2019 IL App (2d) 180428-U
No. 2-18-0428
Order filed February 8, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DOVIE M. WILLIAMS, Plaintiff-Appellant, v. JEFF MAYS, THE ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY BOARD OF REVIEW, and NAPERVILLE DENTAL SPECIALISTS AND GENERAL ORAL HEALTH P.C., Defendants-Appellees.	)	Appeal from the Circuit Court of Kendall County. No. 17-MR-238 Honorable Timothy J. McCann, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The Department properly denied plaintiff unemployment benefits, as it was entitled to find that her testimony was rebutted and that she deliberately and willfully violated a rule prohibiting her from giving medical advice on her employer's behalf.

¶ 2 Plaintiff, Dovie M. Williams, appeals from the judgment of the circuit court of Kendall County affirming the denial of her claim for unemployment insurance benefits. Because the judgment was not clearly erroneous, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff applied for unemployment insurance benefits with the Department of Employment Security (Department). After her employer, Naperville Dental Specialists and General Oral Health P.C. (Naperville Dental), objected to her claim, an administrative law judge (ALJ) conducted a telephone hearing.

¶ 5 The following facts were established at the hearing. Plaintiff had worked for about two years as a treatment coordinator for Naperville Dental. Her duties included reviewing insurance payments and scheduling dental treatments. She was not licensed or trained to provide dental care.

¶ 6 On March 15, 2016, plaintiff spoke on the telephone with a patient who had received dental treatment and was complaining of a severe posttreatment headache. Plaintiff advised the patient to take 200 milligrams of Ibuprofen twice daily and call back in a week, unless the pain became more severe before then. Plaintiff documented that advice in a daily register to which all dental staff, including dentists, had access. Plaintiff, however, did not directly convey the patient's concerns to a dentist.

¶ 7 According to plaintiff, Naperville Dental's owner, Dr. Labacca, advised her and the other nonmedical staff that, because of an excessive number of patient communications regarding posttreatment pain, if a patient called complaining of pain they were to advise the patient to take Ibuprofen or aspirin and wait at least a week or two before calling back. According to plaintiff, she gave the advice on March 15 pursuant to Dr. Labacca's directive. Plaintiff admitted that she was not qualified to make treatment recommendations or provide dental advice without prior authorization.

¶ 8 On May 11, 2016, the patient saw her dentist. During that visit, the patient told her dentist about the advice she had received on March 15. Thereafter, Dr. Labacca discussed the situation with Leah Taylor, Naperville Dental's practice manager. He told Taylor that it was unacceptable for non-medical staff to recommend treatment without first discussing it with a dentist. He instructed Taylor to terminate plaintiff's employment.

¶ 9 According to Taylor, it was unsafe for a treatment coordinator such as plaintiff to recommend treatment to a patient. Accordingly, all non-medical employees were trained not to do so. If a patient calls a treatment coordinator regarding pain, that employee must report it to a dentist. According to Taylor, Naperville Dental had distributed a memorandum to all staff regarding how to handle a patient's complaint of pain. It was a consistent theme at Naperville Dental that only dentists made treatment decisions. Had Dr. Labacca instructed employees to circumvent the established protocol, Taylor absolutely would have known about that.

¶ 10 According to plaintiff, after being confronted by Taylor, she was denied the opportunity to clarify the situation with Dr. Labacca. She would not have handled the March 15 situation the way she had, absent prior authorization.

¶ 11 The ALJ found that plaintiff had been terminated for misconduct within the meaning of section 602(A) of the Unemployment Insurance Act (Act) (820 ILCS 405/602(A) (West 2016)). The ALJ found that plaintiff's advice to the patient violated the rules and regulations applicable to the practice of dentistry and exposed Naperville Dental to malpractice liability. Further, the ALJ found that plaintiff was not credible regarding what Dr. Labacca had told the staff about handling patient complaints of pain. The ALJ found that Taylor credibly rebutted plaintiff's testimony as to office policy and procedures. Thus, the ALJ denied plaintiff's claim for unemployment benefits.

¶ 12 The Board reviewed the record from the hearing and determined that no more evidence was needed. It noted Taylor's testimony that employees had not been instructed to give medical advice and were told to convey any patient concerns to a dentist. In ruling that plaintiff had committed misconduct within the meaning of section 602(A), the Board found that Taylor was credible. The Board also found that plaintiff was not credible when she testified that Dr. Labacca had authorized nonmedical employees to give medical advice to patients. Thus, the Board ruled that plaintiff's conduct on March 15, 2016, constituted a deliberate and willful violation of Naperville Dental's policy.

¶ 13 The trial court, based on the findings of the ALJ and the Board, could not find that it was left with the definite and firm conviction that a mistake had been made. Thus, the court affirmed the ruling of the Board. Plaintiff, in turn, filed this timely appeal.

¶ 14 II. ANALYSIS

¶ 15 On appeal, plaintiff contends that the record does not support a finding that she engaged in misconduct within the meaning of section 602(A). Specifically, she maintains that her testimony regarding Dr. Labacca's directive was never rebutted.

¶ 16 On administrative review, we review the findings of the Board, not the ALJ or the trial court. *Farris v. Department of Employment Security*, 2014 IL App (4th) 130391, ¶ 35. The Board's decision that a plaintiff is ineligible for unemployment benefits because of misconduct presents a mixed question of fact and law. *Petrovic v. Department of Employment Security*, 2016 IL 118562, ¶ 21. We review a mixed question of fact and law under the clearly-erroneous standard. *Petrovic*, 2016 IL 118562, ¶ 21. Applying that standard, we must determine whether the evidence supports the Board's determination that the plaintiff was discharged for misconduct within the meaning of section 602(A). *Petrovic*, 2016 IL 118562, ¶ 21. A decision is clearly

erroneous if, based on the entire record, the court is left with the definite and firm conviction that the Board's decision was a mistake. *Petrovic,* 2016 IL 118562, ¶ 21.

¶ 17 The primary purpose of the Act is to relieve the economic burden caused by involuntary unemployment. *Petrovic*, 2016 IL 118562, ¶ 23. To that end, the Act must be liberally construed in favor of awarding benefits to unemployed workers. *Petrovic,* 2016 IL 118562, ¶ 23. Nonetheless, certain unemployed individuals are disqualified from obtaining benefits. *Petrovic,* 2016 IL 118562, ¶ 24 (citing 820 ILCS 405/600-614 (West 2012)). Such disqualifications include individuals who are discharged for misconduct connected to their work. *Petrovic*, 2016 IL 118562, ¶¶ 24-25 (citing 820 ILCS 405/602(A) (West 2012)).

¶ 18 An employee commits misconduct under section 602(A) only if she commits (1) a deliberate and willful violation, (2) of a reasonable rule or policy governing the employee's performance of her work, that (3) either (a) harmed the employer or a fellow employee or (b) was repeated despite a warning or explicit instruction from the employer. *Petrovic*, 2016 IL 118562, ¶ 26. Unless all three requirements are established by competent evidence, the Board's denial of unemployment benefits should be reversed as clearly erroneous. *Petrovic*, 2016 IL 118562, ¶ 26.

¶ 19 Deliberate and willful conduct is a conscious act made in violation of company rules, knowing that it is against the rules. *Petrovic,* 2016 IL 118562, ¶ 30. The "deliberate and willful" language reflects the legislature's intent that only those who intentionally act contrary to their employer's rules should be disqualified. *Pertrovic*, 2016 IL 118562, ¶ 30. Accordingly, proof of deliberate and willful conduct necessarily requires evidence that the employee was aware that her conduct was prohibited. *Petrovic*, 2016 IL 118562, ¶ 31. Although a rule or policy need not

be written or formalized, it must have been expressed clearly to the employee in order to place the employee on notice that she could be fired for violating it. *Petrovic*, 2016 IL 118562, ¶ 31.

¶ 20 It is important to emphasize that a disqualification for misconduct is intended to exclude individuals who intentionally commit conduct that they know is likely to result in their termination. *Petrovic*, 2016 IL 118562, ¶ 27. Although an employer has the right to fire an at-will employee for any reason or no reason, the Act requires that a different legal standard be applied to whether a terminated employee is eligible to receive unemployment benefits. *Petrovic*, 2016 IL 118562, ¶ 27. Thus, to show that an employee committed misconduct, an employer must satisfy a higher burden than merely proving that the employee had been rightfully discharged. *Petrovic*, 2016 IL 118562, ¶ 27. The burden to prove an employee's disqualification rests with the employer. *Petrovic*, 2016 IL 118562, ¶ 28.

¶ 21 In this case, the sole issue is whether plaintiff deliberately and willfully violated an established employment policy. In that regard, plaintiff contends that Naperville Dental failed to prove that she committed misconduct, because it never rebutted her testimony that Dr. Labacca authorized her to give medical advice to patients. We disagree.

¶ 22 Plaintiff's testimony was rebutted. According to Taylor, the established office protocol was that nonmedical staff were prohibited from giving medical advice. Additionally, Taylor testified that, had Dr. Labacca instructed the nonmedical employees, contrary to the general rule, to give medical advice, she absolutely would have known of it. The Board found Taylor to be credible. Further, the Board found that plaintiff was not credible regarding Dr. Labacca's purported directive. If the issue on review merely involves conflicting testimony or a witness's credibility, we must affirm the Board's determination. *Pesoli v. Department of Employment Security*, 2012 IL App (1st) 111835, ¶¶ 20, 26; *520 South Michigan Avenue Ass'n v. Department*

of Employment Security, 404 Ill. App. 3d 304, 318 (2010). Given that the Board found Taylor credible and plaintiff not credible, plaintiff failed to establish that Dr. Labacca had directed the nonmedical staff to give treatment advice. Absent any credible evidence that the general rule against giving medical advice was not in effect, or that plaintiff had been otherwise instructed, the finding that she engaged in misconduct when she gave medical advice to the patient on March 15, 2016, was supported by the record. Thus, the finding that plaintiff engaged in misconduct was not clearly erroneous.

¶ 23 Although plaintiff relies on *Petrovic*, that reliance is misplaced. In *Petrovic*, our supreme court held that the plaintiff had not engaged in misconduct under section 602(A), because there was no evidence of a reasonable rule or policy, and even if there was, there was no showing that the plaintiff knew of such rule or policy. *Petrovic*, 2016 IL 118562, ¶¶ 32-33. Here, however, there was ample evidence of an employment rule that prohibited nonmedical employees like plaintiff from giving medical advice to patients. Further, there was evidence that plaintiff was aware of that policy. Thus, under the facts of this case, *Petrovic* does not support plaintiff.

¶ 24 Plaintiff also analogizes the facts of this case to *Siler v. Department of Employment Security*, 192 Ill. App. 3d 971 (1989). *Siler* is distinguishable. Unlike in *Siler*, where the administrative tribunal made no finding that the plaintiff "deliberatively and willfully violated the instructions of his employer" (*Siler*, 192 Ill. App. 3d at 975), the Board here indeed made the necessary findings.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we affirm the judgment of the circuit court of Kendall County.

¶ 27 Affirmed.