2017 IL App (2d) 160340-U
No. 2-16-0340
Order filed March 7, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DAPHNE T. LIVSEY	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 15-MR-1059
	)	
ILLINOIS DEPARTMENT OF	)	
EMPLOYMENT SECURITY, DIRECTOR	)	
OF ILLINOIS DEPARTMENT OF	)	
SECURITY, BOARD OF REVIEW, and	)	
McDERMOTT CENTER,	)	Honorable
	)	Bonnie M. Wheaton,
Defendants-Appellees.	)	Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiff failed to show that decision of Board of Review denying her unemployment benefits was contrary to the manifest weight of the evidence where conflicting evidence existed on material issues and adequate testimony supported Board's decision.

¶ 2 I. INTRODUCTION

¶ 3 Plaintiff, Daphne Livsey, appeals the judgment of the circuit court of Du Page County affirming a decision of the Board of Review (Board). The Board affirmed a decision of an

administrative law judge (ALJ) denying plaintiff benefits under the Unemployment Insurance Act (Act) (820 ILCS 405/100 *et seq.* (West 2014)). Plaintiff contends the Board's decision is contrary to the manifest weight of the evidence. For the reasons that follow, we affirm.

¶ 4 At a hearing held by telephone on May 19, 2015, before an ALJ, Patricia Payne, the employer's (McDermott Center) Director of Human Resources first testified. She stated that plaintiff was hired on April 22, 2014, and was subsequently discharged on February 11, 2015, for failing to notify her supervisor of an absence. Payne notified plaintiff in person, and plaintiff stated that she had tried to call but could not find her supervisor's telephone number in her phone. Payne testified that there were other ways plaintiff could have reached her supervisor. On cross-examination, Payne acknowledged that there was a second number where an employee could call in an absence, but she explained that this was the payroll department's number and it did not excuse an employee from notifying his or her supervisor (the parties refer to the line to the payroll department by various names, we will call it the payroll line). Payne did not know whether plaintiff called the payroll line.

¶ 5 Monique Baker, plaintiff's supervisor, next testified. She stated that plaintiff failed to call to notify her of absences on two dates, January 7, 2015, and February 4, 2015. On February 4, 2015, plaintiff called and reported she would be late due to weather conditions. Plaintiff stated she would call back when she was on her way, but she never did so and did not come to work that day. Baker spoke with plaintiff on February 9, 2015, about her not calling or showing up for work. Plaintiff told Baker that she did call her. Baker checked her cell phone's call log and could not find a call from plaintiff. Plaintiff nevertheless stated she had called Baker. Baker asked for proof, and plaintiff did not provide any. Baker testified that plaintiff signed a document on April 22, 2014, setting forth the procedures to follow for calling in an absence.

¶ 6 Baker testified that plaintiff had been warned following an absence on January 7, 2015, regarding following the procedures for calling in an absence. Baker told plaintiff that if she was going to be absent, she had to make two phone calls, including one to Baker. Calling the payroll line alone was not sufficient. Baker added that plaintiff's absence was detrimental to her employer because "she's responsible for children."

¶ 7 In response to questioning by the ALJ, Baker testified that prior to January 7, 2015, plaintiff had called her directly to inform her of an absence. Baker read a written warning issued to plaintiff after the January 7 incident. The warning mentioned "possible termination." Baker signed the warning on January 7, 2015, and, on February 9, 2015, plaintiff wrote on the warning that she refused to sign it. Baker acknowledged that plaintiff did not receive the written warning until February 9, 2015. However, Baker explained, she gave plaintiff a verbal warning shortly after the January 7 incident.

¶ 8 Plaintiff testified that she had called in every day she missed in early February 2015. She was absent because her car was "snowed in." She denied knowing that she had to call her supervisor and testified that she was never given an orientation. She was never provided with a policy or orientation book. She was not given a verbal warning following the January 7 incident. Plaintiff stated that she was told she only had to call the payroll line to report an absence. She had never called Baker to report an accident. Plaintiff further denied calling on February 4 and stating she would be late. Rather, someone called her and plaintiff stated she was trying to find a way to work and that she would call back. Plaintiff later tried to call back, but "did not get anyone." She left a message on the payroll line.

¶ 9 The ALJ found that plaintiff "was discharged because she failed to notify her supervisor of her absences." She found that plaintiff failed to contact her supervisor regarding the absence

on February 4, 2015. Further, the ALJ found that plaintiff "was aware that her job was in jeopardy." Citing section 602(A) of the Act (820 ILCS 405/602(A) (West 2014)), the ALJ held that plaintiff violated a known company rule after having been warned about violating the same policy. Accordingly, the ALJ determined that plaintiff had engaged in misconduct as contemplated by section 602(A), which disqualified her from receiving benefits under the Act.

¶ 10 The Board affirmed the decision of the ALJ, making findings that were virtually identical to those of the ALJ. The circuit court confirmed. This appeal followed.

¶ 11 On appeal, plaintiff contends that the Board's decision 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*.

¶ 12 Here, the Board's determinations find ample support in the record. Specifically, it found:

> "The [plaintiff] worked as a child care specialist from 4/22/2014 through 2/11/2015. She was discharged for failing to call her supervisor to report an absence on 2/4/2015. The [plaintiff] did call the [payroll] line, but failed to call her supervisor. She was previously warned on 1/7/2015 about not calling in her absence to her supervisor."

The first finding is not in dispute. The second—that she was discharged for failing to call her supervisor to report an absence—finds support in the testimony of Payne, who testified that plaintiff was discharged on February 11, 2015, for failing to notify her supervisor of an absence. The third finding finds support in the testimony of both Payne and Baker. Payne testified that plaintiff told her that she had attempted to call Baker, but could not find Baker's number. Baker

testified that she never called back after calling and stating she would be late on February 4 and that she did not come to work that day. As for the final finding, Baker testified that plaintiff was verbally warned following her absence on January 7, 2015, and that Baker told plaintiff that if she was going to be absent, she had to make two phone calls: one to Baker and one to the payroll line. Thus, all of the Board's findings are grounded in testimony presented at the hearing below.

¶ 13 It is true that plaintiff testified to the contrary. She denied being warned about the call-in policy or receiving an orientation. She claimed to have called in when she was absent in early February. She denied being aware that calling the payroll line alone was insufficient. However, this merely created a conflict in the record between plaintiff's testimony and that of Baker and Payne. 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). Plaintiff points to nothing so compelling that we could conclude that the Board was not entitled to accept the testimony of Payne and Baker over hers. Thus, we cannot say that an opposite conclusion to the Board's is clearly apparent or that, in turn, its decision is contrary to the manifest weight of the evidence.

¶ 14 The Board's factual findings provide an adequate basis to hold that plaintiff is not entitled to benefits under the Act. As it existed at the time of plaintiff's discharge, section 602(A) of the Act provided, in pertinent part, as follows:

> "An individual shall be ineligible for benefits for the week in which he has been discharged for misconduct connected with his work and, thereafter, until he has become reemployed and has had earnings equal to or in excess of his current weekly benefit amount in each of four calendar weeks. * * * For purposes of this subsection, the term 'misconduct' means 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).

This section states that an individual discharged for misconduct is ineligible for benefits in accordance with the Act. Further, it defines "misconduct" as the deliberate and willful violation of a rule concerning work where the employee had been previously warned about such violations *or* the behavior harms the employer. Here, there was testimony that plaintiff was warned about the behavior she engaged in and that she, in fact, engaged in such behavior. In addition, Baker testified that plaintiff's absence was detrimental to her employer because plaintiff is responsible for children. Thus, evidence was presented on both of the final elements, alternatively. As such, evidence was presented on all of the statutory elements.

¶ 15 In light of the foregoing, the judgment of the circuit court of Du Page County confirming the decision of the Board is affirmed.

¶ 16 Affirmed.