

No. 1-13-3986

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).

MICHELE SLAV,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	
)	
ILLINOIS DEPARTMENT OF EMPLOYMENT)	
SECURITY, DIRECTOR OF THE ILLINOIS)	
DEPARTMENT OF EMPLOYMENT SECURITY,)	No. 13 L 50375
and BOARD OF REVIEW,)	
)	
Defendants-Appellants)	
)	
(NEW TRIER HIGH SCHOOL DISTRICT 203, employer)	Honorable
)	Patrick J. Sherlock,
Defendant).)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Harris and Justice Liu concurred in the judgment.

ORDER

¶ 1 *Held:* The decision by the Board of Review for the Illinois Department of Employment Security that plaintiff was discharged from her employment for work related misconduct and thus ineligible to receive unemployment benefits was clearly erroneous. The order of the circuit court reversing the Board's decision was affirmed and the Board's decision was reversed.

¶ 2 The Illinois Department of Employment Security (Department), its Director, and the Board of Review (Board) appeal from the circuit court's order reversing the Board's decision denying plaintiff Michele Slav's unemployment benefits under section 602(A) of the Illinois Unemployment Insurance Act (Act) (820 ILCS 405/602(A) (West 2012)). Defendants contend that under the Act plaintiff was ineligible to receive benefits due to misconduct for violating a workplace rule by issuing herself salary advances without prior approval from her supervisor and, as a result, the circuit court erred in reversing the Board's decision.

¶ 3 BACKGROUND

¶ 4 The administrative record shows that plaintiff was employed as Director of Business Services by New Trier High School District 203 (District) from 1997 to June, 2012, when her employment was terminated. She then applied for unemployment benefits. In her application, plaintiff claimed that she was terminated because of a "different opinion on an internal control matter" for which there was no workplace rule or policy associated with her conduct. The District protested her claim.

¶ 5 On July 12, 2012, a claims adjudicator for the Department determined that plaintiff was "not ineligible" for benefits because "the employer did not provide sufficient information or supporting documentation to establish misconduct." The adjudicator concluded that plaintiff's actions were "not a violation of a reasonable rule or policy of the employment unit." The District requested reconsideration of the adjudicator's decision.

¶ 6 On August 8, 2012, a Department referee conducted a hearing in the matter by telephone. Plaintiff testified that the District has a program that offers employees payroll advances upon request. The payroll coordinator processes those advances and plaintiff, as Director of Business

Services, was responsible for determining if the advances were "within line" or a "risk or harm to the District" before issuing the advances. Typically, a district employee would request an advance over the phone or through a written request. Whether the request needed to be in writing depended on the dollar amount of the advance and whether the repayment plan involved multiple payments. Except for one specific case in 2011, plaintiff was not required to get approval from the requesting employee's supervisor for an employee's payroll advance. Plaintiff was responsible for this function for over ten years. Plaintiff printed the checks, recorded the payments and the payback plans. Plaintiff followed this procedure for all payroll advances, including her own. According, to plaintiff, the District's payroll coordinator was aware of all payroll advances including those made by plaintiff.

¶ 7 On April 1st or 2nd 2012, plaintiff was approached by her supervisor, Don Goer, who raised his concern with her about her own payroll advances. He informed plaintiff that he did not "want it to happen again." After this conversation, plaintiff did not take any further payroll advances. On cross-examination, plaintiff testified that all funds were paid back to the District. A final payoff of \$250 was made by a deduction from her final paycheck on June 15, 2012. That payoff was approved in writing by the District. She explained that the reason she did not ask her supervisor for permission to take any payroll advances was because all employees of the District were permitted to take advances and there was no rule requiring their supervisors approve any advance requests.

¶ 8 George Sanders, a District employee, testified on behalf of the District that plaintiff was discharged on June 5, 2012 for payroll advances taken on 8 separate occasions without previous permission from her supervisor. The 8 advances totaled approximately \$12,000 and occurred between 2006 and 2012. He testified that other District employees were permitted to receive

payroll advances. Plaintiff was responsible for providing those employees with a form which required authorization by the staff member's supervisor and another District officer, usually plaintiff. Pursuant to this District policy, plaintiff was required to first seek permission from the Associate Superintendent before processing her own payroll advances. According to Sanders, plaintiff told him that she did not seek prior authorization for her advances because she was concerned the advances would not be approved. The District discovered her payroll advances on May 21, 2012. The District conducted a forensic audit and concluded that all funds were returned.

¶ 9 On August 9, 2012, the referee affirmed the decision of the claim's adjudicator, finding that plaintiff's actions did not constitute misconduct as defined by the Act. The referee held that the evidence did not show plaintiff "deliberately gave herself payroll advances in violation of any employer policy or procedure" and "her actions did not constitute a deliberate and willful disregard of the employer's interest." After outlining her factual findings, the referee determined that plaintiff was discharged for reasons other than misconduct as defined under section 602(A) of the Act. Accordingly, the referee found that plaintiff was eligible to receive benefits.

¶ 10 The District appealed to the Board, and on March 19, 2013, the Board set aside the referee's decision. In doing so, the Board stated that it reviewed the entire record and found that there was a reasonable workplace policy regarding the procedure for staff payroll advances, which plaintiff failed to follow on a case by case basis. The Board found that pursuant to section 602(A) of the Act, misconduct is established where an employee deliberately and willfully violates a reasonable work rule and the violation either harms the employer or was repeated by the employee despite previous warnings. The Board concluded that plaintiff admitted she was responsible for processing the payroll advances which required a form. Although she informed

the payroll coordinator of her advances, she did not seek her supervisor's approval. The Board's decision concluded "based on her experience as a CPA, we find that [plaintiff] was aware of the record keeping necessary to disburse the employer's moneys and keep its accounts, and that she chose to ignore forms. Accordingly, we find the [plaintiff] was discharged for misconduct connected with her work."

¶ 11 Subsequently, plaintiff timely filed a *pro se* complaint for administrative review in the circuit court of Cook County. The Department, its Director and the Board filed an appearance and answered the complaint by filing the administrative record with the clerk's office. The District did not file an appearance or participate in any proceedings before the circuit court. On November 26, 2013, after hearing, the circuit court, without comment, reversed the Board's decision. This timely appeal followed.

¶ 12 ANALYSIS

¶ 13 On appeal, the defendants argue that the circuit court erred in reversing the decision of the Board. For the reasons set forth below, we affirm the judgment of the trial court and reverse the Board's decision.

¶ 14 We first address plaintiff's contention that we lack jurisdiction over this appeal. Plaintiff argues that because her former employer failed to participate at the circuit court level, the Department, its Director and the Board lack standing to appeal the circuit court's reversal of the Board's decision. Plaintiff contends that the Board adjudicates claims between former employees and the employer and, as an adjudicating authority, the administrative agency cannot also act in a prosecutorial function by appealing judgments no longer contested by the employer.

¶ 15 We recently discussed this issue in *Farris v. Department of Employment Security*, 2014 IL App (4th) 130391, finding that the Department, its Director and the Board serve as "the

guardians of the unemployment insurance fund." *Id.* ¶ 29. The Department and its Director administer the fund from which claimants seek to draw benefits and are entrusted with protecting the fund and administering the Act. *Id.* ¶ 30-31. The legislature has conferred standing to the Department, its Director and the Board to "prosecute appeals from adverse circuit court decisions." *Id.* ¶ 31. We find the defendants have an interest in this determination such that we have jurisdiction over the agency's appeal.

¶ 16 Pursuant to the Administrative Review Law, we review the propriety of the Board's decision and not the judgment of the circuit court. *Oleszczuk v. Department of Employment Security*, 366 Ill. App. 3d 46, 50 (2002). The Board's factual findings are *prima facie* true and correct unless they are against the manifest weight of the evidence. *Abbott Industries, Inc. v. Department of Employment Security*, 2011 IL App (1st) 111835, ¶20. The question of whether an employee was guilty of misconduct involves a mixed question of law and fact which we employ the "clearly erroneous" standard of review. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001). An administrative agency's decision is clearly erroneous only where upon reviewing the record, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

¶ 17 A claimant's receipt of unemployment benefits is conditioned on eligibility under the Act. *Grigoleit Co. v. Department of Employment Security*, 282 Ill. App. 3d 64, 68 (1996). Section 602(A) of the Act disqualifies a claimant from receiving unemployment benefits if she was terminated due to misconduct in connection with her work. 820 ILCS 405/602(A) (West 2012). The Act defines misconduct as: (1) a deliberate and willful violation of; (2) a reasonable rule or policy of the employing unit; and, (3) the employer was harmed by the violation or the violation was repeated by the claimant despite previous warnings. 820 ILCS 405/602(A) (West 2012);

Arroyo v. Doherty, 296 Ill. App. 3d 839, 844 (1998). All three elements "must be proven to establish disqualifying misconduct under [section 602(A) of] the Act." *C.R. England, Inc. v. Department of Employment Security*, 2014 IL App (1st) 122809, ¶ 80. Where there is an absence of harm to an employer, the employee's acts cannot constitute misconduct as defined by the Act. See *Adams v. Ward*, 206 Ill. App. 3d 719, 729 (1990).

¶ 18 In this case, we find the Board's decision is clearly erroneous because there is no evidence of harm in the record. Although defendants put forth arguments that some form of harm may have occurred, these arguments are not reasonably based on the facts contained in the record. The Board's written decision denying plaintiff's unemployment claim did not make a specific finding that the District was harmed by plaintiff's conduct. It simply found her misconduct was that "she chose to ignore the forms" that were "necessary to disburse the employer's monies and keep its accounts." Although the Board is not required to make an explicit finding of harm, there must be an evidentiary basis in the report to support such a finding. See *Lachenmyer v. Didrickson*, 263 Ill. App. 3d 382, 385 (1994) (an administrative board is not required to make an explicit finding of harm "when there is evidence in the record to support the finding.").

¶ 19 The defendants argue that the District was harmed in being forced to perform a forensic investigation of plaintiff's payroll advances. We are not persuaded by this rank speculation. Defendants do not suggest how the District was "forced" to perform the audit or how performing the audit harmed the District. The administrative record reveals that the District informed the adjudicator and referee in written documentation that an audit was performed. There is no record of whether the audit was routinely performed or specially requested because of this claim. Additionally, Sanders, the District's witness, testified that the audit "satisfied" the District that

plaintiff's payroll advances were fully repaid. The record does not include any further testimony or reference to the forensic audit. Furthermore, the record contains no evidence to specifically indicate how the audit might have been harmful to the District because common sense would indicate that a school district of this employer's size would, or should, be audited routinely. Any claim of harm due to the audit in this situation is pure conjecture.

¶ 20 Appellants also contend that the District was harmed by plaintiff's failure to use payroll advance forms when processing the employee loans because of "possible difficulty" in collecting repayments from other employees for their own payroll advances. According to the written evidence in the administrative record, plaintiff was terminated for failing to seek supervisory approval for her own payroll advances not for any stated actual or potential collection problems. The finding that plaintiff violated District policy by requiring disbursement request forms "based on her own risk assessment" is meaningless as it relates to employer harm, especially where she has been doing this function for over 10 years without any complaint evidencing, at the very least, acquiescence by the employer in her job performance. Rather, the stated reason for her termination involved only the processing of her own payroll advances without her supervisors approval. Therefore, we find this argument unmeritorious.

¶ 21 Lastly, appellants assert an additional argument in their reply brief, that the District was harmed because it had to hire and train a new business manager. We will not address this argument because any points not raised in an appellant's opening brief are waived and may not be raised for the first time in the reply brief. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 23 ("points not argued in the appellant's brief 'are waived and shall not be raised in the reply brief.' ").

¶ 22 In summary, our review of the administrative record leaves us with a firm conviction that

the Board's decision to deny plaintiff unemployment benefits was clearly erroneous. The Board made a mistake when it found plaintiff ineligible for unemployment benefits based upon work-related misconduct as defined under section 602(A) where the record does not support evidence of harm to the employer. 820 ILCS 405/602(A) (West 2012).

¶ 23

CONCLUSION

¶ 24 For the foregoing reasons, we reverse the Board's denial of benefits and affirm the judgment of the circuit court.

¶ 25 Circuit court affirmed; Board of Review reversed.