FIRST DIVISION
April 6, 2015

No. 1-14-1231

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

MONIQUE L. McGLORY, Plaintiff-Appellee, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, DIRECTOR OF ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, and BOARD OF REVIEW, Defendants-Appellants, and LEXINGTON HEALTH CARE CENTER OF ELMHURST c/o PERSONNEL PLANNERS DAVID PROSNITZ, Defendant.	)	Appeal from the Circuit Court of Cook County. No 12 L 51548 Honorable Robert Lopez Cepero, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Board of Review's determination that plaintiff committed misconduct was not clearly erroneous where it inferred a reasonable policy that employees were required to work when scheduled and there was no suggestion in the record that the employer's bereavement policy applied.

¶ 2 Defendant, the Board of Review ("the Board") of the Illinois Department of Employment Security ("the Department"), appeals the order of the circuit court reversing the Board's decision to deny unemployment benefits to plaintiff Monique McGlory, a former employee at Lexington Healthcare Center of Elmhurst ("Lexington"). On appeal, the Board contends that its determination that plaintiff committed misconduct in the course of her job was not clearly erroneous. We reverse the judgment of the circuit court and affirm the decision of the Board.

¶ 3 The record establishes that plaintiff worked as certified nurse's assistant at Lexington from July 18, 2011, until her employment was terminated on May 21, 2012, due to excessive absences. A claims adjudicator for the Department found plaintiff to be ineligible for benefits under section 602(A) of the Illinois Unemployment Insurance Act, ("the Act") (820 ILCS 405/602(A) (West 2012)), determining that she was discharged for misconduct. Plaintiff appealed the determination.

¶ 4 In July 2012, a referee for the Department held a telephone hearing on plaintiff's appeal. Alain DeLeon, the director of nursing for Lexington, testified that plaintiff was fired for four absences in May 2012: Monday the 14th, Tuesday the 15th, Saturday the 19th, and Sunday the 20th. Plaintiff had not called in for any of the absences and was noted as a "no call no show" in Lexington's system. Lexington's policy required that employees "call in four hours prior ***to the start of the shift." A call placed later than four hours prior results in the absence being classified as "no call no show" which is grounds for termination. Lexington gave plaintiff a copy of this policy when she began working in 2011. Plaintiff had been given written warnings for tardiness six times in January and February 2012. DeLeon also testified that Lexington had a bereavement policy, but he was not familiar with its details beyond that it gave "sufficient time for bereavement." Finally, DeLeon's phone number was posted in Lexington, and employees could call him at any time.

¶ 5 Plaintiff testified that she had been absent from work on March 14, because her half-brother had died in a motorcycle accident the previous night, but she called off. She was not scheduled to work Tuesday, March 15, because Tuesdays are regularly her day off. Plaintiff worked March 18. On that day, she went to Lexington's scheduler and asked if she could leave her shifts an hour early on the next two following days. She wanted to work at a church fundraiser for her brother's funeral expenses. The scheduler told plaintiff that she needed to speak with the administrator and DeLeon. When the scheduler told plaintiff that she could not leave early, plaintiff responded that she would have to call off for the days. Plaintiff then went to the administrator who directed plaintiff back to the scheduler. When she told the administrator that she had come from the scheduler, the administrator told her to talk to DeLeon. Plaintiff had DeLeon's phone number, but did not call him because he was out on business. Plaintiff also testified that she believed Lexington's bereavement policy included three days off for the death of a close relation.

¶ 6 The referee found that plaintiff was fired because she was absent from work on May 19 and 20. Plaintiff asked to leave early on both days to work at a church fundraiser for her brother, but Lexington told her no because she was needed both days. Plaintiff "said if she could not leave early she would call off both shifts, which she ended up doing." She had previously been given two warnings for tardiness. The referee concluded that plaintiff was discharged for misconduct, and therefore, was ineligible for benefits. He explained that she "violated every employer's attendance rule requiring employees to work when scheduled. Any employee must report to work unless she has permission to be off or if her absence was due to circumstances beyond her control." The referee noted that "[t]here was no compelling reason for [plaintiff] to agree to work at the fundraisers *** when she knew she had to work." Plaintiff appealed the

referee's decision to the Board. The Board affirmed the referee's decision as supported by the record. It incorporated the referee's decision and findings into its own decision.

¶ 7 Plaintiff filed a complaint for administrative review in the circuit court of Cook County. The circuit court reversed the board's decision, finding that "the real issue in this case is not whether Plaintiff violated the employer's attendance policies, but whether she violated the bereavement policy" which was not included in the proceedings. It also found the Board's decision to be against the manifest weight of the evidence, because "[w]ithout the [attendance] policy, the evidence does not give the Board a sufficient basis to make the determination." The Defendants appeal.

¶ 8 Defendants argue that the Board's decision that plaintiff was ineligible for unemployment benefits because she was discharged for misconduct was neither against the manifest weight of the evidence nor clearly erroneous. They assert that Lexington had a commonsense work rule that employees must attend work as scheduled unless excused, that plaintiff knew of this policy and disregarded it, and that she had previously been warned about attendance issues.

¶ 9 Plaintiff responds that the Board's decision was clearly erroneous and against the manifest weight of the evidence. She argues that the Board ignored Lexington's stated policies and "made up" an attendance policy that is unsupported by the record. She also asserts that the Board ignored her good faith attempts to comply with Lexington's policies in finding her conduct to be willful. Finally, she asserts that no harm was shown to Lexington and that she was never warned for failure to attend work.

¶ 10 We first determine the standard of review. On administrative review, an appellate court reviews the decision of the agency, not that of the circuit court. *Pesoli v. Department of Employment Security*, 2012 IL App (1st) 111835, ¶ 20. The applicable standard of review depends on whether the reviewing court is considering a question of fact, a question of law, or a

mixed question. *Id.* An agency's factual findings are not reversed unless they are against the manifest weight of the evidence. 735 ILCS 5/3-110 (West 2012). Questions of law are reviewed *de novo*. *Pesoli*, 2012 IL App (1st) 111835, ¶ 20. An agency's determination of mixed questions of law and fact are reversed if they are clearly erroneous. *Id.* A determination is clearly erroneous if the court has a "definite and firm conviction" that the decision was mistaken. *Id.*

¶ 11 Defendants argue that the question of whether plaintiff's actions constitute misconduct is a mixed question, and thus, is reviewed for whether it is clearly erroneous, citing *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 826 (2009). Plaintiff argues that *de novo* review is appropriate, citing *Czajka v. Department of Employment Security*, 387 Ill. App. 3d 168, 173 (2008). However, while the *Czajka* court initially stated that it would apply *de novo* review, it subsequently indicated that the clearly erroneous standard is appropriate. *Id.* at 173-74. Therefore, we apply the clearly erroneous standard.

¶ 12 An individual claiming unemployment benefits bears the burden of proving his or her eligibility. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 327 (2009). Section 602(A) of the Act mandates that individuals discharged for misconduct are not eligible for unemployment benefits until they become reemployed. 820 ILCS 405/602(A) (West 2012). An employee commits misconduct when (1) an employer has a reasonable rule or policy, (2) the employee willfully violates that rule, and (3) the violation either harmed the employer or was repeated despite prior warnings to the employee. *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 557 (2006). We address each prong in turn.

¶ 13 We first determine whether Lexington had a reasonable rule. Reasonable rules are "[s]tandards of behavior that an employer has a right to expect." *Id.* A rule need not be formalized or written. *Sudzus*, 393 Ill. App. 3d at 827. The employer does not need to submit direct evidence of a rule, and the court may rely on "a commonsense realization that certain

conduct intentionally and substantially disregards an employer's interests" in finding that a rule existed. *Greenlaw v. Department of Employment Security*, 299 Ill. App. 3d 446, 448 (1998).

¶ 14 The Board was permitted to rely on common sense in determining that Lexington had a policy requiring workers to work at the times they were scheduled to work. Such a rule is ubiquitous, and necessary for any functioning business. Furthermore, such a rule is clearly reasonable. An employer has a right to expect that its employees work when they are scheduled to work. See *Nichols v. Department of Employment Security*, 218 Ill. App. 3d 803, 811 (1991). The Board's determination that it was reasonable is not clearly erroneous.

¶ 15 Plaintiff argues that this court, like the circuit court, should characterize the issue as whether she violated Lexington's bereavement policy. We find plaintiff's argument unpersuasive. The only evidence of the bereavement policy in the record is DeLeon's assertion that employees are given "sufficient time for bereavement" and plaintiff's assertion that she thought employees received three days for the death of an immediate family member. Even if we assume, *arguendo*, that the Board found plaintiff's testimony credible, there are still a host of relevant questions unanswered by the record. There is no evidence of what an employee must do to claim those days. The record does not reveal when or for what reasons employees may use such days. Too many questions are unanswered to find that the bereavement policy controls. Furthermore, plaintiff herself never indicated that the bereavement policy applied. In her testimony, plaintiff did not state that she attempted to invoke the bereavement policy. She did not request the days off as part of the bereavement policy. Her singular reference to the bereavement policy did not suggest that Lexington should have given her the days off, but rather the reference was part of a larger complaint that the employer should have been more compassionate to her. Given the dearth of evidence regarding the bereavement policy in the record other than plaintiff's own

fleeting reference to the policy, the Board's implicit determination that the bereavement policy was inapplicable was neither against the manifest weight of the evidence nor clearly erroneous.

¶ 16 Defendant cites *Reo Movers, Inc., v. Industrial Commission*, 226 Ill. App. 3d 216, 223 (1992), arguing that we must presume the bereavement policy was beneficial to her position because the policy was in Lexington's control and they failed to produce it. That case is inapposite to the current facts. *Reo Movers, Inc.* dealt with a missing lease that was dispositive of an issue in that case. See *Id.* Here, the bereavement policy was only tangentially referenced. Moreover, in *Reo Movers, Inc.* the evidence in question was under the sole control of one of the parties. *Id.* Here, plaintiff herself testified that she had a copy of the policy book. Thus, no presumption applies.

¶ 17 Defendant also argues that the Board erred by determining an implied, commonsense rule where the evidence indicated that a bereavement policy and a "call off" policy existed. As already discussed, the Board may use its common sense in determining that an unwritten rule exists. See *Greenlaw*, 299 Ill. App. 3d at 448. We note that neither the bereavement policy nor the "call off" policy contradict the implicit rule found by the Board. Each exists as a corollary to the more generic, commonsense rule that an employee must work when scheduled. While the referee did find that plaintiff abided by the "call off" policy, this is not incompatible with the finding that plaintiff violated an attendance rule. Common sense dictates that an employee could not "call off" continuous scheduled shifts without approval without facing repercussions. Because neither of the explicit policies is incompatible with the rule inferred by the Board, its determination that defendant violated a reasonable rule was not clearly erroneous.

¶ 18 We next determine whether plaintiff's violation was willful. A violation is willful when an employee is aware of the employer's reasonable rule, but disregards it. *Livingston v. Department of Employment Security*, 375 Ill. App. 3d 710, 716 (2007). As the implicit policy

requiring employees to work when scheduled unless excused is common sense, it follows that plaintiff, by utilizing common sense, knew she was required to attend scheduled shifts. There is no question that plaintiff knew she was scheduled to work both days. However, when she was told that she could not leave early during those shifts, she chose instead not to attend work at all. Thus, plaintiff's violation was clearly conscious and intentional.

¶ 19 Plaintiff argues that her conduct was not willful because she tried in good faith to comply. She cites several cases for the proposition that an employee does not commit misconduct where she attempts in good faith to comply with a policy but is unable to do so. See, *e.g.*, *Abbot Industries v. Department of Employment Security*, 2011 IL App (2d) 100610, ¶ 22. She notes that she tried to leave only an hour early each day and that she was left with an impossible choice between work and family. While plaintiff did initially try to take only an hour off for each shift, she was told by multiple individuals that she needed to call DeLeon to make her request. She had DeLeon's number, but chose not to call him to ask to leave early without any given excuse. Thus, there is no support for plaintiff's proposition that she did everything she could before choosing to call off on the days in question. Furthermore, plaintiff's argument that she was unable to comply is unpersuasive. In *Abbot Industries*, which plaintiff cites, the reviewing court found a claimant's absences were not intentional where the claimant was the primary caregiver for her ill mother, and she missed work to provide "absolutely necessary" care for her mother. *Id.* ¶¶ 21-22. Plaintiff's reason for her absence is distinguishable. Plaintiff scheduled herself to participate in fundraisers when she knew she had to work; she did not unexpectedly have to care for a family member's health. Unlike in *Abbot Industries*, there was no indication that plaintiff was the only person who could have collected money at the fundraiser. Finally, while plaintiff's choice between helping out at her brother's fundraiser and attending work as scheduled may have been difficult, it does not rise to the same level of compulsion as

the care of a sick family member. Therefore, the Board's determination that plaintiff's conduct constituted a willful violation was not clearly erroneous.

¶ 20 Finally we determine whether plaintiff's violation harmed the employer or was repeated after previous warnings. Absences and tardiness always harm an employer, as they disrupt the ordinary operations of any business. *Woods v. Department of Employment Security*, 2012 IL App (1st) 101639, ¶ 21. Moreover, there is no dispute that plaintiff was previously warned by Lexington due to her tardiness. Plaintiff argues her the previous warnings were for tardiness and not absence, and that warnings for unrelated misconduct do not satisfy the repetition prong of the misconduct determination. Plaintiff is correct that unrelated warnings do not satisfy the repetition prong. *Zuaznabar v. Department of Employment Security*, 257 Ill. App. 3d 354 (1993). However, tardiness and absenteeism are not unrelated. They are not different in character, but rather, different only in degree. Both are a matter of not being at work during one's scheduled shift. As such, plaintiff's absence from work despite earlier warnings for tardiness fulfills the third prong even if harm is not presumed.

¶ 21 The Board's determination that plaintiff willfully violated a reasonable rule of Lexington despite prior warnings and that her violation harmed the employer was not clearly erroneous. For the foregoing reasons, we find the Board's determination that plaintiff's conduct constituted misconduct and that she was consequently ineligible for benefits was not clearly erroneous. Accordingly we reverse the judgment of the circuit court of Cook County and affirm the decision of the Board.

¶ 22 Reversed; Board's decision reinstated.