." Plaintiff maintained that the three absences were not intentional. She stated that after being absent on February 8, 2011, she reported to work the next day and found that she was not scheduled to work that day, but had been scheduled to work the previous day. Plaintiff again stated "I just made a mistake and read the posted schedule wrong."

¶ 5 The claims adjudicator found that the evidence showed plaintiff was discharged from her job because she was absent from work. The adjudicator further found that plaintiff violated a known and reasonable company policy, and thus, she was discharged for misconduct connected with her work. Consequently, the claims adjudicator found plaintiff ineligible for unemployment insurance benefits.

¶ 6 Plaintiff appealed that decision stating that she misread the schedule only on one of the dates, January 25, 2011. Plaintiff claimed that on February 8, 2011, she was given permission to switch days off with another employee and was told that she did not have to call in an absence. Plaintiff further stated that on February 18, 2011, she called in to notify the store that she was going to be late for work because someone had broken her car windows and she had to have them repaired before driving to work. Plaintiff stated "I knew I couldn't call off or anything because I would get fired." When plaintiff arrived to work, the woman she had spoken with was gone, so she told another assistant manager that she would speak with someone in two days because she was not working the next day (February 19, 2011). Plaintiff maintained that she had misread the schedule.

¶ 7 At the May 19, 2011, telephone hearing, Wal-Mart assistant manager Alexandria Davis testified that plaintiff was terminated from her job for being absent from work and not calling in on January 25, 2011, February 8, 2011, and February 19, 2011. Plaintiff had been warned about her attendance and tardiness on three prior occasions. Plaintiff had received a verbal warning, a written warning, and a "decision day." If an employees switches days off with another employee, the work schedule is amended at that time with the employee present. Davis testified that the work schedules are posted three weeks in advance, and employees can check their schedules on the time clock and at home. Therefore, it is not acceptable for an employee to claim she made a

mistake or did not know her work schedule. Davis opined that plaintiff had numerous opportunities to view her work schedule and insure that she noted the correct days.

¶ 8 Plaintiff testified that she switched days off with another employee on February 8, 2011, because she had to go to court on that date. Plaintiff notified her assistant manager, Sheila Walker, about the change, and Walker told her she would take care of it in the computer system. Plaintiff misread the work schedule and thought she was off on February 19, 2011, but she was scheduled to work. Plaintiff acknowledged that she did not report to work on February 19, and that she did not call in, but claimed her absence was not intentional. Plaintiff further acknowledged that she also misread the schedule on January 25, 2011. Plaintiff conceded that it was her responsibility to read the schedule correctly, but argued that she merely made a mistake.

¶ 9 The IDES appeals referee issued a written decision affirming the denial of benefits to plaintiff. The referee found that plaintiff failed to report to work as scheduled and did not call in an absence twice within a month's time. The referee noted that plaintiff had received previous warnings regarding her attendance. The referee concluded that plaintiff's violation of her employer's reasonable attendance policy constituted misconduct, rendering her not eligible for unemployment insurance benefits.

¶ 10 Plaintiff appealed the referee's decision to the Board. Plaintiff acknowledged that she did not report to work on February 19, 2011, and did not call in to report the absence. She argued, however, that the wrong assistant manager testified at the telephone hearing. Plaintiff stated that when she subsequently reported to work, she told Sheila Walker that she had misread the schedule, and Walker told her not to worry about it. However, on February 28, 2011, Walker told plaintiff that she was being terminated due to her failure to report to work and call in her absences. Plaintiff maintained that she made an honest mistake.

¶ 11 The Board reviewed the entire record, including plaintiff's application for benefits and the transcript from the telephone hearing, and found that additional evidence was not necessary. After due consideration, the Board found that the referee's decision was supported by the record and the law. The Board incorporated the referee's decision and affirmed the denial of benefits.

¶ 12 Plaintiff appealed the Board's ruling to the circuit court of Cook County. The circuit court held a hearing, and affirmed the Board's decision denying plaintiff benefits.

¶ 13 On appeal, plaintiff contends that she did not engage in misconduct because her failure to report to work was not deliberate and willful, but instead, was a mistake due to her misreading of the work schedule. Plaintiff argues that there is no evidence of intentional wrongdoing, and her negligence or carelessness cannot be considered misconduct.

¶ 14 This court reviews the final decision of the Board rather than that of the circuit court. *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010). The Board's factual findings are considered *prima facie* true and correct, and will not be disturbed unless they are against the manifest weight of the evidence. *520 South Michigan Avenue Associates v. Department of Employment Security*, 404 Ill. App. 3d 304, 312 (2010). Under this standard, the Board's factual findings "must stand unless 'the opposite conclusion is clearly evident.' " *Id.* at 313, quoting *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204 (1998). When reviewing an administrative agency decision, courts are precluded from reweighing the evidence, resolving conflicts in the testimony, or evaluating the credibility of the witnesses. *Woods v. Illinois Department of Employment Security*, 2012 IL App (1st) 101639, ¶ 16. It is the Board's responsibility to weigh the evidence, determine the credibility of the witnesses, and resolve conflicts in the testimony. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 329 (2009). A reviewing court is prohibited from substituting its judgment for that of the Board. *520 South Michigan Avenue*, 404 Ill. App. 3d at 317. Where the record

contains any evidence that supports the Board's decision, that decision is not contrary to the manifest weight of the evidence and must be affirmed on review. *Woods,* 2012 IL App (1st) 101639 at ¶ 16.

¶ 15 Whether an employee was properly terminated due to misconduct, and thus, ineligible for unemployment benefits, is a mixed question of law and fact that is reviewed under the clearly erroneous standard. *AFM Messenger Service, Inc., v. Department of Employment Security*, 198 Ill. 2d 380, 391 (2001). The Board's decision is considered clearly erroneous where the court reviews the record and definitively concludes that a mistake has been made. *Id.* at 395. Under section 602(a) of the Illinois Unemployment Insurance Act (820 ILCS 405/602(A) (West 2010)), a person who is discharged by her employer for misconduct connected with her work is not eligible to receive unemployment insurance benefits. *Phistry*, 405 Ill. App. 3d at 607.

¶ 16 Misconduct is defined as an employee's willful and deliberate violation of a reasonable policy or rule which harms the employer. *Phistry*, 405 Ill. App. 3d at 607. An employee's conduct is considered willful when she is aware of a company policy and consciously disregards that policy. *Livingston v. Department of Employment Security*, 375 Ill. App. 3d 710, 716 (2007). Carelessness and poor performance may justify termination, but standing alone, do not make an employee ineligible for unemployment benefits. *Wrobel v. Department of Employment Security*, 344 Ill. App. 3d 533, 537 (2003).

¶ 17 Here, we find that the Board's determination that plaintiff willfully and deliberately violated Wal-Mart's attendance policy was not against the manifest weight of the evidence. It is undisputed that plaintiff was aware of Wal-Mart's policy, contained in the employee handbook, that employees must call in if they are going to be absent. It is also undisputed that plaintiff did not report for work on February 19, 2011, and did not call in an absence. It is further undisputed that plaintiff had been issued three prior warnings regarding her attendance and tardiness.

Plaintiff informed the claims adjudicator that she was "put on a decision day in January for absences and attendance" and explained "this is like a final warning." We acknowledge that plaintiff has consistently maintained that she failed to report to work on February 19, 2011, because she misread the work schedule. However, assistant manager Alexandria Davis testified at the telephone hearing that such an excuse is unacceptable because the work schedules are posted three weeks in advance, and employees can check their schedules on the time clock and at home. Davis opined that plaintiff had numerous opportunities to view her work schedule and insure that she noted the correct days. Whether plaintiff had mistakenly misread the work schedule was a credibility determination for the Board. Based on the Board's decision, it apparently found plaintiff's testimony not credible.

¶ 18 The Board reviewed all of the evidence in the record, including the testimony from the telephone hearing, and determined that plaintiff deliberately and willfully violated Wal-Mart's attendance policy. Our review of the record reveals that an opposite conclusion is not clearly evident, and thus, we will not disturb that finding. Accordingly, we conclude that plaintiff was discharged for misconduct connected to her work, and the Board's determination that she was ineligible for unemployment insurance benefits was not clearly erroneous.

¶ 19 For these reasons, we affirm the judgment of the circuit court of Cook County affirming the Board's decision.

¶ 20 Affirmed.