

FIRST DIVISION
January 3, 2017

No. 1-15-3186

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

MARY LOU MURPHY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	
)	
ILLINOIS DEPARTMENT OF EMPLOYMENT)	
SECURITY; DIRECTOR OF ILLINOIS DEPARTMENT)	
SECURITY; and BOARD OF REVIEW,)	
)	No. 15 L 50217
Defendants-Appellants.)	
)	
and)	
)	
WALT LAGESTEE, INC., c/o EQUIFAX)	
(TALX UCM SERVICES),)	Honorable
)	Robert Lopez-Cepero,
Defendant.)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Simon and Mikva concurred in the judgment.

O R D E R

¶ 1 *Held:* Board of Review decision that plaintiff was ineligible for unemployment benefits because she was discharged for misconduct – taking an unapproved absence, when under warning for previously adjusting her schedule without permission to suit herself, and when other employees' schedules had to be adjusted to cover her absence – was not clearly erroneous.

¶ 2 Defendants Department of Employment Security (Department) and its Director and Board of Review (Board) – collectively, the State Parties – appeal from an order of the circuit court reversing a decision by the Board finding plaintiff Mary Lou Murphy ineligible to receive benefits under the Unemployment Insurance Act (Act). 820 ILCS 405/100 *et seq.* (West 2014). The Board affirmed a Department referee's decision finding plaintiff ineligible because she was discharged from her employment by defendant Walt Lagestee, Inc. (Lagestee) for misconduct: taking an unapproved absence, when she was under a warning and probation for previously adjusting her schedule without permission to suit herself, and when other employees' schedules had to be adjusted to cover her absence. On appeal, the State Parties contend that the Board's decision was not clearly erroneous. For the reasons stated below, we confirm the Board's decision.

¶ 3 Plaintiff filed a claim for benefits under the Act in November 2014 based on her employment by Lagestee from January 2008 through November 4, 2014, as bakery department manager in Lagestee's grocery store. She was discharged by store manager for taking an allegedly unjustified absence when she was "on a probation from his last writeup in August," referring to a warning of August 23, 2014. She claimed that she had no previous issues with taking absences, had not taken an absence in the preceding year, and taking an absence had never required approval.

¶ 4 Lagestee filed a protest claiming that plaintiff was discharged for violating a reasonable and known policy. She was placed on three months' probation in August for changing her work schedule without the store manager's approval, and was warned at that time that another such

violation could result in her discharge. Plaintiff told the store manager on October 23 that she would not be working the next day because her daughter was visiting her and she wanted to prepare dinner, but she scheduled other employees to "cover" her absence or work in her place. The manager told her that this was an unacceptable reason for her absence.

¶ 5 A Department claims adjudicator investigated and ruled on plaintiff's claim in November 2014, finding that her actions resulting in her discharge were not deliberate or willful so she was "not ineligible" for benefits. Lagestee sought reconsideration, which was denied.

¶ 6 Lagestee appealed, and submitted various documents in support of its appeal. A notice of discharge of November 4, 2014, stated that plaintiff "was on 3 month disciplinary probation at the time of the infraction," from August 4 through November 4, she was discharged "as consequence of failure to improve" and "insubordination," and she knowingly or willingly took an unauthorized absence on October 24 as the store manager told her on October 23 that her request for leave was denied. A disciplinary report of August 4, 2014, indicated that plaintiff worked 2.75 unauthorized hours on July 21 and 1.5 unauthorized hours on July 22, for which she received one day's unpaid suspension and three months' probation with "discipline up to and including termination" as the "consequences of failure to improve." A memorandum of a November 4 meeting with plaintiff, the store manager, Lagestee's human-relations director, and others stated that plaintiff admitted to previously changing her schedule and acknowledged that she was on probation, and she "admitted to the latest violation of the schedule while still on probation" but was "was very non-apologetic." Two memoranda of October 24 documented plaintiff taking off from work because her daughter was visiting and she wanted to prepare a meal for her. Lagestee's submission also included a copy of its employee manual and plaintiff's January 2008 acknowledgement of reading the manual.

¶ 7 A Department referee held a hearing on January 22, 2015. Lagestee's human-relations director Jose Mendez testified that Lagestee owns a grocery store where plaintiff was a full-time employee since January 2008 and was managing the bakery department until her discharge on November 4, 2014. Mendez and store manager Tom Brancher attended the meeting of that date where plaintiff was discharged for taking an unauthorized absence on October 24. She was scheduled to work that day based on a schedule she prepared and Brancher approved, but she phoned Brancher on the 23rd to inform him that she would be absent on the 24th. Brancher deemed the reason for her absence – she wanted to prepare a meal for her visiting daughter – invalid and told her to appear at work as scheduled, but she told him that she would not. In the meeting of November 4, plaintiff confirmed for Mendez that the reason given for her absence was correct, and Mendez told her that her refusal to work as scheduled was insubordination and an unauthorized absence. Mendez explained that Lagestee's attendance policy was in the employee manual plaintiff was given at her hiring and was expected as department manager to enforce as well as obey. Plaintiff was disciplined for violating another policy – adjusting her own schedule to her personal convenience – and given one day's suspension and three months' probation on August 4, 2014.

¶ 8 Store manager Tom Brancher testified consistently with Mendez, adding that he told plaintiff in the phone call of the 23rd that he would try to let her go home early on the 24th but "I need you here," and asked her why she could not make the meal for her daughter in advance. Plaintiff had replied to Brancher that she would not be at work on the 24th and he should "do what you got to do." Brancher testified that he had to "rearrange people" on the work schedule, and an employee who otherwise had the 24th off had to work in plaintiff's stead as bakery manager.

¶ 9 Plaintiff testified that she was discharged by Lagestee on November 4 by Brancher with Mendez attending. She had "called off" work on the 24th, demurring that she did not request an absence but merely informed Brancher that she would be absent. She indeed took the absence to prepare a meal for, and spend the day with, her daughter, who had been away at college for two months. When she spoke with Brancher by telephone on the 23rd, he told her that he needed her to work on the 24th and her reason for not working was unacceptable. She told him that she was not seeking approval for her absence but merely notifying him of it. While she was not disciplined previously for absence, she had been disciplined for changing her schedule. When she refused to work on the 24th, she did not consider her probation nor did she think she would be discharged for a notified absence. Brancher had taken absence the previous week as his daughter was giving birth but was not discharged. Regarding the schedule changing, plaintiff testified that she had been coming to work early, and ending work late, for years until Brancher was store manager.

¶ 10 On cross-examination, plaintiff denied that Brancher had reminded her of her probation during the call of the 23rd. She did not believe she had to report her planned absence to Brancher himself but merely to someone who would take note of it. While she disagreed with the discipline of August 4, she acknowledged that she received a warning as part of the discipline that day.

¶ 11 The referee issued her decision in January 2015. She found that plaintiff worked for Lagestee from January 2008 to November 4, 2014, as a bakery department manager and was discharged for rearranging her work schedule to accommodate her personal obligations, contrary to Lagestee's policies and expectations regarding attendance and scheduling. The final incident for which she was discharged was her absence of October 24, preceded by her call of the 23rd with the store manager. In that call, she said that she would be absent to prepare a meal for her daughter and

he told her that he needed her at work and her reason for not working was unacceptable. Plaintiff replied that she was not seeking permission, though she had been previously disciplined with three months' probation on August 4 for "similar attendance/scheduling issues." The referee found that plaintiff "intentionally violated [Lagestee's] known and reasonable policies and expectations governing attendance and rearranging her schedule," the final incident prompting her discharge was her absence of October 24, and her "own testimony and admissions to the employer reveal that her absence was due to reasons within her ability to control." The conclusion that plaintiff acted intentionally, the referee found, was reinforced by the store manager telling her before her absence that her reason was unacceptable. Plaintiff "was on probation for a similar offense and was aware that her job was in jeopardy." The referee concluded that plaintiff was discharged for misconduct and thus ineligible for benefits.

¶ 12 Plaintiff appealed to the Board, which affirmed the referee's decision in February 2015 in an order finding that the record including the hearing transcript was "adequate and the further taking of evidence [was] unnecessary." Finding that the referee's decision was supported by the record and law, and incorporating that decision into its order, the Board found that plaintiff was discharged for refusing to work on a scheduled day because she wanted to prepare a meal for her daughter, she was told this reason was unacceptable, she persisted in refusing to work, "and another worker had to be called in from her day off to cover for" her. Plaintiff "had been previously disciplined for changing her schedule without authority," and she "did not have a compelling reason for her last absence."

¶ 13 Plaintiff timely filed an administrative review action in the circuit court, which reversed the Board's decision in October 2015. After reciting the hearing evidence and the applicable law,

the court found that the referee's finding that plaintiff was previously disciplined for an offense similar to her final offense was against the manifest weight of the evidence. Plaintiff's previous discipline was for rearranging her schedule to suit herself, not being absent from work without authorization, the court found. Thus, there was no evidence that her terminating offense was similar to the offenses for which she received a warning and probation. As there was also no evidence or finding of harm to Lagestee, the court found, the Board's conclusion that plaintiff was discharged for misconduct was erroneous. The State Parties timely filed a notice of appeal.

¶ 14 Before proceeding to consider this case on the merits, we note that plaintiff has not filed an appellee's brief. We shall consider the appeal on the brief of the State Parties alone. *In re Marriage of Earlywine*, 2013 IL 114779, ¶ 13.

¶ 15 On appeal, the State Parties contend that the Board's decision that plaintiff was discharged for misconduct under the Act was not clearly erroneous.

¶ 16 Section 602(A) of the Act provides that a person is ineligible for unemployment insurance benefits when he was "discharged for misconduct connected with his work." 820 ILCS 405/602(A) (West 2014). 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 2014).

¶ 17 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. Dep't of Employment Security*, 2016 IL 118562, ¶ 27. The elements of misconduct are that the (1) claimant deliberately and willfully violated a rule or policy of the employer, (2) rule or policy was reasonable, and (3) violation either harmed the employer or was repeated despite warnings. *Id.*, ¶ 26. A claimant's conduct was willful or deliberate if he was aware of but consciously disregarded a rule of the employer. *Id.*, ¶ 30. Potential as well as actual harm may underlie misconduct. *Williams v. Dep't of Employment Security*, 2016 IL App (1st) 142376, ¶ 64.

¶ 18 We review the decision of the Board, not the circuit court. *Petrovic*, ¶ 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*, ¶ 53. 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*, ¶¶ 21, 26. The Board's decision is clearly erroneous only if, after reviewing the entire record, we definitely and firmly believe that a mistake has occurred. *Id.*, ¶¶ 21-22.

¶ 19 Here, it is undisputed that plaintiff told her store manager on October 23, 2014, that she would be absent from work the next day for personal reasons – that she wanted to prepare a meal for her daughter – that he told her that she was needed at work and her reasons were unacceptable, and that she told him that she would be absent nonetheless. It is undisputed that she was absent the next day, and there was uncontested evidence that other employees' schedules were adjusted to accommodate plaintiff, including having an employee work on her day off to take plaintiff's place. At the time plaintiff took her unexcused absence, she was under three months' probation for

adjusting her schedule without permission to suit herself. The findings of the circuit court notwithstanding, we find that plaintiff's actions resulting in her discharge and her earlier warning and probation were sufficiently similar – plaintiff adjusting her working hours without Lagestee's permission to suit herself rather than Lagestee – for the Board to find misconduct. Moreover, it is not clearly erroneous to conclude that there was harm to Lagestee from plaintiff's unexcused absence in the effects on other employees' schedules – as the Board noted in its order – and in Lagestee's staff having to make those schedule adjustments. Thus, the Board's conclusion that plaintiff was discharged for misconduct was not clearly erroneous. Accordingly, we reverse the judgment of the circuit court and confirm the decision of the Board.

¶ 20 Circuit court reversed; Board of Review confirmed.