NOTICE
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2012 IL App (5th) 110381-U

NO. 5-11-0381

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

NORMAN L. VOLPERT,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 11-MR-82
	)	
THE DEPARTMENT OF EMPLOYMENT SECURITY; DIRECTOR OF EMPLOYMENT SECURITY; and THE BOARD OF REVIEW,	)	
	)	
Defendants-Appellants,	)	
	)	
and	)	
	)	
HYDRO SERVICES, INC.,	)	Honorable
	)	Stephen P. McGlynn,
Defendant.	)	Judge, presiding.

JUSTICE SPOMER delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The Board of Review of the Illinois Department of Employment Security properly denied unemployment benefits to the plaintiff. The plaintiff's failure to certify was properly construed as a voluntary leaving because he was aware of the necessity of certification, the certification was within his control, and his discharge was without good cause attributable to his employer. 56 Ill. Adm. Code 2840.101(a) (2010).

¶ 2 The plaintiff, Norman L. Volpert, filed a complaint for administrative review, seeking to reverse a decision by the defendant Board of Review (Board) of the Illinois Department of Employment Security (IDES) that he was ineligible to receive unemployment benefits. The circuit court of St. Clair County reversed the Board's decision. The Board of IDES and

the director of IDES (collectively, IDES) appealed. For the following reasons, we reverse the order of the circuit court and reinstate the decision of the Board.

¶ 3 FACTS

¶ 4 Norman Volpert worked for defendant Hydro Services, Inc. (Hydro Services), from 1970 until he was discharged on August 20, 2010. On September 22, 2010, a claims adjudicator determined that Volpert did not commit misconduct connected with his work (see 820 ILCS 405/602(A) (West 2010)) and was accordingly eligible for unemployment benefits. On October 29, 2010, a telephone hearing was conducted, pursuant to Hydro Service's appeal of the decision. At the hearing, Larry Rhutasel, president of Hydro Services, testified that Volpert had been a full-time water and wastewater treatment plant operator at Hydro Services. Rhutasel explained that he discharged Volpert for his failure to maintain his Missouri operator's certification, as required by the Missouri Department of Natural Resources (DNR). Rhutasel testified that Hydro Services had always allowed its employees to take time off to attend training, and had always paid for the expense of training, but he emphasized that it is the individual operator's responsibility to actually obtain the necessary training and to take any examinations required to maintain certification. Rhutasel averred that Hydro Services could not have continued Volpert's employment without the license because there were no other openings for him in the company.

¶ 5 Volpert testified that a Missouri operator's certification was a requirement for his continued employment with Hydro Services. He conceded that his Missouri operator's certification expired in 2007. Volpert explained, however, that he had received notices from the Missouri DNR regarding the required training and certification and placed them on the desk of his boss, Chad Rhutasel, but the training never got scheduled. The record contains questionnaires filled out by Volpert, on which Volpert elaborated that he had asked Chad Rhutasel on at least one occasion to help him recertify but it never happened. When asked

whose responsibility it was to obtain the training, Volpert replied, "In the long run I guess they figured it's mine."

¶ 6 On October 30, 2010, the hearing referee issued a decision that found section 601(A) of the Unemployment Insurance Act (Act) (820 ILCS 405/601(A) (West 2010)) applicable to the case, rather than section 602(A) (820 ILCS 405/602(A) (West 2010)). Based on section 601(A), the referee held that when an occupational license (a tool of an individual's trade) is within the individual's control to obtain and maintain, a separation from work as a result of the failure to obtain or maintain such license constitutes a voluntary leaving or a "constructive quit," rather than a discharge. The referee found that Volpert voluntarily left his job. See 820 ILCS 405/601(A) (West 2010). The referee further found that Volpert's leaving was without good cause attributable to Hydro Services. See *id*. Accordingly, the referee found Volpert ineligible for unemployment benefits and set aside the claims adjudicator's earlier determination of eligibility. Volpert filed a notice of appeal with the IDES Board of Review. On February 16, 2011, the Board of Review issued its ruling, affirming the decision of the referee.

¶ 7 On March 22, 2011, Volpert filed a complaint in the circuit court, requesting a judicial review of the Board's decision. The circuit court entered an order on August 4, 2011, reversing the decision of the Board. The director of IDES and the Board of Review filed a timely notice of appeal.

¶ 8 ANALYSIS

¶ 9 "On appeal from a decision [regarding] unemployment compensation benefits, the duty of the appellate court is to review the decision of the [B]oard and not that of the circuit court." *Czajka v. Department of Employment Security*, 387 Ill. App. 3d 168, 172 (2008). The issue on appeal is whether Volpert voluntarily left his employment without good cause attributable to Hydro Services. See 820 ILCS 405/601(A) (West 2010). This question is a

mixed one of law and fact to which the "clearly erroneous" standard of review applies. *Horton v. Department of Employment Security*, 335 Ill. App. 3d 537, 540-41 (2002). "The [Board's] decision will be deemed clearly erroneous only where the reviewing court, on the entire record, is ' "left with the definite and firm conviction that a mistake has been committed." ' *Czajka*, 387 Ill. App. 3d at 173 (quoting *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 393 (2001) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948))).

¶ 10 The relevant statute in this case is section 601(A) of the Act, which provides, "An individual shall be ineligible for benefits for the week in which he *** has left work voluntarily without good cause attributable to the employing unit ***." 820 ILCS 405/601(A) (West 2010). Accordingly, we will review the evidence to determine two things: (1) whether Volpert voluntarily left Hydro Services and (2) whether there was good cause attributable to Hydro Services regarding the cessation of Volpert's employment.

¶ 11 *Voluntary Leaving*

¶ 12 Section 2840.101(a) of title 56 of the Illinois Administrative Code contains the following principles for interpreting section 601 of the Act (820 ILCS 405/601 (West 2010)), with regard to the voluntariness of an employee's leaving:

> "[W]hen obtaining or maintaining a 'tool of the trade' necessary to perform a job including but not limited to an occupational or other license required by federal or State law, is within an individual's control, a work separation that results from the individual's failure to obtain or maintain the tool of the trade is a voluntary leaving." 56 Ill. Adm. Code 2840.101(a) (2010).

¶ 13 In addition to the above provision, IDES cites *Hawkins v. Department of Employment Security*, 268 Ill. App. 3d 927, 929 (1994), in which the plaintiff was a bus driver who became subject to a federal regulatory requirement to obtain a commercial driver's license

(CDL) as a condition of employment. The plaintiff was notified of this requirement more than two years before the deadline. *Id.* Two months before the deadline, the employer posted a memo, reminding the workers to obtain the CDL. *Id.* Moreover, the employer sent the plaintiff a letter on March 17, 1992, informing him that he would be terminated if he had not obtained the CDL by April 1, 1992. *Id.* The plaintiff took the required test on March 23, 1992, and failed. *Id.* He was terminated on April 2, 1992, for failure to obtain a CDL. *Id.* Subsequently, the plaintiff applied for unemployment benefits, but was denied when the Board determined that he voluntarily left his job without good cause attributable to his employer. *Id.* On appeal, the plaintiff argued that his failure to obtain the CDL was due to circumstances beyond his control. *Id.* at 931. The plaintiff contended that the test was difficult, the testing locations were inconvenient, and the employer would not give him time off to take the test. *Id.* The appellate court found, *inter alia*, that the plaintiff's failure to obtain the CDL was attributable to his own inaction and affirmed the Board's determination. *Id.*

¶ 14 IDES also cites *Horton v. Department of Employment Security*, 335 Ill. App. 3d 537, 538 (2002), in which the plaintiff worked for a car rental agency which had a collective bargaining agreement with the Teamster's union that required an immediate reporting to the employer if any employee had his or her driver's license suspended or revoked. *Id.* In 1999, the plaintiff received three citations, which resulted in a suspension of his driver's license. *Id.* The plaintiff was subsequently terminated from his employment for failing to notify the employer of the suspension (*id.*) and was denied unemployment benefits. *Id.* at 539-40. On appeal, the plaintiff argued that his termination was attributable to the employer because under the Teamster's contract, the employer was required to provide him 30 days to obtain a valid driver's license but failed to do so. *Id.* at 541. The appellate court found that, according to the contract, the employer was only required to provide the 30 days if the

plaintiff immediately notified the employer of his suspended license, which the plaintiff failed to do. *Id.* at 541-42. Accordingly, the Board's decision denying the plaintiff benefits was reinstated. *Id.* at 542.

¶ 15 Applying these principles to the case at bar, maintaining certification was required by the DNR. Volpert and Larry Rhutasel both testified to this fact. Moreover, this requirement was in place when Volpert began working for Hydro Services in 1970. Not only was Volpert aware of the need to recertify, but the recertification was also within Volpert's control. Volpert testified that he received certification letters from the DNR. Although he placed the letters on Chad Rhutasel's desk, there is no evidence that it was Hydro Service's responsibility to ensure Volpert's certification. To the contrary, Larry Rhutasel testified that it is the individual operator's responsibility to obtain the necessary training and take any examinations required to maintain certification. This testimony is unrefuted. When asked whose responsibility the certification was, Volpert's response was, "In the long run I guess they figured it's mine." Volpert testified that he asked Chad Rhutasel for help in recertifying "on at least one occasion," but that help was never forthcoming. This does not change the fact that the certification was ultimately Volpert's responsibility to maintain. When Volpert received no response from Chad Rhutasel after placing the letters on the desk, he could have taken the initiative to follow up and ensure his certification. However, his failure to do so resulted in Larry Rhutasel discharging him from his job. Because Volpert was aware of the necessity of the certification and because the maintenance of the certification was within his control (see 56 Ill. Adm. Code 2840.101(a) (2010); *Hawkins*, 268 Ill. App. 3d at 931; *Horton*, 335 Ill. App. 3d at 542), the Board's decision that his failure to certify was a voluntary leaving was not clearly erroneous.

¶ 16 *Good Cause Attributable to the Employer*

¶ 17 In order for unemployment benefits to be properly denied, section 601(A) of the Act

requires not only a voluntary leaving but also that there be no good cause attributable to the employer regarding the leaving. See 820 ILCS 405/601(A) (West 2010). Volpert cites *Pearson v. Board of Review of the Department of Employment Security*, 194 Ill. App. 3d 1064, 1070, (1990), in which the appellate court held that in determining whether good cause attributable to the employer exists, "the employer [may] not be even *one* causal factor in the termination." (Emphasis in original.) In *Pearson*, the Board's denial of unemployment benefits was improper because the employer's refusal to withhold any part of past union dues owed was deemed to be one cause of the termination. *Id.* Volpert stresses this "one cause" analysis and adds that a cause attributable to the employer includes the inaction of the employer as well as the action. See *Jaime v. Director*, 301 Ill. App. 3d 930, 936 (1998). Volpert argues that Hydro Services' inaction, namely its failure to assist him in recertifying, is "a cause" of the termination and the Board's decision should therefore be overturned. We disagree.

¶ 18 In looking at the cases cited by Volpert, we note that the plaintiffs in both cases had no control over the actions or inactions of the employers. In *Jaime*, the company relocated, which resulted in transportation difficulties for the plaintiff that ultimately led to her termination. 301 Ill. App. 3d at 932. It was noted that the relocation of the company was beyond the plaintiff's control. *Id.* at 937. In *Pearson*, the plaintiff worked for a union local that automatically deducted dues from her paycheck. 194 Ill. App. 3d at 1066. The plaintiff was subsequently transferred to another job location within a different union local. *Id*. The plaintiff was not informed that she needed to sign a new authorization for the deduction of dues, nor was she aware that the dues were no longer being automatically deducted because her rate of pay had changed. *Id.* at 1066-67. By the time the plaintiff became aware of the need to reauthorize the automatic deductions, she owed $80 in past-due amounts, which she could not afford to pay. *Id.* at 1067. When she signed the new authorization, she requested

that the past-due amount be deducted from future checks, but the union steward refused, although the appellate court noted that nothing prevented the employer from granting the plaintiff's request. *Id.* at 1067-68. The appellate court held that, although the evidence overwhelmingly showed that the employer's conduct caused the termination, it was sufficient that only one cause, the failure to withhold the dues from future checks, proximately caused the termination. *Id.* at 1070. The plaintiff in *Pearson* (194 Ill. App. 3d at 1064), like the plaintiff in *Jaime* (301 Ill. App. 3d at 930), had no control over the circumstances leading to her termination, nor the causes of the termination which were attributable to the employer, which, as mentioned above, is a key distinction between those cases and the case at bar.

¶ 19 Here, Volpert contends that the inaction of Hydro Services was its lack of a response when he placed the letters from the DNR on Chad Rhutasel's desk. We note that placing a letter on a desk is not the equivalent of requesting assistance. Even assuming, *arguendo*, that Volpert directly requested assistance from Hydro Services, there is no evidence to indicate that Volpert was incapable of doing it for himself. The evidence establishes that it was ultimately Volpert's own responsibility to get it done. No such circumstances existed in *Pearson* (194 Ill. App. 3d at 1064) or *Jaime* (301 Ill. App. 3d at 930). We add that placing such a burden on employers would lead to an absurd result in cases where terminations are the consequence of conduct within an employee's control. Accordingly, the Board's decision that Volpert's discharge was without good cause attributable to Hydro Services was not clearly erroneous. See 56 Ill. Adm. Code 2840.101(a) (2010).

¶ 20 CONCLUSION

¶ 21 For the above reasons, we reverse the order of the circuit court and reinstate the decision of the Board that denied unemployment benefits to Volpert.

¶ 22 Circuit court reversed; Board decision reinstated.