2011 IL App (5th) 100490-U

NO. 5-10-0490

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

AMY R. DELONG, Plaintiff-Appellant, v. THE DEPARTMENT OF EMPLOYMENT SECURITY, ANNA R. SMITH, DMD, PC, and DENTISTRY WITH TLC, Defendants-Appellees.	)	Appeal from the Circuit Court of Madison County. No. 09-MR-273 Honorable Clarence W. Harrison II, Judge, presiding.

JUSTICE DONOVAN delivered the judgment of the court.
Justice Wexstten concurred in the judgment.
Presiding Justice Chapman dissented.

O R D E R

¶ 1 *Held*: Plaintiff's refusal to sign a statement consisting of employer's revised rules and policies constituted employee misconduct, thereby disqualifying her for benefits under section 602(A) of the Illinois Unemployment Insurance Act (820 ILCS 405/602(A) (West 2008)).

¶ 2 Plaintiff, Amy Delong, also known as Amy Hargiss, filed a claim for unemployment benefits with the Illinois Department of Employment Security. The Department's Board of Review (Board) determined that plaintiff was ineligible for unemployment benefits because she was discharged for "misconduct" connected with her work when she refused to sign a copy of employee rules as instructed by her employer, Anna R. Smith, DMD, PC, and Dentistry With TLC. Plaintiff filed a complaint for the administrative review of the Board's decision, which subsequently was affirmed by the circuit court of Madison County. Plaintiff

now appeals the circuit court's decision, claiming that the Board's determination that she was discharged for misconduct was clearly erroneous. We affirm.

¶ 3 Plaintiff worked for employer as a dental assistant from January 12, 2008, until October 6, 2008. Plaintiff was discharged on October 6 because she refused to sign a written policy entitled "Dentistry with TLC Employee Rules and Info." All employees had been given a copy of the revised employee rules in mid-September of 2008 and had been instructed to sign and return them by September 22. Plaintiff refused to sign the rules even after being told she would be discharged if she did not sign them. At the hearing, Dr. Smith testified that she was the one who discharged plaintiff. She explained that she met with plaintiff on three occasions to discuss the matter of her refusal to sign the rules and informed her of the consequences of not signing. She testified she revised the rules because plaintiff repeatedly came late to work, traded shifts with other people, and was absent from work with various excuses. According to Dr. Smith, plaintiff's personal life had been interfering with work by creating stress within the office because other employees frequently had to cover for her. Dr. Smith further stated that if plaintiff would have signed the policy, she would have been allowed to continue to work. Plaintiff did not sign the revised rules because she did not agree with the new policy and believed that the terms and conditions of the policy would be used against her. She further stated that the new rules contained terms and conditions of employment completely different from those she received when she began her employment and that she had not been required to sign the first set of rules. She testified she had only missed four whole days out of a nine-month period. She also had arranged for other employees to cover parts of her shifts on five occasions, as required under the former rules.

¶ 4 Relevant portions of the new policy stated as follows:

> "If you have an emergency and you can't be here you must find someone to cover your schedule. If you can't find someone to cover your schedule you must be

here.

> If you are sick and have to stay at home you must call [employer] at home *** the evening before or morning of *** to let them know who you have arranged to work your schedule.
>
> If your child is sick you must have a babysitter who can watch your child at any given time. You must have a back up for this babysitter when they are not available. You must have a back up babysitter for the back up babysitter. If you do not have a network of support people in your life to help with your children then your job is to be primary care giver for your children and you need to stay at home with them on a daily basis."

The policy also asked for information regarding the names of the primary babysitter, as well as those of the backup sitters, plus the home and cell phone numbers for each sitter.

¶ 5 The hearing referee ruled that plaintiff refused to sign an acknowledgment of being given the new policy and rules and that this action constituted a deliberate and willful violation of a reasonable rule or policy of employer which resulted in harm to employer or which plaintiff repeated despite a prior warning or explicit instruction. The referee concluded, therefore, that plaintiff was disqualified for benefits under section 602(A) of the Illinois Unemployment Insurance Act (Act) (820 ILCS 405/602(A) (West 2008)). The circuit court on review determined that employer amended its attendance policy in response to staffing issues created by plaintiff's absences. It found that, while burdensome, the new rules were not so inherently unreasonable, given plaintiff's attendance history, that they excused her noncompliance.

¶ 6 The function of this court as a reviewing court is to determine whether the Board's decision was against the manifest weight of the evidence. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210, 886 N.E.2d 1011, 1018 (2008);

Adams v. Ward, 206 Ill. App. 3d 719, 723, 565 N.E.2d 53, 56 (1990). We may not reweigh the evidence, substitute our judgment for that of the agency, or judge the credibility of the witnesses. *Cinkus*, 228 Ill. 2d at 210, 886 N.E.2d at 1018. The question regarding whether an employee was properly terminated for misconduct in connection with his or her work, however, involves a mixed question of law and fact; thus, we review the agency's decision to determine if it was clearly erroneous. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 327, 913 N.E.2d 1067, 1071 (2009). An agency decision is clearly erroneous when the entire record leaves the reviewing court with the definite and firm conviction that a mistake has been made. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395, 763 N.E.2d 272, 282 (2001); *Hurst*, 393 Ill. App. 3d at 327, 913 N.E.2d at 1071. Under the circumstances presented here, the Board's determination that plaintiff's refusal to sign the acknowledgment constituted misconduct within the intendment of the Act, thereby making her ineligible for unemployment benefits, is not clearly erroneous.

¶ 7 We acknowledge that the purpose of the Act is to provide monetary benefits to unemployed workers to alleviate the hardships of involuntary unemployment. *Nichols v. Department of Employment Security*, 218 Ill. App. 3d 803, 809, 578 N.E.2d 1121, 1126 (1991). The receipt of benefits is conditional, however, and the claimant has the burden of proving that he or she is entitled to unemployment benefits. *Nichols*, 218 Ill. App. 3d at 809, 578 N.E.2d at 1126. Because the Act is not intended to benefit employees who are discharged "on account of their own misdeeds," employees are ineligible for unemployment benefits if they have been discharged for work-related misconduct. *Nichols*, 218 Ill. App. 3d at 809, 578 N.E.2d at 1126. Under section 602(A) of the Act, an employee may be charged with misconduct if he or she deliberately or willfully violates a reasonable rule governing his or her behavior in performance of the work or where that violation harms the

employer or other employees or has been repeated by the individual despite a warning to cease the conduct. 820 ILCS 405/602(A) (West 2008). Every violation of a company rule does not constitute misconduct, however. The rule must be a reasonable rule governing the conduct or the performance of an employee (*Adams*, 206 Ill. App. 3d at 725, 565 N.E.2d at 57) and must have some nexus with the employment (*Medvid v. Department of Employment Security*, 186 Ill. App. 3d 747, 750-51, 542 N.E.2d 852, 854 (1989)). Standards of behavior that an employer has a right to expect in the workplace constitute reasonable rules and policies. *Caterpillar, Inc. v. Department of Employment Security*, 313 Ill. App. 3d 645, 654, 730 N.E.2d 497, 505 (2000).

¶ 8 The evidence here amply supports the Board's factual findings that plaintiff received the revised rules, knew that employer required all employees to sign them, and deliberately did not do so. An employee willfully and deliberately violates a policy of his or her employer when he or she is aware of the policy but chooses to disregard it. *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 826, 914 N.E.2d 208, 219 (2009); *Hurst*, 393 Ill. App. 3d at 328-29, 913 N.E.2d at 1072. The revised rules specifically addressed employee attendance at work, as well as employee conduct in the office. The rules specified that employees were to work as scheduled and set forth procedures to ensure that the office would be adequately staffed with a minimum of disruption caused by employees trading schedules. The requirement that employees sign the rules was reasonable because it ensured that each employee knew and understood the rules. Again, employers have the right to expect a certain standard of behavior from their employees in matters that directly concern their employment, and they may have reasonable rules to regulate that behavior. See *Lachenmyer v. Didrickson*, 263 Ill. App. 3d 382, 388, 636 N.E.2d 93, 98-99 (1994); *Bandemer v. Department of Employment Security*, 204 Ill. App. 3d 192, 195, 562 N.E.2d 6, 7 (1990). Plaintiff's conduct in failing to follow employer's policies and procedures had the potential to harm employer,

and her refusal to sign the rules had the potential to encourage other employees who had already signed the rules to nevertheless disregard employer's policies. Once again, plaintiff was discharged for failing to sign and return the rules, a requirement designed to ensure that all employees read and were aware of the revised rules of employment. Because her deliberate and willful violation of employer's rules had the potential to harm employer, her actions constituted misconduct within the meaning of section 602(A) of the Act. See *Bandemer*, 204 Ill. App. 3d at 195, 562 N.E.2d at 7-8.

¶ 9 Plaintiff argues that the new policy and rules were unreasonable. There is no evidence in the record, however, that the new policies and rules themselves had been applied to plaintiff or any other employee. While plaintiff believed that she would not be able to comply with the rules and would eventually be terminated, those actions had not yet occurred. While some of the statements in the policy appear to reflect a questionable bias of employer, plaintiff chose the wrong time and possibly even the wrong court to fight over the reasonableness of those statements and/or the policy as a whole. Not until the policy was enforced would the reasonableness of the specific rules and employer's application of them become relevant. Simply stated, plaintiff's argument that employer's rules are unreasonable and impossible is premature. We reiterate once again, plaintiff was discharged because she refused to sign a copy of the employee rules, and it is under those facts that the Board determined that her actions constituted misconduct. Accordingly, we must affirm the judgment of the circuit court upholding the decision of the Board to deny unemployment benefits to plaintiff. The Board's finding that plaintiff violated her employer's policies and procedures when she refused to sign and return the revised employee rules is supported by the evidence in the record, and the Board's determination that she was terminated for misconduct connected with her work is not clearly erroneous.

¶ 10 For the foregoing reasons, we affirm the judgment of the circuit court of Madison

County.

¶ 11 Affirmed.

¶ 12 PRESIDING JUSTICE CHAPMAN, dissenting:

¶ 13 I respectfully disagree with my colleagues' interpretation of the statute and their analysis and application of the relevant case law in support of their decision to affirm the lower court. I would find the order of the Board clearly erroneous and reverse the circuit court's decision affirming the Board.

> "Misconduct" is defined under the Act as follows:
>
> "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 2008).

Not every violation of a company rule will constitute misconduct. The rule must be "a reasonable rule governing the conduct or performance of an employee." *Pesce v. Board of Review of the Department of Employment Security*, 161 Ill. App. 3d 879, 882, 515 N.E.2d 849, 852 (1987).

¶ 14 Amy was presumably an at-will employee who could have been terminated without cause. It follows that Amy could have been discharged by her employer for any of her prior absences from work or for her refusal to acknowledge receipt of her employer's new written policies. However, conduct which can serve as the basis for such a termination is not always sufficient to establish a discharge for "misconduct" under the Act. *Oleszczuk v. Department of Employment Security*, 336 Ill. App. 3d 46, 51, 782 N.E.2d 808, 812 (2002); *Grigoleit Co. v. Department of Employment Security*, 282 Ill. App. 3d 64, 72, 669 N.E.2d 105, 111 (1996).

¶ 15 The Department of Employment Security hearing referee found, "[S]ince the reason for which the claimant was discharged was within the claimant's control to avoid, the claimant was discharged for misconduct connected with the work." Upon review, the Board found, "[A]fter due consideration, *** the Referee's decision is supported by the record and the law." Neither the referee nor the Board addressed whether the new policy was reasonable.

¶ 16 While the majority here claims it does not need to examine the reasonableness of the policy rules, the circuit court did do so and declared that the new rules were not so inherently unreasonable, given plaintiff's attendance history, that they excused her noncompliance. While I disagree with the lower court's holding regarding the reasonableness of the rules, I believe that it got it right when it analyzed the work performance the rules pertained to.

¶ 17 This court, however, found that Amy's misconduct was simply her refusal to acknowledge by signature her receipt of a new written policy of employee rules. Again, while I believe this insubordination alone could warrant discharging Amy from her employment, it is not the type of statutory misconduct that would deprive her of unemployment benefits. There is no dispute that Amy was aware of the existence of the new written policy, so her failure to sign her acknowledgment of this policy added nothing to her awareness of its existence. Additionally, there is no requirement that an employer's rules or policies even have to be written or formalized to hold an employee accountable for misconduct. *Sudzus*, 393 Ill. App. 3d at 827, 914 N.E.2d at 220. The reason Amy would not acknowledge the new policy by signature was that she believed the rules to be unfair. Consequently, it seems illogical to analyze Amy's conduct without examining the underlying rules contained in the policy. It is that fairness or reasonableness under the statute that we must examine in order to determine whether Amy's conduct amounted to statutory misconduct.

¶ 18 The majority claims that it was premature to examine the underlying rules–stating, "Not until the policy was enforced would the reasonableness of the specific rules and employer's application of them become relevant." Order at ¶ 9. However, the majority did just that when it went on at some length to describe what the rules addressed–*i.e.*, attendance and staff coverage–and concluded that "employers have the right to expect a certain standard of behavior from their employees in matters that directly concern their employment, and they may have reasonable rules to regulate that behavior." Order at ¶ 8. Furthermore, in examining whether Amy's conduct had the potential to harm the employer, the majority again referenced the rules themselves by stating that "her refusal to sign the rules had the potential to encourage other employees who had already signed the rules to nevertheless *disregard employer's policies*." (Emphasis added.) Order at ¶ 8. This statement highlights the speciousness of the argument urged by her employer and accepted by the majority. The obvious subtext here is that by acknowledging the new written policy there is also an acknowledgment that the employee will follow the rules contained therein.

¶ 19 I believe that both logic and the statutory language dictate that we must examine the reasonableness of the rules governing the employee's conduct in order to determine whether Amy's refusal to acknowledge by signature her receipt of the policy constitutes statutory misconduct. To do otherwise is to decide this case in a vacuum with potentially untoward consequences. What if the new policy rules were not just unreasonable, as Amy asserts, but instead were of a criminal or immoral nature? Would the majority still conclude that Amy's refusal to sign the acknowledgment amounted to misconduct under the Act? I think not.

¶ 20 Turning to the policy itself, I need go no further than the first rule to determine that the policy is unreasonable: "If you have an emergency and you can't be here you must find someone to cover your schedule. If you can't find someone to cover your schedule you must be here." It takes little imagination to conjure up any number of factual scenarios where

adherence to this work rule would become impossible. For example, Amy is hit by a train and lies in a coma but must get up and go to work because she cannot get someone else to cover her schedule.

¶ 21 I would find that any rule that would be impossible to comply with is inherently unreasonable. Accordingly, I would find the Board's determination that she was terminated for misconduct clearly erroneous and would reverse the trial court's judgment affirming the Board's decision.