THIRD DIVISION
November 12, 2014

No. 1-13-3380

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DIANE WASHINGTON, Plaintiff-Appellee, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; DIRECTOR OF ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; BOARD OF REVIEW; Defendants-Appellants, and ELMWOOD CARE, INC., Defendant.	)	Appeal from the Circuit Court of Cook County. No. 13 L 50134 Honorable Robert Lopez Cepero, Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Pucinski and Justice Lavin concurred in the judgment.

O R D E R

¶ 1 *Held*: Where evidence established that an employee engaged in an altercation with a nursing home resident, the Board of Review of the Illinois Department of Employment Security's determination that the employee committed misconduct rendering her ineligible for unemployment benefits was not clearly erroneous; circuit court's decision is reversed and Board's decision is reinstated.

¶ 2 Defendant, the Board of Review (the Board) of the Illinois Department of Employment Security (IDES), appeals an order of the circuit court reversing the Board's decision to deny unemployment benefits to plaintiff Diane Washington, a former restorative aide at Elmwood Care, Inc. On appeal, the Board contends its determination that plaintiff committed misconduct in the course of her job was not clearly erroneous. We agree and reverse the judgment of the circuit court and reinstate the decision of the Board.

¶ 3 From February 9, 1999 until July 24, 2012, plaintiff worked for Elmwood Care, Inc., a nursing home, as a restorative aide. She was discharged on July 24, 2012 after she was involved in an altercation with one of the facility's residents. According to Elmwood, plaintiff violated a rule requiring her to be polite to residents when she yelled and jerked a food cart away from one of its residents. When she applied for unemployment benefits, Elmwood protested the claim. The claims adjudicator determined that plaintiff had been discharged for misconduct connected with work, and was disqualified from receiving unemployment benefits under Section 602(A) of the Unemployment Insurance Act. 820 ILCS 405/602(A) (West 2012).

¶ 4 Plaintiff requested reconsideration of the claim adjudicator's decision and, if applicable, an appeal to an IDES referee. The determination remained the same on reconsideration, and an appeal to the referee was filed. An IDES referee conducted a telephone hearing with plaintiff and Elmwood employees Mark Solomon, Nadia Nordlie, Christine Jose, and Dariusz Pierlak.

¶ 5 Mark Solomon, an administrator for Elmwood, testified that plaintiff had been discharged for a confrontation involving resident David Sanchez. The week before the incident, plaintiff attended in-service training on the subject of treating residents with respect, regardless of what the resident does. Solomon, who had viewed a video recording of the incident, said that plaintiff

was asked to step away twice by the department manager, but she returned. The video also showed plaintiff and Sanchez arguing and struggling over the coffee cart.

¶ 6 Nadia Nordlie testified that she observed plaintiff and Sanchez arguing after she overheard shouting in the hallway. When she asked why they were arguing, plaintiff explained that it was because Sanchez wanted to help himself to coffee, but he did not want it earlier when she offered it to him in the dining room. Nordlie observed Sanchez "breathing heavily" and that he was "exhausted from the arguing." She told plaintiff to leave. Plaintiff left, but she came back again and continued the argument. An employer representative questioned Nordlie regarding whether a resident would be able to get coffee "whenever he wanted it" to which she replied that she "would think so." When asked if a resident was allowed to have coffee only at specific time Nordlie responded "No."

¶ 7 Christine Jose testified that she and Nordlie were in the office when they heard a commotion outside. They found plaintiff and Sanchez arguing about the coffee. Sanchez was gasping for breath. Nordlie told plaintiff to walk away, and she did, but came back yelling and arguing with Sanchez.

¶ 8 Dariusz Pierlak testified that he was made aware of the altercation when one of the residents told him that Sanchez needed help. He stated that at that time, he was trying to take care of residents, but plaintiff was "arguing loudly, shouting." He stepped out of his office and observed Sanchez asking plaintiff for coffee, but plaintiff said that “he wouldn’t get coffee anymore because she asked before and he didn’t want [it]. So now he won't get coffee.” Sanchez insisted and held on to the cart. Plaintiff attempted to take the cart into the kitchen, which resulted in both her and Sanchez "jerking the cart back and forth and very loudly shouting." He

stated that Sanchez was "out of breath, heavily breathing, and really, really agitated." Pierlak asked plaintiff to go to the dining room so that he could take care of Sanchez and help him calm down. He thought that she had left, but seconds later she was back, arguing again. After he told both Sanchez and plaintiff to stop, he thought that the altercation was over. However, plaintiff returned and continued to argue with Sanchez. Pierlak eventually took Sanchez to his room to help him calm down.

¶ 9 Plaintiff testified that she had been involved in a prior confrontation with Sanchez on the day she was discharged from Elmwood. She reported the matter to two social workers. During lunch, plaintiff asked Sanchez what he wanted to drink, and he replied “I don’t want anything from you.” Later, plaintiff asked Sanchez a second time, and he responded “I don’t want you to get me anything.” As she was taking the cart back to the kitchen, Sanchez jumped up and said “don’t you take that coffee pot anywhere.” Plaintiff called out to Pierlak for help, and he told her to wait. She began to push the cart back to the kitchen, but Sanchez started cursing at her. Plaintiff stated that she tried to go to the kitchen "because [residents] are not allowed to touch the coffee cart." She asked Pierlak whether he was going to continue to let Sanchez speak to her in an insulting manner. Eventually Nordlie and Jose arrived, and Nordlie told plaintiff to leave. Plaintiff left, but returned because Sanchez "kept calling me bitches and stuff." Another staff member told her to go, and she went into the dining room. Plaintiff stated that the incident could have been avoided if the social workers had done their job that morning. She denied arguing with Sanchez, and did not remember jerking the cart away from him.

¶ 10 The referee found that there was no rule prohibiting residents from serving themselves coffee. The referee concluded that plaintiff willfully violated Elmwood's known and reasonable

rule requiring her to be polite to residents. The referee further concluded that because the reason plaintiff was discharged was within her control to avoid, plaintiff was discharged for misconduct connected with her work, pursuant to section 602(A). Plaintiff appealed the referee's decision to the Board. The Board adopted the referee's findings, and affirmed plaintiff's denial of employment benefits.

¶ 11 Subsequently, plaintiff timely filed a *pro se* complaint for administrative review in the circuit court of Cook County. After the parties presented oral argument, the circuit court reversed the decision. The court found that Elmwood had a rule prohibiting residents from serving themselves coffee, and that plaintiff was acting in accordance with the rule. Although the Board based its decision on whether plaintiff could have avoided the incident, the court found that the Board applied the wrong standard.

¶ 12 Initially we note plaintiff has not filed a brief in response to defendant's contentions. However, we have the authority to decide the merits of this appeal because the record is simple and the claimed errors are such that we can decide them without the assistance of an appellee's brief. *People v. Cosby*, 231 Ill. 2d 262, 285 (2008) citing *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill.2d 128, 133 (1976).

¶ 13 On appeal, the Board contends its determination that plaintiff committed misconduct in the course of her job was not clearly erroneous where she refused a resident's request for coffee, argued with him about it, and deliberately continued to argue with him even after she was told by management to leave the scene of the incident.

¶ 14 Section 602(A) of the Act provides that employees discharged for misconduct are ineligible to receive unemployment insurance benefits. *Alternative Staffing, Inc. v. Illinois*

Department of Employment Security, 2012 IL App (1st) 113332, ¶ 30; 820 ILCS 405/602(A) (West 2012). Three elements must be proven to establish misconduct: "(1) there was a deliberate and willful violation of a rule or policy of the employing unit, (2) the rule or policy was reasonable, and (3) the violation either harmed the employer or was repeated by the employee despite a previous warning or other explicit instruction from the employing unit." *Woods v. Illinois Department of Employment Security*, 2012 IL App (1st) 101639, ¶ 19, citing 820 ILCS 405/602(A) (West 2012). An employee willfully violates a work rule or policy when she is aware of and consciously disregards that rule. *Odie v. Department of Employment Security*, 377 Ill. App. 3d 710, 713 (2007).

¶ 15 In an appeal from an administrative review proceeding, this court reviews the decision of the Board rather than that of the circuit court. *Walls v. Department of Employment Security*, 2013 IL App (5th) 130069, ¶ 14. The hearing officer functions as the fact finder, determines witness credibility and the weight to be given their statements, and draws reasonable inferences from the evidence. *Young-Gibson v. Board of Education of the City of Chicago*, 2011 IL App (1st) 103804, ¶ 56. "We may affirm an agency's decision on any basis supported by the record." *Id*. "The question of whether an employee was properly terminated for misconduct in connection with [her] work involves a mixed question of law and fact, to which we apply the clearly erroneous standard of review." *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 327 (2009). The Board's decision is clearly erroneous only if, after reviewing the entire record, we definitely and firmly believe that a mistake has occurred. *Abbott Industries Inc. v. Department of Employment Security*, 2011 IL App (2d) 100610, ¶ 15.

¶ 16 In this case, we find that the Board's determination that plaintiff was ineligible for unemployment benefits was not clearly erroneous. First, it was undisputed that plaintiff was consciously aware of Elmwood's policy of treating residents with respect, regardless of what the resident does, as she had attended a training on the topic a week prior to the incident. Accordingly, when plaintiff chose to engage in an altercation with Sanchez she deliberately and willfully violated the policy. Plaintiff engaged in both a loud argument and a physical struggle over a coffee cart with Sanchez. Witnesses testified that they told plaintiff to leave the scene of the altercation a number of times in order to de-escalate the situation; however, she returned to continue her argument with Sanchez. Plaintiff maintained that she was attempting to uphold Elmwood's policy that prohibited residents from serving themselves coffee. Although the administrative agency and the trial court disagreed on whether such a rule existed, we review the decision of the Board rather than that of the circuit court. See *Walls*, 2013 IL App (5th) 130069, ¶ 14. Moreover, we find that regardless of the existence of such a rule, it does not absolve plaintiff from her duty to be respectful and polite to a resident, regardless of what he does. Thus, plaintiff willfully violated Elmwood's policy on resident care.

¶ 17 Second, we find that Elmwood's rule that employees must be polite and respectful to residents at all time was reasonable. A reasonable rule concerns "standards of behavior which an employer has a right to expect" from an employee. *Livingston v. Department of Employment Security* 375 Ill. App. 3d 710, 716 (2007). Moreover, an employer does not need to prove that it has a reasonable rule or policy against employees refraining from impolite and disrespectful behavior because common sense dictates that certain conduct intentionally and substantially disregards an employer's interests. See *Greenlaw v. Department of Employment Security*, 299 Ill.

App. 3d 446, 448 (1998). Because, as the *Livingston* court found, a nursing home has "a duty to provide an abuse-free environment," Elmwood's rule requiring employees to treat residents with respect at all times helps to ensure that duty is upheld. See *Livingston*, 375 Ill. App. 3d at 717.

¶ 18 Finally, we find that plaintiff's conduct harmed Elmwood and had the potential to do further harm. This court has found that in determining whether an employee's conduct harmed her employer, the employee's conduct should not be viewed narrowly in the context of actual harm, but should be evaluated in terms of potential harm. *Greenlaw*, 299 Ill. App. 3d at 448. Plaintiff's argument with Sanchez caused him to become visibly agitated and interrupted other Elmwood employees from their duties in order to stop the altercation. Thus, we find that her conduct was harmful to Elmwood's interests. Furthermore, this court has found that harm to a nursing home resident also harms the employer because the employee's misconduct not only interferes with the nursing home's ability to provide an environment free from abuse, but also exposes the nursing home to potential tort liability and damage to its reputation. *Livingston*, 375 Ill. App. 3d at 717-18. Thus, plaintiff's disruptive conduct had the potential to do further harm to Elmwood.

¶ 19 The Board reviewed all of the evidence in the record, including testimony from the telephone hearing, and determined that plaintiff deliberately and willfully violated Elmwood'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.

¶ 20 Based on the foregoing reasons, we reverse the judgment of the circuit court of Cook County and reinstate the order of the Board disqualifying plaintiff from receiving unemployment benefits.

¶ 21 Reversed; Department decision reinstated.