FIRST DIVISION
March 6, 2017

2017 IL App (1st) 160689-U
No. 1-16-0689

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

GENNIE MILLER, Plaintiff-Appellant, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; DIRECTOR OF ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; and BOARD OF REVIEW, Defendants-Appellees, and CHICAGO PARK DISTRICT, Defendant.	)	Appeal from the Circuit Court of Cook County. No. 15 L 50735 Honorable Alexander P. White, Judge, presiding.

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

ORDER

¶ 1 *Held*: Board of Review decision that plaintiff was ineligible for unemployment benefits because she was discharged for misconduct – removing employer's property from its premises without permission – was not clearly erroneous.

¶ 2 Plaintiff Gennie Miller appeals from an order of the circuit court affirming a decision by the Board of Review (Board) of the Department of Employment Security (Department) finding her 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 dismissed from employment as an arts and crafts instructor for defendant Chicago Park District (Park District) for misconduct: removing Park District property from its premises without permission. On appeal, plaintiff contends that the Board's decision was erroneous and based solely on hearsay evidence. We affirm.

¶ 3 Plaintiff filed a claim for benefits under the Act in May 2015 based on her employment by the Park District as an arts and crafts instructor from June 1984 through March 2015.

¶ 4 The Park District filed a protest in June 2015 claiming that plaintiff was suspended without pay pending discharge for removing Park District property from Ada Park without prior permission. Attached to the protest was a Park District "corrective action meeting disposition" letter of May 2015 notifying plaintiff that she was "terminated for cause" because she was seen removing Park District property without prior permission on March 11, 2015. The letter stated that she violated rules that she obey proper orders of her supervisor, comply with written Park District policies and procedures, "not use, remove, or appropriate for his/her personal use" property of the Park District, and "properly secure, handle, and account for the Park District equipment, tools, supplies, furnishings, facilities, and other property assigned to or under the employee's care or responsibility." Also attached was a Park District letter of March 12, 2015, stating that she was placed on unpaid suspension effective the preceding day. Lastly, attached was a Park District Donation/Grant Acceptance form ("donation form") of October 2009 stating that plaintiff received, on behalf of the Park District, 15 used sewing machines donated by the

Ada Park Advisory Council for sewing classes and fund-raising and "to remain on site at Ada Park." In particular, the box on the donation form marked "Received by CPD (last, first)" was filled in with plaintiff's name.

¶ 5 A Department claims adjudicator investigated and ruled upon plaintiff's claim in June 2015, finding that she was discharged for unauthorized removal of her employer's property and thus for misconduct rendering her ineligible for benefits. Plaintiff sought reconsideration, which was denied in July 2015.

¶ 6 Plaintiff appealed, and a Department referee held a hearing on August 14, 2015.

¶ 7 Plaintiff testified that she was a full-time craft instructor for the Park District from June 1984 through March 11, 2015, and that she was terminated for removing Park District property from the park. She indeed moved "some sewing machines" to a non-Park District storage facility, but she "believed they were ours, they belonged to my class" and she was going to retire soon. She did not purchase the machines; they were donated in 2009 so that a sewing class previously sponsored by a nearby school would continue. Plaintiff accepted the machines. When asked why she believed they were donated to her rather than the Park District, she replied that the donor negotiated the donation with her "not with the park," and she and her class moved the machines to the park in their private vehicles. At the time of the donation, plaintiff reported the donation to her supervisor. When asked about the donation form, and particularly about the condition that the machines remain at the park, plaintiff claimed to be unaware of the donation form and maintained that she believed the machines to be a donation to her. Plaintiff testified that she told her supervisor of her intent to take the machines a week before she took them. When asked what she intended to do with multiple sewing machines, she replied that she was going to bring them to a nearby church to continue the sewing class there.

¶ 8 The referee issued his decision in August 2015, affirming the denial of benefits upon his finding that plaintiff "deliberately violated a common sense rule against taking employer's property without permission." The referee found that the Park District was harmed by the loss of trust in plaintiff and the need to devote resources to investigating the incident.

¶ 9 Plaintiff appealed to the Board, which affirmed the referee's decision in September 2015. The Board found the referee's record adequate so that no further evidentiary proceedings were needed, and expressly rejected plaintiff's request for a hearing because neither witnesses nor oral argument were necessary. The Board found that plaintiff was discharged for removing sewing machines from Park District premises. While noting plaintiff's testimony that she believed the machines to be her personal property, the Board concurred with the referee that "the preponderance of the credible evidence" established misconduct. The Board noted that the Park District, not persons attending sewing classes, paid plaintiff to run the classes. The Board found that the donation form was "apparently *** kept by the Park District in the ordinary course of their business" and thus reliable and admissible evidence despite its hearsay nature. The donation form established that plaintiff accepted the machines on behalf of the Park District rather than as her own property. The Board noted that, while plaintiff testified to informing her supervisor of her intent to take the machines, she did not testify that she sought the supervisor's permission to take the machines. Plaintiff also admitted that she took the machines to run her own sewing class. The Board noted that charitable donations are usually made to take a tax deduction, which the sewing machines' donor could take for a donation to the Park District but not to plaintiff personally. In sum, the Board found that plaintiff's argument that she believed the machines to be hers "was unreasonable and lacked credibility."

¶ 10 Plaintiff filed an administrative review action in the circuit court, which affirmed the Board's decision as "not clearly erroneous" on February 11, 2016. This appeal timely followed.

¶ 11 On appeal, plaintiff contends that the Board's ineligibility finding was erroneous and that the only evidence against her was inadmissible hearsay.

¶ 12 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).

¶ 13 The disqualification for misconduct is not intended to encompass all rightful terminations 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.

¶ 14 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, its findings of fact are considered *prima facie* true and correct, and we shall not reweigh the evidence or substitute our judgment for that of the Board. *Williams*, ¶¶ 52-53. The Board's decision as to whether an employee's employment was terminated 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.

¶ 15 Hearsay – a statement, other than one made by the declarant while testifying at the hearing at issue, offered in evidence to prove the truth of the matter asserted – is generally inadmissible. Ill. Rs. Evid. 801(c) (eff. Oct. 15, 2015), 802 (eff. Jan. 1, 2011). However, in administrative review, "[t]echnical errors in the proceedings before the administrative agency or its failure to observe the technical rules of evidence shall not constitute grounds for the reversal of the administrative decision unless it appears to the court that such error or failure materially affected the rights of any party and resulted in substantial injustice to him or her." 735 ILCS 5/3-111(b) (West 2014).

¶ 16 " 'It is well established that when hearsay evidence is admitted without an objection, it is to be considered and given its natural probative effect.' " *Pesoli v. Dep't of Employment Security*, 2012 IL App (1st) 111835, ¶ 24, quoting *Jackson v. Board of Review*, 105 Ill. 2d 501, 508 (1985). Furthermore, the general rule against hearsay has various exceptions whereby certain evidence is admissible even with an objection, including records of regularly-conducted activities and public records. The former is:

> "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information

> transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness, but not including in criminal cases medical records. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." Ill. R. Evid. 803(6) (eff. Apr. 26, 2012).

The latter are:

> "Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report *** unless the sources of information or other circumstances indicate lack of trustworthiness." Ill. R. Evid. 803(8) (eff. Apr. 26, 2012).

¶ 17 Here, it is undisputed that plaintiff was terminated for taking multiple sewing machines that had been on Park District premises off the premises, and that she indeed did so. The issues in dispute before the Board were whether the machines were Park District property and whether plaintiff took them without permission.

¶ 18 On the former point, the Park District offered into evidence the donation form stating unequivocally that the machines were donated to the Park District; that is, that plaintiff received them from the donor in 2009 on behalf of the Park District. Plaintiff argues that the donation form is inadmissible but unobjected-to hearsay that should be given no probative weight. Firstly,

we reiterate that we do not reweigh evidence that has been weighed by the Board. Moreover, the Board did not admit the donation form merely because plaintiff did not object, but affirmatively found it to be reliable and admissible evidence as a regularly-kept public record of the Park District. To the extent that plaintiff argues that the Park District did not establish a sufficient foundation for the admission of the donation form as a regularly-kept public record, plaintiff's lack of an objection deprived the Park District of the opportunity, and eliminated the need, to establish a fuller foundation. See *Pesoli*, ¶ 23 (an argument, issue, or defense not presented in an administrative hearing is forfeited and may not be raised for the first time on administrative review). We find that the Board did not err in admitting the donation form.

¶ 19 Plaintiff has also failed to show that substantial injustice resulted from the admission of the donation form. The Board as trier of fact was not obligated to credit plaintiff's testimony that the machines were donated to her personally or that she was unaware of the donation form. The Board's admission of the donation form and acceptance of it at face value were corroborated by two eminently reasonable inferences in favor of donation to the Park District. The first is that plaintiff, indisputably a full-time Park District employee until her termination, was paid to run the sewing classes by the Park District rather than the sewing class attendees. The other is that it is unlikely that a charitable donation would be made to an individual rather than to the Park District because a tax deduction would be available for the latter but not the former.

¶ 20 On the issue of permission, the Park District discharged plaintiff for taking the machines without permission, and plaintiff did not testify that she sought or received permission but only that her supervisor was aware of her intent to take the machines. Moreover, the Board was not obligated to credit this testimony either. In sum, we are not left after reviewing the record with a definite and firm belief that the referee and Board erred in concluding that plaintiff committed

misconduct by taking Park District property from its premises without permission. The Board's conclusion that plaintiff was discharged for misconduct was not clearly erroneous.

¶ 21 Accordingly, we affirm the judgment of the circuit court.

¶ 22 Affirmed.