No. 1-10-2072

SIXTH DIVISION
JUNE 30, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

VICTORIA JONES, Plaintiff-Appellant, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, an administrative agency of the State of Illinois; DIRECTOR OF ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, BOARD OF REVIEW, an administrative agency of the State of Illinois, Defendants-Appellees (BREMEN HIGH SCHOOL DISTRICT 228, Defendant).	)	Appeal from the Circuit Court of Cook County. No. 10 L 50551 Honorable Sanjay Tailor, Judge Presiding.

JUSTICE ROBERT E. GORDON delivered the judgment of the court.
Justices Cahill and McBride concurred in the judgment.

ORDER

Held: Where an employee of a school district copies student records without authorization in violation of the school districts policy and federal and state statutes, a decision by the Board of Review of the Illinois Department of Employment Security to deny unemployment benefits was properly confirmed by the circuit court and affirmed on appeal.

Plaintiff, Victoria Jones (Jones), is appealing the circuit court's confirmation of a decision by the Board of Review (Board) of the Illinois Department of Employment Security (Department) to deny unemployment benefits under Section 602A of the Illinois Unemployment Insurance Act (Act). 820 ILCS 405/602A (West 2008). On appeal, plaintiff contends that the Board's finding that she was discharged for misconduct was clearly erroneous. We affirm the Board's decision.

BACKGROUND

Jones worked as a secretary at Bremen High School (Bremen) from June 5, 1984 until she was discharged on November 17, 2009. Prior to her discharge, Jones filed a federal discrimination lawsuit against Bremen under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. Jones admits that, in furtherance of her discrimination suit against Bremen, she copied student documents and provided them to her attorney. Bremen learned of the copying in late October 2009; and on November 12, 2009 Jones met with Ray Houser (Houser), the Bremen School Board Attorney, and was later placed on suspension due to the copying of confidential student records in violation of the Illinois School Student Records Act, 105 ILCS 10 (West 2002), and the Family Educational and Privacy Rights Act, 20 U.S.C. § 1232g. On November 17, 2009, Jones received written notice from the Bremen School Board that she had been discharged. In her application for unemployment benefits Jones describes the sequence of events, saying she "was suspended on 11/12/09 and then the board approved for [her] to be terminated." Jones argues that the documents she disclosed to her attorney were permitted as evidence in her Equal Employment Opportunity Commission suit and covered

under a federal court Protective Order, therefore she did not violate the Student Records Act or the Family Educational and Privacy Rights Act.

Following her discharge, on November 30, 2009, Bremen filed a protest to receipt of benefits regarding Jones with the Department and on December 3, 2009 Jones filed a request for unemployment benefits. The benefits were denied on December 4, 2009 because Jones was understood to have been discharged pursuant to Section 602(A) of the Illinois Unemployment Insurance Act, which states that,

> "[a]n 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 [sufficient subsequent earnings]."

820 ILCS 405/602(A). Section 602(A) goes on to define "misconduct" as,

> "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."

The Department denied benefits because Jones "was discharged from Bremen because she breached the confidentiality policy," which "adversely affected the employer's interests."

Jones requested reconsideration of the decision by a Department referee on December 7, 2009 stating that she was not fired due to the copying of confidential information but in retaliation for "engaging in a protected activity." A hearing was conducted via telephone on

January 21, 2010; and on January 22nd the decision to deny benefits was affirmed. During the hearing, Dr. David Corbin and Ray Houser were presented as witnesses for Bremen and testified that Jones admitted she copied the confidential documents and provided them to her attorney.

Dr. Corbin testified that "part of [Jones's] job description" was "coming into contact with confidential information pertaining to staff and students, and she has to maintain confidentiality." Dr. Corbin also indicated that the employer's policy regarding confidential information was contained in "handbooks for the staff." The policy requires procuring a "request[] for student records" and "authorization of either the parent or [the student] if the student is 18 or older" "if an individual wants records to be duplicated and passed on to another individual." By not complying with the confidentiality policy, Dr. Corbin indicated that the District could be subject to a lawsuit and "held liable for [the] information" that was disclosed.

Jones did not admit to having prior knowledge of the confidentiality rule or the process for obtaining consent to copy and disseminate student documents, but she did admit that she did not seek permission to copy the records because she was "suing them" and that she "didn't feel that [she] had to [be]cause [she] was giving them to [her] attorney." Jones explained that she was using the records as evidence of misspellings and illegible handwriting in her suit against Bremen for discrimination, saying that she had been "blamed for . . . misspelled names on documents" attributable to other individuals and "was basically showing that a lot of names that [she] was getting [were] not the correct names."

The parties disagree about whether or not the records were subpoenaed by Jones' attorney. Houser testified that Bremen "never [received] a subpoena [or] a request for the

production of student records," while Jones indicated that the documents were sought during discovery. In addition, the parties disagree about the number of records that were copied. Jones admits to copying four records and Houser testified that "over 200 students are individually identified in the records she produced." The specific materials that Mr. Houser alleged Jones copied were "suspension notifications," "hall passes," "tardy sheets," and "sign-in sheets for students entering the Dean's office," while Jones only references a "suspension form."

The referee found that Jones was discharged for "breach of confidentiality" and that Bremen "proved by a preponderance of the evidence that [Jones] was discharged for misconduct connected with her work," therefore Jones was ineligible for benefits. The copying of student records was viewed by the referee as harmful to the employer's interests and that the misconduct had been conducted willfully by Jones, satisfying the requirements of the Illinois Unemployment Insurance Act Section 602(A).

On February 1, 2010, Jones filed a timely appeal to the Board. Jones argued that she should be able to receive her unemployment benefits because (1) she "only gave the student records to [her] attorneys," (2) Bremen was aware she provided the documents, (3) "giving the student records to [her] attorneys did not violate any state or federal law," (4) Bremen "was under a duty to produce the very same student records in the litigation based on the discovery requests," (5) the federal court allowed her to use the records and issued a Protective Order "so that the student records would remain confidential," and (6) she "was not represented by counsel when the District had the Investigatory meeting and when the Board decided to terminate [her]."

The appeal was heard on March 26, 2010 and the Board affirmed the denial of benefits,

finding "the Referee's decision [ ] supported by the record and the law." Jones then filed a Pro Se Complaint for Administrative Review (Complaint) with the Circuit Court of Cook County on March 30, 2010. On July 19, 2010, the circuit court confirmed the decision of the Board after an administrative hearing regarding Jones's Complaint.

ANALYSIS

We review the Board's decision as the finder of fact not the decision of the circuit court and accept their factual findings as prima facie true and correct. See *Jackson v. Board of Review of the Department of Labor*, 105 Ill. 2d 501, 510 (1985); *Kilpatrick v. Illinois Department of Employment Security*, 401 Ill. App. 3d 90, 92-93 (2010). According to Administrative Review Law judicial review extends to all questions of law and fact presented by the record. The question of whether misconduct was the reason for discharging Jones is a mixed question of law and fact and is therefore reviewed under a clearly erroneous standard. See *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205 (1998) (determining that "a clearly erroneous standard of review is appropriate" when there is a "mixed question of fact and law"); *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 826 (2009). To find a judgment clearly erroneous, the court must have a "definite and firm conviction that a mistake has been committed." *Messer & Stilp, Ltd. v. Department of Employment Security*, 392 Ill. App. 3d 849, 856 (2009) (citing *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 393 (2001)).

To establish misconduct the employee must have willfully violated a reasonable rule in a way that harms the employer. 820 ILCS 405/602(A); see also *Sudzus*, 393 Ill. App. 3d at 826.

The first question is whether Jones's action was willful and deliberate. The court in *Sudzus* finds that willful means the employee is aware of the rule and disregards it. *Id.*; see also *Wrobel v. Illinois Department of Employment Security*, 344 Ill. App. 3d 533, 538 (2003) (explaining that willful conduct "is a conscious act made in violation of company rules, when the employee knows it is against the rules" and listing delays due to traffic congestion, broken alarm clocks, and automobile troubles as conduct which is not willful and deliberate). Jones does not admit to being aware of the rule requiring permission to copy and distribute student records, however, the Board heard testimony that the rule is included in the employee handbook and Jones's role as a Dean's secretary included working with confidential student records and seeking permission when they are to be distributed. Despite the fact that Jones did not admit that she was aware of the rule against copying confidential student documents, the likelihood that she had experience through her position with the procedure for handling documents leads this court to the conclusion that she was aware that her actions were contrary to school policy and chose to remove the documents anyway.

This court has also found that "[a] reviewing court need not find direct evidence of a rule or policy and, instead may make a commonsense determination that certain conduct intentionally and substantially disregards an employer's interests." *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010). Jones explained to the Board that she did not ask permission to copy the records because she was using them as evidence in a lawsuit against Bremen. Her response indicates that she was aware of her employer's interests in the documents and disregarded them when she copied and disclosed them to a third-party. We cannot say that

the trial court finding that Jones's actions were willful and deliberate provides us with a "definite and firm conviction that a mistake has been committed."

Jones argues that her attorney should not be considered a third-party, but rather an extension of herself and that the protective order covering the student documents which were disclosed has maintained their confidentiality and therefore her actions did not violate any policy regarding the sharing of student documents. Jones cites *Jepson, Inc. v. Makita Electric Works*, 30 F.3d 854 (7th Cir. 1994), *Jacobs v. Schiffer*, 47 F. Supp. 2d 16, 21 (D.D.C. 1999), and *Aufox v. Board of Education of Township High School District No. 113*, 225 Ill. App. 3d 444, 447-48 (1992) to support her propositions, however, the holding of the above cases are not instructive here. *Jepson* covers the role of protective orders which cover documents obtained through discovery, but the documents Jones copied were not procured through discovery; they were duplicated by Jones and given to her attorney. In Jepson the district court entered a protective order over the documents after they had been disclosed in discovery. Here the records were not a product of discovery and Jones did not disclose to Bremen that the records were given to her attorney. Further, the records were not subject to a protective order until after the records were given to her attorney and Bremen learned of the disclosure.

Jacobs deals with a government attorney who is involved in a whistleblower situation who shows confidential documents to his personal attorney to seek personal legal advice. The D.C. District Court's decision is limited to allowing government attorneys to disclose documents to seek advice from their personal attorneys with the intention of protecting the rights of potential government whistleblowers. Despite Jones's argument that *Jacobs* allows an

individual to disclose confidential documents to their personal attorney, the decision in *Jacobs* was narrowly defined to pertain to government attorneys protecting the rights of potential government whistleblowers.

Finally, Jones discusses the decision in *Aufox* which allowed a school district to disseminate student records to an attorney "representing the district" in special education placement hearings. Like *Jacobs*, *Aufox* is a case with narrow applicability. The court did not make a general finding that all individuals working in a school district may disclose student records to their attorneys, but rather that the school district themselves may disclose documents to an attorney representing the school district in lawsuits regarding student placement. Therefore, even under *Aufox*, an employee of a school district is not allowed to disclose student documents to their private attorney without following the school's procedure for handling confidential documents. Here the records were not given to a lawyer representing the school district, Jones gave them to her personal attorney. We cannot say that Jones's actions were not willful and deliberate in disregard of the employer's rules and policies, and we cannot say that we have a "definite and firm conviction that a mistake has been committed."

The second requirement for misconduct is that the rule broken by the employee was "reasonable." 820 ILCS 405/602(A). "A reasonable rule encompasses standards of behavior that an employer has a right to expect from an employee. . . . such a rule need not be written down or otherwise formalized." *Czajka v. Department of Employment Security*, 387 Ill. App. 3d 168, 176-77 (2008); see also *Jackson*, 105 Ill. 2d at 512-13. "[A]n employer is not required to prove the existence of a reasonable rule by direct evidence, and a court may find the existence of

a reasonable rule 'by a commonsense realization that certain conduct intentionally and substantially disregards an employer's interests.'" *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 557 (2006) (quoting *Greenlaw v. Department of Employment Security*, 299 Ill. App. 3d 446, 448 (1998)). Bremen testified before the Board that the policy regarding the handling of confidential documents was included in their employee manual. Commonsense dictates that the copying and disseminating of confidential student information "intentionally and substantially disregards [the] employer's interests." *Greenlaw*, 299 Ill. App. 3d at 448. This court cannot find that such a rule would be unreasonable. Therefore, the rule Jones violated is reasonable and satisfies the second requirement for misconduct under the Act.

The final requirement is that the conduct "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). The Board found that Jones's "action harmed her employer['s] interest" and we agree. Disseminating confidential student records to a third-party is against the interests of the employer, harming their reputation for professionalism and allowing for potential lawsuits by students whose information was disclosed. Students have a right that their confidential information will not be disclosed without their approval. See Family Educational and Privacy Rights Act, 20 U.S.C. § 1232g (protecting "the privacy rights of students" by requiring "consent" from the parent or student before records may be disclosed). The Family Educational and Privacy Rights Act also prohibits the receipt of federal funding by "any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents to any individual,

agency, or organization." See also Illinois School Student Records Act, 105 ILCS 10/6(a) (specifying limited situations where "school student records or information contained therein may be released, transferred, disclosed, or otherwise disseminated"). It is against Bremen's interests and policy to be found in violation of the above-mentioned statutes and Jones's behavior directly violates both the Family Educational and Privacy Rights Act and the Illinois School Student Records Act.

The court in *Zuaznabar v. Board of Review of the Illinois Department of Employment Security*, 257 Ill. App. 3d 354, 357 (1993), found that the employer failed to prove that it suffered actual harm from the plaintiff's conduct, explaining that the potential for injury is not enough to establish the third element for a finding of statutory misconduct. See also *Kiefer v. Department of Employment Security*, 266 Ill. App. 3d 1057, 1061 (1994). However, *Kiefer* also recognized "that a few courts have upheld that a threat of future financial loss occasioned by the conduct of the employee has been held to be harmful to an employer" when the threats are "real and impending, not remote and speculative possibilities." *Id.* at 1062. Bremen has not provided evidence of financial harm or impending lawsuits due to plaintiff's conduct, but the fact that the students' confidential information was given to Jones's attorney to be used in a lawsuit can subject Bremen to lawsuits in the future, and is in violation of both state and federal regulations dealing with student records, and harms Bremen's reputation as an educational institution, and places its ability to obtain federal funding in jeopardy. We cannot say that the decision of the Board finding that Bremen was harmed by Jones's actions was clearly erroneous. Jones's conduct satisfies the three requirements to be classified as misconduct, which disqualifies her

from receiving unemployment benefits.

Jones also introduces an argument on appeal that was not presented to the Board or the circuit court, arguing that other employees of Bremen who violated the same policy of copying confidential records were not discharged and thus Bremen's policy is discriminatory. As this argument was not raised previously, we must treat it as forfeited. *Cook County Board of Review v. Property Tax Appeal Board*, 395 Ill. App. 3d 776, 786 (2009); see also *People v. Burns*, 75 Ill. 2d 282, 290 (1979) (stating that "issues which could have been raised but were not are deemed waived").

For the foregoing reasons, we affirm the decision of the circuit court and the Board's decision disqualifying Jones from receiving unemployment benefits.

Affirmed.