

2012 IL App (1st) 112949-U

FOURTH DIVISION
December 13, 2012

No. 1-11-2949

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

ROSEMARIE ALLEN,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	
)	No. 11 L 50534
ILLINOIS DEPARTMENT OF EMPLOYMENT)	
SECURITY; DIRECTOR OF ILLINOIS DEPARTMENT)	
OF EMPLOYMENT SECURITY; BOARD OF REVIEW;)	
and MAINLINE INFORMATION SYSTEMS, INC.,)	Honorable
)	Alexander P. White,
Defendants-Appellees.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* Where evidence established that employee refused to assist in transition of account to new salesperson, Board's determination that employee committed misconduct making her ineligible for unemployment benefits was not clearly erroneous; the decision of the Board was affirmed.

¶ 2 Plaintiff Rosemarie Allen appeals the order of the circuit court affirming the decision of the Board of Review (the Board) of the Illinois Department of Employment Security (the Department) to deny her unemployment benefits after she was terminated from her position as an

account executive for Mainline Information Systems (Mainline). On appeal, plaintiff contends the evidence presented does not support the Board's determination that her actions were insubordinate so as to support her discharge for misconduct. We affirm the decision of the Board.

¶ 3 The record establishes that plaintiff's position involved selling computer hardware and software and related services to various clients. Pursuant to plaintiff's employment agreement with Mainline, her compensation consisted of sales commissions earned on transactions completed or invoiced on or before the employee's last day of employment. The agreement contained a commission schedule setting out the splitting of commissions between sales representatives in certain situations.

¶ 4 In 2010, a representative of one of plaintiff's largest clients, the University of Chicago, asked that another Mainline salesperson be assigned to their main and ancillary accounts or else the university would end its relationship with Mainline. On March 31, 2010, plaintiff was notified by letter that her employment would be terminated on April 30.

¶ 5 Plaintiff's application for unemployment benefits was challenged by Mainline, which asserted that plaintiff was discharged for misconduct related to her work and therefore was ineligible for benefits under section 602(A) of the Unemployment Insurance Act (the Act) (820 ILCS 405/602(a) (West 2010)). In its response to plaintiff's application, Mainline stated that her employment had been terminated for her insubordinate actions toward Jim Dixon, her direct supervisor and the sales director for Mainline's central region, and Bill Nemesi, Mainline's vice president of sales, when she was asked to assist in the transfer of the main University of Chicago account to another salesperson.

¶ 6 On October 19, 2010, a Department referee conducted a telephone hearing that included plaintiff, plaintiff's attorney, Dixon, Nemesi and Joyce Chastain, Mainline's human resources

director. Dixon testified that in February 2010, the University of Chicago requested that a different Mainline sales representative be assigned to their account due to problems with the timeliness with which they received quotes for products and services and also due to inaccuracies in those quotes. Dixon decided to assign Dave Rowan to the account and asked plaintiff to assist in that transition.

¶ 7 Dixon testified that plaintiff told him she had pending sales for which she wanted to receive commissions. When Dixon asked plaintiff for help with transferring the University of Chicago account to Rowan, plaintiff wanted to discuss her commission rate for her pending sales and for future sales in which she had presented quotes that had been accepted but where the products had not been delivered or invoiced.

¶ 8 Dixon said that in March 2010, he attempted to facilitate an agreement between plaintiff and Rowan about the commission split but they were "unable to arrive at a mutually agreeable conclusion" and plaintiff "was unwilling to help with the transition" of the account to Rowan. Several pages of e-mail messages memorializing those negotiations were presented as exhibits in the Department hearing and are contained in the record.

¶ 9 Dixon, Rowan and plaintiff met at a coffee shop on March 15 near the University of Chicago. An e-mail from Rowan to Dixon on March 12 stated that he would be "involved as of the 15th with the account" and that they "were going to meet ahead of time *** to discuss the meeting with the customer." The e-mail mentioned other accounts that were being transferred to plaintiff.

¶ 10 As to the March 15 meeting, Dixon testified that "no progress" was made in deciding what percentage of the commission that plaintiff should receive and that she left "in a huff." Dixon testified the March 15 meeting "was it" for him, and he consulted Nemesi because it was "probably time to [] do something different" with plaintiff. Dixon testified that plaintiff "would

have continued with us" had she agreed to a reasonable split of the commission with Rowan and to assist with the account's transition; however, plaintiff "made it clear that she was unwilling to discuss any of the transition items for the customer or as it related to the customer until the commission discussion was resolved."

¶ 11 In an e-mail to Nemesi and Dixon on March 19, plaintiff set out a commission arrangement and wrote "this is what I believe is fair considering my 7 year history." Dixon responded on March 22 via e-mail with a different proposal and stated that plaintiff "must work cooperatively and in a positive manner" with Rowan during the second quarter of the year.

¶ 12 Nemesi testified that Dixon called him after the March 15 meeting and said he was not able to reach an agreement with plaintiff. Dixon recommended to Nemesi that plaintiff's employment be terminated. Nemesi testified he wanted to speak with plaintiff before taking that step to "make sure that [she was] going to stick with" her position.

¶ 13 Nemesi said he spoke with plaintiff on March 26 and based on that conversation, he believed she "didn't even want to stay at Mainline. She was very short with me [and] asked me if we were going to be flexible on the existing offer. And I said no. And I believe that she hung up on me without even saying good bye or I have to go or anything like that." After that call, Nemesi e-mailed Chastain to relay the incident; in that e-mail, Nemesi said he believed the "only step is to terminate" plaintiff's employment.

¶ 14 When questioned by plaintiff's attorney, Nemesi acknowledged that in his e-mail to Chastain on March 26, he referred to the uncertainty of whether plaintiff hung up on her or whether he ended the phone call. Nemesi testified he felt plaintiff was acting in an insubordinate manner in that phone call and her demeanor was not "appropriate." In the March 26 e-mail to Chastain, Nemesi referred to plaintiff's behavior as uncooperative and condescending. Nemesi described his conversation with plaintiff in that e-mail message to Chastain as follows:

"Our key exchange in my mind was I told her I was disappointed that she could not come to agreement with Jim D [Dixon] on what was fair moving forward and felt she was being uncooperative. I asked her if she wanted to stay at Mainline, and she asked if I was firing her. I said no, but that she needed to be able to work cooperatively with Jim Dixon. She said he needed to be more cooperative with her. I told her that her attitude on this call is very similar to the attitude that Jim D described to me. I told her she had the weekend to decide what she wanted to do, and she was very short and basically said she would not cooperate so I said Joyce Chastain would be calling her on Monday if we did not hear a sign of her reaching back out. She said fine, and hung up."

¶ 15 On March 27, Dixon forwarded several e-mails to Chastain documenting the complaints submitted by the University of Chicago as to plaintiff's handling of their account and their request for a new representative. Dixon stated at the end of that e-mail to Chastain, "As I said last night, please do not do anything as a result of reading their examples."

¶ 16 Plaintiff testified in the hearing that the March 31 letter notifying her of the termination of her employment stated that action was being taken in accordance with the provision in her employment agreement allowing termination without cause with 30 days' notice. As to the University of Chicago account, plaintiff stated the commission structure suggested by Dixon and Rowan would not compensate her for sales for which she completed most or all of the work.

¶ 17 Regarding Rowan, plaintiff testified she was asked to "mentor him and to work with him so he could get the sales which I would get no compensation from." When asked if she agreed to that arrangement, plaintiff stated she was glad to assist Rowan on new business but asked to be

compensated for work she had completed. Plaintiff said she continued in her "last month" to perform work on various jobs and worked "as a good employee I worked diligently [] getting business closed to the end *** knowing I wasn't getting compensated."

¶ 18 Plaintiff testified she did not deliberately violate any rule or policy of Mainline or refuse to comply with a direct order of a supervisor. When asked about the March 26 phone conversation with Nemesi and if she hung up on him, plaintiff said she "took notes on that call" and pursuant to her notes, Nemesi told her that if she did not cooperate with Dixon, Chastain would "be calling" her on Monday. Plaintiff said Nemesi told her to "think about this," and she told him "thank you and to have a good weekend." Plaintiff testified she "would never hang up on anyone."

¶ 19 The referee asked plaintiff why she did not accept Mainline's offer to work on other accounts, and plaintiff responded she had put "hundreds of hours of work" into the University of Chicago accounts. At that point in the hearing, Chastain asked plaintiff if she remembered Chastain telling her over the phone that her employment was being terminated as a result of her "inability or your desire to not negotiate the commissions" as discussed with Dixon and Nemesi. Plaintiff responded she did not recall Chastain giving a reason for the termination. Chastain stated, when questioned by the referee, that Mainline ended plaintiff's employment "resulting from her failure to effectively negotiate" with Dixon and "transition the account over" to Rowan.

¶ 20 On November 4, 2010, the referee issued an order disqualifying plaintiff from receiving unemployment benefits, finding that she was discharged for misconduct as defined in section 602(A) of the Act. The order stated that plaintiff's "refusal to assist the new executive until the employer resolved the commission issue constituted insubordination" in that it was a "willful disregard of the employer's request." Plaintiff appealed to the Board, which affirmed the denial

of benefits, noting that insubordination was defined as the refusal to submit to reasonable authority. The circuit court affirmed the decision of the Board.

¶ 21 On appeal, plaintiff contends the Board's determination that she acted in an insubordinate manner so as to constitute misconduct under the Act was clearly erroneous. She argues no evidence was presented as to a rule or policy of Mainline that she could have been reasonably charged with violating or that she caused any harm to the company.

¶ 22 The main purpose of the Act is to alleviate the economic insecurity and burden caused by involuntary unemployment, and the Act "is intended to benefit only those persons who become unemployed through no fault of their own." 820 ILCS 405/100 (West 2010); *Jones v. Department of Employment Security*, 276 Ill. App. 3d 281, 284 (1995). The individual claiming unemployment insurance benefits has the burden of establishing his eligibility, and an employee discharged for misconduct is ineligible to receive those benefits. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 327 (2009).

¶ 23 Whether an employee was properly terminated for misconduct in connection with his work involves a mixed question of law and fact, to which we apply the clearly erroneous standard of review. *Id.* An agency decision is clearly erroneous where the entire record leaves the reviewing court with the definite and firm conviction that a mistake has been made. *Id.* The Board is the trier of fact in cases involving claims for unemployment compensation, and we review the findings of the Board, rather than the findings of the Department referee or of the circuit court. *Village Discount Outlet v. Department of Employment Security*, 384 Ill. App. 3d 522, 524-25 (2008).

¶ 24 In Illinois, employers have a right to expect a certain standard of conduct from employees in matters that directly concern their employment. *Selch v. Columbia Management*, 2012 IL App (1st) 111434, ¶ 43. Misconduct under the Act has been defined as the deliberate and willful

violation of a reasonable rule or policy governing the individual's behavior in the performance of his work. 820 ILCS 405/602(A) (West 2010). Three elements of misconduct must be established: (1) the rule or policy must be deliberately or willfully violated; (2) the rule or policy of the employer must be reasonable; and (3) the violation must have harmed the employer or it must have been repeated by the employee despite previous warnings. 820 ILCS 405/602(A) (West 2010); *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 557 (2006).

¶ 25 A reviewing court need not find direct evidence of a rule or policy and instead, may make a commonsense determination that certain conduct intentionally and substantially disregards an employer's interest." *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010). Moreover, in determining harm, the employee's conduct should be viewed in the context of potential harm, not actual harm. *Manning*, 365 Ill. App. 3d at 557.

¶ 26 In the instant case, the Board determined that plaintiff violated a rule or policy of Mainline by refusing to assist Rowan until the arrangement for splitting commissions had been decided. The Board further concluded the company's policy of having an account executive assist in a transition "seems completely in keeping with an active business enterprise trying to service its clients." As to the third element of misconduct, the Board noted the potential harm to Mainline of the loss of the University of Chicago as a client if plaintiff did not aid in the transition to a new representative.

¶ 27 We find no basis to disturb the Board's decision. Plaintiff's conduct was deliberate and willful in that she refused to assist in the transition of the account to Rowan. Plaintiff had the opportunity to remain on other Mainline accounts. However, Dixon testified plaintiff "was unwilling to discuss" a transition of the account to Rowan until the commission arrangement was resolved. Nemesi's March 26 e-mail to Chastain describes his conversation with plaintiff in which he told her she "had the weekend to decide what she wanted to do," and plaintiff

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responded that she would not cooperate with the discussions. Plaintiff's testimony at the hearing did not refute Nemesi's account; plaintiff said Nemesi told her that if she did not cooperate, she would be hearing from Chastain. When plaintiff contended she did not recall the reason for her termination, Chastain recounted a conversation which she had specified plaintiff's inability or refusal to negotiate her commissions.

¶ 28 In conclusion, the Board's determination that plaintiff's actions constituted misconduct such that she should be denied unemployment benefits was not clearly erroneous. Accordingly, the judgment of the Board is affirmed.

¶ 29 Affirmed.