

FIFTH DIVISION
JUNE 20, 2014

No. 1-13-1409

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

ADRIENE D. ADAMS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	
)	
ILLINOIS DEPARTMENT OF EMPLOYMENT)	
SECURITY; DIRECTOR OF THE ILLINOIS)	No. 13 L 50030
DEPARTMENT OF EMPLOYMENT SECURITY;)	
BOARD OF REVIEW; and ALDEN HEATHER)	
REHAB & HEALTHCARE c/o NSN JERRY)	Honorable
WEINSTEIN,)	Eileen O'Neil Burke,
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Taylor concurred in the judgment.

ORDER

¶ 1 *Held:* Where the record shows that plaintiff failed to follow her employer's policies, she was discharged for misconduct, and the Board of Review's final administrative decision denying her unemployment insurance benefits is affirmed.

¶ 2 *Pro se* plaintiff Adrienne Adams 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 policy. On appeal, plaintiff challenges the denial of benefits. We affirm.

¶ 3 The record shows that plaintiff was employed as a certified nursing assistant at Alden Heather Rehabilitation and Health Care Center (Alden) from July 17, 2003, until November 4, 2011, when she was discharged for violating Alden's policy on resident care. Plaintiff applied to the Illinois Department of Employment Security (IDES) for unemployment insurance benefits. Alden protested plaintiff's claim for benefits stating that plaintiff was discharged for violating its company policy after she failed to provide proper care of a resident's needs. Attached to Alden's protest were eight disciplinary memoranda documenting infractions committed by plaintiff from 2005 through her termination in 2011. Also attached was a copy of a page from Alden's "Work Rules" which indicated that pursuant to Rule 36, "[f]ailure to follow any work standard or any policy or procedure for resident care established by the facility" would lead to discipline ranging from a formal warning to discharge. Alden also attached forms signed by plaintiff in 2003 and 2007 acknowledging that she read Alden's employee handbook, agreed to comply with the policies therein, and understood that her failure to follow the policies and work rules would result in disciplinary action, including discharge.

¶ 4 Plaintiff informed the IDES claims adjudicator that she was discharged for improper care of a resident. Plaintiff explained that prior to taking her break, she asked a resident what she wanted for lunch. The resident told plaintiff that she needed to use the bathroom, and plaintiff replied that she would be "right back." Plaintiff then took her break and used the bathroom herself, and when she returned to assist the resident, the charge nurse told plaintiff to "punch

out." Plaintiff asserted that she merely needed to use the bathroom herself, and that her relief was in the dining room. Plaintiff acknowledged that she was aware of Alden's policy that she was required to assist residents who needed help going to the bathroom.

¶ 5 The claims adjudicator found that plaintiff was discharged by Alden due to deliberate poor work performance and failure to follow a well-known company policy. The adjudicator further found that because plaintiff was discharged for violating a known and reasonable company policy, she was discharged for misconduct connected with her work. Consequently, the claims adjudicator found plaintiff ineligible for unemployment insurance benefits. Plaintiff appealed that decision stating that she was wrongfully terminated because she returned to perform her duties and was then sent home.

¶ 6 A telephone hearing was held on April 27, 2012, but Alden failed to appear. Accordingly, the administrative law judge (ALJ) found that there was no evidence that plaintiff engaged in a deliberate and willful violation of her employer's reasonable rule or policy, and therefore, her discharge was not based on misconduct. The ALJ set aside the denial of benefits and found plaintiff eligible for benefits. Alden's subsequent request for a rehearing was granted.

¶ 7 A second telephone hearing was held on May 24, 2012, where both parties appeared and testified. The record does not include a transcript from this hearing. In his written order, the ALJ found that the evidence showed that a resident had asked plaintiff to change her diaper, but plaintiff also had an urgent need to use the bathroom. Plaintiff told the resident that she first needed to take a break. Plaintiff acknowledged that there was a bathroom within 30 feet of the resident's room, but she chose to go downstairs instead. She returned about 15 minutes later. Plaintiff was aware of Alden's rules regarding abuse and neglect of residents, and acknowledged that she was previously disciplined for a patient care issue in March 2011. The ALJ noted that

Alden did not present a witness with first-hand knowledge of the incident, but instead, offered only hearsay testimony from an administrator regarding what the resident had said. The ALJ found that there was a nearby bathroom available, and although plaintiff was not very credible, the remainder of her testimony was unrebutted. The ALJ concluded that a preponderance of the evidence showed that plaintiff did not engage in willful and deliberate misconduct, and therefore, she was eligible for unemployment benefits.

¶ 8 Alden appealed the ALJ's decision contending that plaintiff violated a company policy and rendered improper care to the resident. Alden asserted that plaintiff should have changed the resident's diaper before taking her break, should have asked another nurse to change the resident, or should have used the nearby washroom and returned to change the diaper. Alden emphasized that plaintiff left the resident sitting in a dirty diaper for more than 15 minutes.

¶ 9 Upon review, the Board found that a transcript from the hearing was not available, and therefore, it lacked an adequate record to determine whether the ALJ's decision was proper. Consequently, the Board remanded the matter to the ALJ for a new hearing and a new decision based upon the evidence presented at the new hearing.

¶ 10 At that hearing, Alden administrator Valerie Kay testified that plaintiff worked at the nursing home as a certified nursing assistant (CNA) until she was discharged for failing to provide proper care to a resident. The resident told plaintiff that she needed to be changed, but plaintiff said she needed to take her break first. Plaintiff then took her break without notifying anyone else that the resident needed assistance. The resident reported plaintiff's conduct to several staff members. Kay testified that plaintiff was discharged because her job required her to satisfy the needs of the residents, and plaintiff failed to do so. Although plaintiff was previously disciplined for other violations, this final incident alone was the cause of her discharge.

¶ 11 Omayemi Kayode, Alden's director of nursing, testified that a physical therapist notified her that one of the residents complained that a CNA refused to change her until after she took her lunch break. Kayode then spoke with the resident, who confirmed that she had asked plaintiff to change her, and plaintiff said she was going to take her lunch break first and would change the resident after she returned. The resident still had not been changed, and Kayode found another CNA to change her. The charge nurse did not know where plaintiff was. Kayode then called downstairs to the cafeteria and plaintiff answered the phone. Kayode asked plaintiff why she did not change the resident, and plaintiff said she told the resident she would change her after her lunch break. Plaintiff claimed that she told the charge nurse that she was going to lunch. Kayode told plaintiff that it was impermissible to leave a resident soiled, and instructed her to return upstairs, punch out, and go home.

¶ 12 Kayode further testified that the work rules and union book state that if a CNA is going to leave the floor, she must notify the charge nurse prior to leaving. The staff at Alden has been instructed that if they are going to lunch, they must notify their charge nurse in case any resident needs assistance while they are off the floor. In addition, when a resident asks to be changed, the person is to be changed immediately. If the CNA is unable to change the resident immediately, the CNA must inform the charge nurse, who will find someone else to change the resident. If a resident is left in unsanitary conditions for any length of time, it could cause the skin to break down, the resident would be in pain, and it is expensive to heal.

¶ 13 Plaintiff testified that she was discharged for improper care of a resident. Plaintiff initially denied speaking with Kayode on the day she was discharged. The ALJ noted that plaintiff acknowledged during a prior telephone hearing that she spoke with Kayode about a resident. Plaintiff then testified that while she was on break, Kayode called her on the telephone,

after which plaintiff used the washroom and returned upstairs. Kayode told the charge nurse to tell plaintiff to punch out and go home. Plaintiff usually took a 30-minute lunch break, but on this day, she took only a 10 to 15-minute break. Before she went on break, a resident told her that she needed to be changed. Plaintiff told the resident that she was going on break and would return, and the resident said "okay." When plaintiff returned, she was sent home. Plaintiff testified that she could not change the resident before her break because plaintiff needed to use the washroom herself, and she needed to get something to drink. Plaintiff explained that she did not look for anyone else to change the resident because by the time she would have found someone, she could have gone to the bathroom, returned and changed the resident herself.

¶ 14 The ALJ issued a written decision affirming the denial of benefits to plaintiff. The ALJ found that, although plaintiff was entitled to a break, she was required to inform someone else to change the resident, and the resident could have been harmed by being left in unsanitary conditions. The ALJ found plaintiff's testimony that she had to use the washroom not credible as there was a nearby washroom available which plaintiff did not use. The ALJ concluded that plaintiff engaged in willful and deliberate misconduct, rendering her not eligible for benefits.

¶ 15 Plaintiff appealed the ALJ's decision to the Board stating that the resident said she would wait until plaintiff returned from her break. Plaintiff asserted that she would never deliberately place a resident in harm's way or jeopardize her job. Plaintiff also claimed her firing was due to personal reasons because she had argued with a colleague.

¶ 16 The Board reviewed the entire record, including the transcript from the telephone hearing, and found that the ALJ's decision was supported by the record and the law. The Board also found that the further taking of evidence was unnecessary. The Board incorporated the ALJ's decision as part of its decision, and affirmed the denial of benefits. 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 unemployment benefits.

¶ 17 On appeal, in a two-sentence argument not supported by any legal authority, plaintiff contends that state law requires any type of abuse or neglect to be reported to the state, which would preclude plaintiff from further using her CNA certificate. Plaintiff argues that she was not reported for abuse or neglect because she was falsely accused and unjustly terminated. In her conclusion, plaintiff asks this court to reverse the denial of unemployment benefits.

¶ 18 Defendants argue that plaintiff has forfeited her contention because she is raising it for the first time in this appeal, and because she failed to comply with the requirements for appellate briefs set forth in Supreme Court Rule 341(h) (eff. Feb. 6, 2013). Alternatively, defendants argue that the Board's decision denying plaintiff unemployment benefits should be affirmed.

¶ 19 It is well established that an issue or argument not presented at an administrative hearing is waived and cannot be raised for the first time on appeal to this court. *Carpetland U.S.A., Inc. v. Illinois Department of Employment Security*, 201 Ill. 2d 351, 396-97 (2002). Our review is confined to the issues, arguments and evidence that were presented before the Board. *Texaco-Cities Service Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 278-79 (1998).

¶ 20 Here, the record shows that plaintiff never raised any issue before the Board alleging that she was not reported to the state for neglect or abuse, thereby demonstrating that she was falsely accused. Accordingly, plaintiff waived this issue for purposes of review and we decline to consider it any further. See *Texaco-Cities*, 182 Ill. 2d at 278.

¶ 21 In addition, we agree with defendants that plaintiff's *pro se* brief fails to conform with the requirements stated in Supreme Court Rules 341(h) and 342 (eff. Jan. 1, 2005). Most notably, plaintiff has failed to articulate an organized and cohesive legal argument, and her brief is

completely devoid of any citation to legal authority. Based upon plaintiff's noncompliance with these rules, her appeal is subject to dismissal. *Marzano v. Department of Employment Security*, 339 Ill. App. 3d 858, 861 (2003). However, because the issue is apparent, and we have the benefit of a cogent appellee's brief (see *Twardowski v. Holiday Hospitality Franchising, Inc.*, 321 Ill. App. 3d 509, 511 (2001)), we choose to entertain the appeal (see *Harvey v. Carponelli*, 117 Ill. App. 3d 448, 451 (1983)).

¶ 22 Plaintiff is challenging the denial of unemployment benefits. 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.' " *520 South Michigan Avenue*, 404 Ill. App. 3d 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. If the issue on review merely involves conflicting testimony and witness credibility, the Board's determination should be sustained. *520 South Michigan Avenue*, 404 Ill. App. 3d at 318. 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, ¶ 16.

¶ 23 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. *AFM Messenger*, 198 Ill. 2d 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.

¶ 24 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). Harm need not be actual harm, but instead, may consist of potential harm. *Livingston*, 375 Ill. App. 3d at 716. This court has previously found that harm to a nursing home resident also harms the employer because the employee's misconduct interferes with the nursing home's ability to provide an environment free from abuse and exposes the nursing home to potential tort liability and damage to its reputation. *Livingston*, 375 Ill. App. 3d at 717-18.

¶ 25 Here, we find that the Board's determination that plaintiff willfully and deliberately violated Alden's policies and work rules regarding resident care was not against the manifest

weight of the evidence. The record shows that plaintiff was aware of Alden's rules regarding abuse and neglect of residents, and that plaintiff was previously disciplined for a patient care issue several months before her discharge. Plaintiff specifically acknowledged that she was aware of Alden's policy that she was required to assist residents who needed help going to the bathroom. All of the evidence, including plaintiff's own testimony, shows that the resident informed plaintiff that she needed to be changed, and instead of changing the resident, plaintiff told the resident that she was going to take her break and would change her when she returned. Plaintiff claimed that she needed to use the restroom herself. However, the Board, incorporating the ALJ's decision, found plaintiff's testimony not credible as there was a bathroom within 30 feet of the resident's room which she did not use. Instead, plaintiff was located in the basement cafeteria. It was the Board's responsibility to determine the credibility of plaintiff's testimony, and this court will not disturb that determination.

¶ 26 It is undisputed that plaintiff took her lunch break and left the floor without notifying anyone else that the resident needed to be changed. The policies and work rules also required plaintiff to notify the charge nurse before leaving the floor in case one of the residents needed assistance; however, the charge nurse was unaware of plaintiff's whereabouts. The record thus shows that plaintiff was aware of Alden's policies and rules regarding resident care, but consciously disregarded those rules, leaving a resident in unsanitary conditions, for the sole purpose of taking her lunch break. Therefore, plaintiff's conduct was willful and deliberate. The record further shows that plaintiff's conduct posed serious potential harm to the resident, who could have suffered a painful skin breakdown. Plaintiff's conduct also harmed her employer because it interfered with Alden's ability to provide an environment free from abuse and exposed

the nursing home to potential tort liability and damage to its reputation. See *Livingston*, 375 Ill. App. 3d at 717-18. Consequently, plaintiff's failure to assist the resident constituted misconduct.

¶ 27 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 Alden's policy on resident care. Our review of the record reveals that an opposite conclusion is not clearly evident, and therefore, we will not disturb the Board's finding. Accordingly, we conclude that plaintiff was discharged for misconduct connected with her work, and the Board's determination that she was ineligible for unemployment insurance benefits was not clearly erroneous.

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

¶ 29 Affirmed.