2017 IL App (1st) 160598-U

No. 1-16-0598

Order filed May 31, 2017

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

VIOLETA SHTARO,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	No. 15 CH 7123
ILLINOIS DEPARTMENT OF EMPLOYMENT	)	
SECURITY; DIRECTOR OF ILLINOIS DEPARTMENT	)	
OF EMPLOYMENT SECURITY; BOARD OF	)	
REVIEW; and ALL FOR YOU HAIR DESIGNS, LTD.,	)	Honorable
	)	Alexander P. White,
Defendants-Appellees.	)	Judge, presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Board of Review's decision that plaintiff was ineligible for unemployment benefits because she was discharged for misconduct was not clearly erroneous where the employer testified plaintiff used profanity and raised her voice in front of customers and coworkers.

¶ 2 Plaintiff, Violeta Shtaro, appeals a circuit court order affirming a decision by the Board of Review (Board) of the Department of Employment Security (Department) finding that she

was ineligible for unemployment benefits because she was discharged for misconduct in connection with her work under section 602(A) of the Illinois Unemployment Insurance Act (the Act) (820 ILCS 405/602(A) (West 2012)). The Board affirmed a Department referee's decision finding Shtaro ineligible because she was terminated for misconduct from her position as a hairstylist employed by defendant, All For You Hair Designs, Ltd. (AFY). On appeal, Shtaro argues that her verbal altercation with the co-owner of AFY, Antonio Pinto, was not the reason for her discharge and that her behavior during the dispute did not constitute misconduct mandating denial of benefits. We affirm the circuit court.

¶ 3 AFY was owned by Antonio and Renee Pinto. The record shows that Shtaro was employed as a hairstylist with AFY from May 2003 to August 2013. On August 3, 2013, Shtaro was terminated from her position. The following day, Shtaro filed for unemployment insurance benefits.

¶ 4 Thereafter, a claims adjudicator conducted an interview with Shtaro. According to the claims adjudicator's summary, Shtaro stated that there was a lot of "drama" at AFY. Specifically, she had complained in the past that Renee would reduce her pay by "shaving" hours from those she had worked and, more recently, complained that salon employees were providing customers with sexual services in the back of the salon. During the final two days of Shtaro's employment, Antonio offered to cook Shtaro dinner at his home so they could talk about her concerns. She stated that she declined because she was fasting for Ramadan.

¶ 5 The claims adjudicator could not reach Antonio but conducted a telephone interview with Renee. Renee stated that Shtaro had been fired for use of profanity towards others while at work. AFY's employee handbook prohibited profanity on the salon floor and Shtaro had been verbally

warned after several prior violations. Shtaro spoke poorly of coworkers in her discussions with customers and some customers did not return because of her language and behavior.

¶ 6 The claims adjudicator held that Shtaro was eligible for unemployment benefits because she was not fired for misconduct. Rather, she was fired over a dispute over whether AFY was shaving hours from her pay.

¶ 7 AFY appealed the claims adjudicator's decision, claiming that Shtaro was fired for misconduct. It stated that Shtaro was fired for her threatening behavior and her use of offensive language regarding her coworkers in the presence of clients.

¶ 8 In January 2014, a Department referee conducted a telephone hearing. Renee testified that, prior to Shtaro being fired, there had been tension between Shtaro and another employee. Shtaro had been asked before to "cool down" her behavior. On the day Shtaro was fired, Renee left the salon for a couple of hours. Upon her return, she was told by a few clients that Shtaro had been out of control, speaking poorly of management and other salon workers. At the end of the day, with one customer remaining in the salon, Antonio approached Shtaro to "ask her what was going on." Shtaro "exploded," using profanity in reference to coworkers and making accusations about the salon. Antonio asked her repeatedly to stop yelling and using profanity. Shtaro proceeded to "scream and yell about how *** we don't know how to run the salon basically." Antonio then fired Shtaro.

¶ 9 Antonio testified that the events of that day were a culmination of events that began six months earlier when Shtaro and two other employees went on a vacation together. Shtaro fought with another coworker on the trip and, after returning to work, Shtaro was constantly and openly hostile toward that coworker. Antonio asked Shtaro to stop calling her coworker profane names.

Shtaro began arriving to work late and refused to sign in. Shtaro tried to bring up issues the night before she was fired, but Antonio told her he did not want to talk about it anymore and that Shtaro just needed to act respectfully. The day Shtaro was fired, Antonio received calls from the salon that his wife was gone and he needed to come in because Shtaro was out of control. Two customers also called Antonio to inform him Shtaro had been using profanity and speaking poorly of AFY's management and her coworkers. Antonio went to the salon and confronted Shtaro, telling her that her behavior was unacceptable and that he could confirm she had always been paid the correct amount. Shtaro put a finger in Antonio's face, used profanity, and complained about her coworkers. Antonio then fired her.

¶ 10 Ewa Litski, a former coworker of Shtaro's, testified that Shtaro did not act respectfully towards Litski and other coworkers. She also stated that Shtaro had been using profanity, was loud, and had been coming in late to work.

¶ 11 Shtaro testified that, a couple of years before her termination, she discovered customers were allegedly paying a coworker money for sexual acts in the back of the salon. Shtaro complained to Antonio about the alleged prostitution multiple times to no avail. Every time she complained, Antonio told her to mind her own business and reminded her that she was a single mother and needed her job.

¶ 12 Shtaro further testified that, the day she was fired, Antonio came into the salon and offered to cook her dinner and talk. Shtaro refused, telling him she did not want to talk about work or money. He had made a similar invitation the week prior, which she had also declined. She knew that Antonio wanted to talk about growing the business and how to make the workers more comfortable, but she had already told him why the workplace was uncomfortable. Antonio

then confronted her but she was not ready to have that conversation. She used profanity and told him to "watch it." Shtaro told Antonio that either he had to stop the prostitution or she would have to stop it herself. Eventually, Antonio told Renee to call the police. Shtaro threatened to call the police herself and report the alleged prostitution.

¶ 13 Antonio testified in rebuttal that Shtaro never made any complaints regarding prostitution at the salon. Litski testified that she had never been approached to engage in prostitution in her 17 years with the salon.

¶ 14 The Department referee ruled against Shtaro, finding that Shtaro was fired for misconduct, not for a dispute involving wages. Thereafter, Shtaro appealed to the Board, which affirmed the referee's determination. In concluding Shtaro was terminated for misconduct, the Board made the following factual findings:

> "The claimant was unhappy with her work situation, particularly her perception that another employee was offering sexual services to customers and the owner in the back room. The claimant did not want to be unemployed so she decided to confront the owner about her complaints. She did this on 8/3/2013 by yelling, swearing and acting out at the shop in front of customers and other employees. She would not stop when the owner asked her to cease yelling etc. *** When she refused to calm down, she was terminated."

¶ 15 Shtaro appealed to the circuit court, which affirmed the decision of the Board. This appeal followed.

¶ 16 On appeal, Shtaro contends that her use of profanity on the day she was terminated did not constitute misconduct because AFY did not have any rules or policies of which she could be

in violation and that, in fact, she was fired in retaliation her complaints about both prostitution at the salon and underpayment for her work. The State parties respond that the Board's conclusion that Shtaro was fired for misconduct is supported by the record.

¶ 17 Section 602(A) of the Act provides that a person is ineligible for unemployment insurance benefits when that person was "discharged for misconduct connected with his work." 820 ILCS 405/602(A) (West 2012). Misconduct is:

> "the deliberate and willful violation of a reasonable rule or policy of the employing unit, governing the individual's behavior in performance of his work, provided such violation has harmed the employing unit or other employees or has been repeated by the individual despite a warning or other explicit instruction from the employing unit." 820 ILCS 405/602(A) (West 2012).

¶ 18 The disqualification for misconduct is not intended to encompass all rightful terminations of employment but to exclude claimants who intentionally commit conduct that they know is likely to result in their termination, on the assumption that an employee who deliberately violates a known rule does so knowing that unemployment will likely result. *Petrovic v. Department of Employment Security*, 2016 IL 118562, ¶ 27. The elements of misconduct require that (1) the claimant deliberately and willfully violated a rule or policy of the employer, (2) the rule or policy was reasonable, and (3) the violation either harmed the employer or was repeated despite warnings. *Id.* ¶ 26.

¶ 19 We review the decision of the Board, not the circuit court. *Id.* ¶ 22. The Board is the trier of fact in cases under the Act, and its findings of fact are considered *prima facie* true and correct. *Williams v. Department of Employment Security*, 2016 IL App (1st) 142376, ¶ 52. We shall not

reweigh the evidence or substitute our judgment for that of the Board. *Id.* The Board's decision as to whether an employee was discharged from employment for misconduct under the Act presents a mixed question of law and fact reviewed for clear error. *Petrovic*, 2016 IL 118562, ¶¶ 21, 26. The Board's decision is clearly erroneous only if, "based on the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Id.* ¶ 21 (Internal quotation marks omitted.).

¶ 20 As a preliminary matter, Shtaro argues that she was not fired for misconduct but in retaliation for her complaints that prostitution was being committed at AFY and that she was being underpaid. The State parties respond that Shtaro's assertion that she was fired in retaliation is against the manifest weight of the evidence. Factual findings of the Board will be affirmed unless they are contrary to the manifest weight of the evidence. *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 819 (2009). Accordingly, we will disturb such a decision only if an opposite conclusion is clearly apparent. *Id.* We will not, indeed cannot, simply substitute our judgment for that of the Board. *Id.* While Shtaro's testimony may have conflicted with Antonio and Renee's testimony regarding the motive for her termination, assessing the credibility of witnesses and resolving conflicts in the evidence is primarily a matter for the Board. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 329 (2009). Here, Renee and Antonio testified at the hearing that Shtaro was terminated for her conduct, *i.e.*, using profanity in the presence of coworkers and clients. Shtaro herself testified that she used profanity during the dispute with Antonio that led to her termination. In light of the foregoing, we cannot say that the Board's decision is contrary to the manifest weight of the evidence.

¶ 21 Defendant also argues that AFY had no rules or policies at all, let alone rules or policies prohibiting profanity in front of coworkers and clients, because, while Renee alluded to a handbook in an initial interview, there was no proof that any rules existed. The State parties argue that the record established Shtaro had been verbally warned for her language on the floor and, therefore, AFY had established a rule "prohibiting the use of vulgar language on the salon floor in front of clients or coworkers."

¶ 22 Misconduct requires violation of an existing rule or policy. *Jackson v. Board of Review of Department of Labor*, 105 Ill. 2d 501, 512-13 (1985). An employer may prove the existence of a reasonable rule or policy "by a commonsense realization that certain conduct intentionally and substantially disregards an employer's interests." *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 557 (2006). Such a rule or policy is not required to be written or otherwise formalized. *Id.*

¶ 23 The testimony at the January 2014 Department hearing established that AFY had a policy prohibiting employees from using profanity on the salon floor. Antonio and Renee testified that, in the past, they had repeatedly told Shtaro it was unacceptable to call coworkers profane names. Renee testified that, the day of Shtaro's termination, Antonio repeatedly asked her to calm down and to stop using profanity before ultimately terminating her. Moreover, even in the absence of a written rule, common sense implies that the use of hostile, intimidating and vulgar language "intentionally and substantially disregards an employer's interests." *Manning*, 365 Ill. App. 3d at 558. Such a rule or policy does not need to be written or otherwise formalized. *Caterpillar, Inc. v. Department of Employment Security*, 313 Ill. App. 3d 645, 654 (2000).

Accordingly, the Board did not commit clear error when it found that AFY had a policy prohibiting the use of profanity in front of customers and coworkers.

¶ 24 There is no question of Shtaro willfully violated the rule prohibiting profanity on the salon floor. Conduct is deemed willful where it constitutes a conscious act made in knowing violation of company rules. *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010). During the January 2014 hearing, Shtaro admitted that she had used profanity in a dispute with Antonio in the moments leading up to her dismissal. Furthermore, Renee testified that Antonio did not immediately terminate Shtaro at the beginning of their dispute that evening, but only did so after warning her to stop using profanity. Shtaro continued to use profanity and Antonio terminated her. The Board did not commit clear error when it found Shtaro's violation of the prohibition of profanity was willful.

¶ 25 Finally, misconduct requires harm to the employer. *Id.* at 607. Whether an employer was harmed by the employee's conduct is viewed in the context of potential harm and does not require actual harm. *Manning*, 365 Ill. App. 3d at 557. Damage or injury to the employer's operations or goodwill constitutes harm under the Act. 56 Ill. Adm. Code 2840.25(b) (2012). Shtaro's use of profanity on the salon floor had the potential to drive AFY's customers away and cause future financial losses. The threat of financial losses caused by the conduct by an employee is harmful to an employer. *Bandemer v. Department of Employment Security*, 204 Ill. App. 3d 192, 195 (1990). Shtaro admitted using profanity in her dispute with Antonio on the shop floor. Antonio and Renee testified that AFY customers had complained of Shtaro's conduct. The Board found that such language disregards an employer's interests. *Manning*, 365 Ill. App. 3d at 558.

Accordingly, the Board's finding that Shtaro's conduct harmed AFY within the meaning of the Act was not clearly erroneous.

¶ 26 The evidence supports the Board's finding that Shtaro willfully violated a reasonable AFY policy thereby causing harm to the salon. We therefore conclude that the final determination of the agency finding Shtaro was ineligible for unemployment benefits because she was discharged based on misconduct connected with her work was not clearly erroneous. We affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.