2013 App (1st) 123075-U

FOURTH DIVISION
August 29, 2013

No. 1-12-3075

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ANNE J. BECK, Plaintiff-Appellant, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; DIRECTOR OF THE ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; BOARD OF REVIEW; and COUNTY OF KANE HUMAN RESOURCES MGMT., Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Law Division. No. 11 M1 123590 Honorable Daniel T. Gillespie, Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

ORDER

¶ 1 *Held*: The finding of the Board of Review that the plaintiff was ineligible for unemployment benefits was not clearly erroneous where the record established that in violation of the employer's policies, the plaintiff, a registered nurse, knowingly began dating a patient while he was still under the care of the employer.

¶ 2 The plaintiff, Ann E. Beck, appeals from an order of the circuit court affirming the final

administrative decision by the defendant, the Board of Review (hereinafter the Board) of the Illinois Department of Employment Security (hereinafter the ILDES), that she deliberately and voluntarily violated the rules and policies of her employer by having a romantic relationship with a client, and that she is therefore ineligible for unemployment benefits pursuant to section 602A of the Unemployment Insurance Act (Act) (820 ILCS 405/602A (West 2010)). The plaintiff contends that she did not violate any of her employer's rules, and that even if she did, any violation was not "willful and deliberate." She also contends that the rules were unreasonable, and that in any event, depriving her of unemployment benefits based upon a personal and consensual relationship among two adults that occurred during off-duty hours is a violation of her constitutional right to freedom of intimate association. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The record reveals the following pertinent facts and procedural history. The plaintiff worked as a registered nurse for the Kane County Health Department (hereinafter the employer) from September 1, 2005, through October 30, 2011, when she was discharged. Soon thereafter, the plaintiff applied for unemployment benefits with the ILDES. On November 7, 2011, the employer protested the plaintiff's application arguing that the plaintiff was discharged for misconduct pursuant to section 602A of the Act (see 820 ILCS 405/602A (West 2010)) because she engaged in an inappropriate relationship with a client, Santos Carmona (hereinafter Carmona). In protesting the application, the employer provided a copy of two termination letters sent to the plaintiff on October 31, 2011.

¶ 5 The first termination letter informed the plaintiff that she was being discharged for misconduct on the basis of violating several of the employer's rules and standard nursing policies, and thereby "jeopardiz[ing] [the employer's] presence and the integrity of [its] operations in the community." According to that letter, on October 11, 2011, the employer's clinical supervisor received a complaint from a patient's wife alleging that the plaintiff was having an affair with the patient. The employer initiated an investigation into the matter that included, but was not limited to, meetings with the complainant, her husband and the plaintiff on three occasions.

¶ 6 According to the first termination letter, evidence gathered from this investigation confirmed that the plaintiff's behavior violated: (1) "the core values of [the employer] (specifically violating *** the values of trust and respect); (2) the responsibilities outlined within [the plaintiff's] job description (relative to professionalism and ethics); and (3) the proper ethical and professional conduct required of nurses as outlined in Section 1309.90 of the Illinois Administrative Code [see 68 Ill. Admin. Code 1300.90 (2012)]." That section provides in pertinent part:

> "(a) The Division may suspend or revoke a license, refuse to issue or renew a license or take other disciplinary action based upon its findings of unethical or unprofessional conduct (see Section 70-5(b)(7) of the Act), which is interpreted to include, but is not limited to, the following acts or practices:
>
> (1) Engaging in conduct likely to deceive, defraud or harm the public, or demonstrating a willful disregard for the health, welfare or safety of a patient. Actual injury need not be established.

(2) A departure from or failure to conform to the standards of professional or practical nursing as set forth in the Act or this Part. Actual injury to a patient need not be established.

(3) *Engaging in behavior that crosses professional boundaries* (such as signing wills or other documents not related to client health care).

(4) *Engaging in sexual conduct with a patient*, or conduct that may reasonably be interpreted by a patient as sexual, or in any verbal behavior that is sexually harassing to a patient." (Emphasis added.) 68 Ill. Admin. Code 1300.90 (2012).[1]

¶ 7 According to the first termination letter, the evidence gathered during the employer's investigation also revealed that the plaintiff "disregarded the standards of professional nursing regarding professional boundaries" as outlined in the "Public Health Nursing, Scope and Standards of Practice" (American Nursing Association 2007) Standard 12- Ethics (hereinafter the ANA Code of Ethics for Nurses), a copy of which the plaintiff received during a training session on May 20, 2010. According to the termination letter, the plaintiff specifically violated section 2.4 of the ANA Code of Ethics, which states in pertinent part:

"When acting within one's role as a professional, the nurse recognizes and maintains boundaries that establish appropriate limits to relationships. While the nature of nursing

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[1]Section 1300.90 further incorporates by reference the "Code for Nurses with Interpretive Statements" (ANA 2001), and the "Standards of Practice and Educational Competencies of Graduates of Practical/Vocational Nursing Programs" (National Association for Practical Nurse Education and Service, Inc. 2007).

> work has an inherently personal component, nurse-patient relationships and nurse-colleague relationships have, as their foundation, the purpose of preventing illness, alleviating suffering, and protecting, promoting and restoring the health of patients. In this way, nurse-patient and nurse-colleague relationships differ from those that are purely personal and unstructured, such as friendship. The intimate nature of nursing care, the involvement of nurses in important and sometimes highly stressful life events, and the mutual dependance of colleagues working in close concert all present the potential for blurring of limits to professional relationships. Maintaining authenticity and expressing oneself as an individual while remaining within the bounds established by the purpose of the relationship can be especially difficult in prolonged or long-term relationships. *In all encounters, nurses are responsible for retaining their professional boundaries*. When those professional boundaries are jeopardized, the nurse should seek assistance from peers or supervisors or take appropriate steps to remove her/him from the situation." (Emphasis added.) "Public Health Nursing, Scope and Standards of Practice"; Standard 12-Ethics; §2.4 (ANA 2007).

¶ 8 The second termination letter provided by the employer in contesting the plaintiff's receipt of unemployment benefits concerns the plaintiff's alleged failure to return several client files to the employer in a timely basis. According to that termination letter, the plaintiff was directed to return all client files in her custody to the employer by the close of business on October 27, 2011. The plaintiff did not return those client files until October 28, 2011. After a review of the returned files, the plaintiff's supervisor discovered that six additional client files

from her caseload were missing. On October 31, 2011, during a pre-disciplinary meeting, the plaintiff was informed about the six missing files and given notice to return the files by 3 p.m. that day. The second termination letter further states:

> "Clients trust that we are professionals and will keep their information contained in files confidential and in an appropriate place of storage. We treat the misplacement of client files as a serious violation of our values and policies. Your decision not to return our files will require us to report this to the proper authorities as theft. Additionally, your continued insubordination to these matters further subjects [you] to disciplinary actions.
>
> We see this as a blatant refusal to cooperate in the location of client files and have determine[d] this behavior to be serious enough to warrant termination effective immediately."

¶ 9 On November 23, 2011, the ILDES issued a determination concluding that the plaintiff was eligible for unemployment benefits because her actions did not constitute a "deliberate or willful" violation of the employer's regulations/policies.

¶ 10 On December 27, 2011, the employer appealed this determination, arguing that the plaintiff's actions were both deliberate and willful. The employer asserted that the plaintiff as a public health nurse committed misconduct by engaging in an inappropriate relationship with a married client of the employer. In addition, the employer asserted that in doing so, the plaintiff explicitly violated professional and ethical nursing boundaries, under the guise of performing her professional responsibilities as the client's nurse. In support of its appeal, the employer attached: (1) the first termination letter; and (2) an October 27, 2011, pre-termination notification letter,

sent to the plaintiff during the investigation into her alleged misconduct.

¶ 11 That notification letter informed the plaintiff that during the ongoing investigation into her alleged inappropriate relationship with Carmona, Carmona confirmed that after the plaintiff's last visit to his home to administer medication, he went out with her several times including, having lunch, and dinner, followed by "staying out together in an Elgin park from 10 p.m. until 4 a.m." the next day. The letter further stated that based upon this information, the employer was placing the plaintiff on immediate administrative leave and considering discipline, up to and including termination.

¶ 12 On January 12, 2012, an ILDES referee held an administrative hearing by telephone pursuant to section 800 of the Act. 820 ILCS 405/800 (West 2010). The following testimony was adduced at that hearing. The employer's executive director of human resource management, Sheila McCraven (hereinafter McCraven) testified that the plaintiff was discharged and presented with a termination letter on October 31, 2011, in the presence of her direct supervisor, Arlene Randeck. According to McCraven, the plaintiff was informed at that meeting that she was being terminated because she engaged in misconduct, *i.e.*, an inappropriate relationship with one of the employer's patients. McCraven explained that as a nurse, the plaintiff was assigned to administer medication to that patient--Carmona. After Carmona's wife made a complaint to the employer, alleging that the plaintiff was having "a sexual affair" with Carmona, McCraven initiated an investigation. As part of that investigation she spoke both to Carmona and his wife, as well as the plaintiff. According to McCraven, the plaintiff initially denied the affair, but admitted to it during their second meeting. The plaintiff, however told McCraven that "it was her personal

business what she did after hours." McCraven explained that as a nurse the plaintiff was bound by ethical codes of conduct under which she was not allowed to engage in an after-hours relationship with a client, so long as that client remained a patient of the employer. McCraven stated that this code of conduct is both articulated in the employer's policies, as well as part of the general code of conduct for all nurses. McCraven explained that the plaintiff signed off on the employer's policy handbook and received training from the employer on ethics and codes of conduct for nurses. In addition, McCraven asserted that the plaintiff must have been made aware of the ANA Code of Ethics for Nurses every time she renewed her license to be a nurse. McCraven testified that when she reminded the plaintiff of these policies during her investigation, the plaintiff became "belligerent" and told her that "it was none of her business" and that she was "dragging" the client's good name "through the mud."

¶ 13 Barbara Jeffers, the employer's assistant director for administration, next testified that she was involved in investigating the plaintiff's misconduct and that she was present when the plaintiff was discharged. She testified that she spoke to Carmona, who reiterated that he spent a night with the plaintiff in an Elgin park. Carmona informed Jeffers that during his visit to the Elgin park, an officer approached the vehicle that he and the plaintiff were in, but that they were not ticketed after the plaintiff spoke to the officer. When Jeffers attempted to corroborate this event by calling the Elgin police department, she was informed that there would be no record of the incident since no ticket was issued. Jeffers next questioned the plaintiff about the incident. Although the plaintiff initially denied spending the night in the park with Carmona at the second interview with Jeffers she admitted to the affair.

¶ 14 The referee next heard from the plaintiff, who testified that she was discharged by Jeffers on October 31, 2011. The plaintiff stated that on that date she was given two separate discharge letters, one involving her unprofessional relationship with Carmona and the other alleging she had stolen charts from the employer. She stated that the second letter involving the charts, was pretextual and intended only as an excuse to have her terminated.

¶ 15 The plaintiff admitted that she dated Carmona but insisted that it was "an appropriate" relationship. She explained that between May 2011 and September 2011 she was assigned to deliver medication to Carmona's home. According to the plaintiff her job was "a five-ten minute" task, "typically performed by non-nurses." She simply went to Carmona's home, gave him the medication, waited for him to take it and then left. The plaintiff averred that at her last scheduled meeting with Carmona, Carmona asked her out, and that about a week later they began dating.

¶ 16 The plaintiff acknowledged that she was aware that Carmona was scheduled for a follow-up clinic visit with the employer in about two or three months and that he therefore remained a patient of the employer, even though he was not under her specific care. The plaintiff averred, however, that she checked the employer's policy handbook and that there were no rules or regulations therein against dating a patient after she stopped being his nurse. When she informed her employer about this during the investigation, she was referred to the ANA Code of Ethics for Nurses.

¶ 17 The plaintiff also averred that Carmona is not married, and that the woman claiming to be his wife is just a "roommate" "some 20 years older than him." The plaintiff stated that Carmona

told both her and her employer repeatedly that he is not married, and that there should have been a more thorough investigation to determine who was telling the truth. The plaintiff insisted that to determine the truth, the employer should have held a joint interview with all three parties: (1) Carmona; (2) his "alleged wife;" and (3) the plaintiff.

¶ 18 After hearing all the evidence, the referee admitted into evidence several documents, including: (1) the ILDES initial determination dated November 23, 2011, finding that the plaintiff was eligible for unemployment benefits; (2) the employer's appeal of that determination; (3) a questionnaire completed by the plaintiff dated November 2, 2011, as part of her request for unemployment benefits; and (4) the employer's November 7, 2011, protest to the unemployment benefits and the exhibits attached thereto.

¶ 19 On January 24, 2012, the referee rendered a written decision, finding that the plaintiff was ineligible to collect unemployment benefits pursuant to section 602A of the Act (820 ILCS 405/602A (West 2010)). In doing so, the referee found the following facts:

> "[The plaintiff] worked approximately six years as a case manager at a final hourly wage of $28.00. The employer discharged [her on October 17, 2011,] for inappropriate behavior with a client. [The plaintiff] was temporarily assigned to administer medications to a patient. The patient's wife contacted the employer to state that the plaintiff was having a personal sexual affair with her husband. The employer confronted [the plaintiff], who initially denied the allegations. At a subsequent meeting during the investigation of the matter, [the plaintiff] admitted the allegations, informing the employer that what she did after hours was her personal business. [The plaintiff] was

> required to maintain a professional and ethical relationship with clients. As a nurse, she was required to adhere to the known company policies, as well as the nursing standards set by the professional association which issued her nursing license. In addition, she received regular training on ethical and professional standards. [The plaintiff] alleged that the patient was not married, and that she started her personal relationship with him after her specific assignment with him ended, but while the employer continued to provide services to him. [The plaintiff] is a member of a union but the union refused to file a discharge grievance on her behalf."

¶ 20 Based on the aforementioned facts, the referee found that "the preponderance of the evidence" established that the employer discharged the plaintiff for misconduct pursuant to section 602A of the Act (820 ILCS 405/602A (West 2010)). As the referee explained:

> "The employer credibly testified about the events which led to [the plaintiff's] discharge for her inappropriate relationship with a client. [The plaintiff] failed to offer competent and compelling evidence in order to rebut the employer's statements and substantiate her own allegations. While [the plaintiff] stated that her temporary assignment involving the patient was over, she admitted that the patient continued to be involved with and maintained a relationship with the employer. [The plaintiff] could have been called to service the patient again in the future. The [plaintiff's] actions constituted a deliberate and willful disregard of the employer's interests. The employer discharged [the plaintiff] for misconduct connected with the work."

¶ 21 On February 23, 2012, the plaintiff filed an administrative appeal to the Board. The

plaintiff argued that she did not violate any work policy or professional nursing standard, and that she did not harm her employer by engaging in an intimate relationship with one of the employer's patients. In addition, the plaintiff asserted that any violation was not deliberate and willful since she would not have entered into the relationship with the patient had she known she could be discharged for it.

¶ 22 On May 7, 2012, the Board issued its decision, concluding that the referee's decision was supported by the record and law. The Board noted that the record before it was adequate and that further taking of evidence was unnecessary and then adopted the referee's decision as its own.

¶ 23 On September 20, 2012, the plaintiff filed a complaint in the circuit court for administrative review of the Board's final decision. The administrative record was filed as the answer to the complaint. The circuit court affirmed the Board's decision. The plaintiff now appeals.

¶ 24 II. ANALYSIS

¶ 25 On appeal, the plaintiff makes several assertions. She first argues that the four rules/policies cited by the employer in the termination letter as reasons for her discharge[2] are rules/policies that, as applied to this particular situation, govern the plaintiff's social relationships

[2] As already noted above, these include the violation of: (1) the employer's "core values" of "trust and respect"; (2) the plaintiff's "responsibilities outlined within [her] job description (relative to professionalism and ethics)"; (3) the ethical and professional conduct of nurses outlined in the Illinois Administrative Code (see 68 Ill. Admin. Code 1300.01 (2012)); and (4) section 2.4, Standard 12–Ethics of the ANA Code of Ethics for Nurses.

outside of work hours, instead of her "performance at work" and therefore do not meet the Act's definition of misconduct (820 ILCS 405/602A (West 2010)). Second, the plaintiff contends that even if the rules are somehow related to her employment, the facts do not establish that the plaintiff violated any of the four rules/policies cited in that termination letter, or that any such violation was willful or deliberate. Third, the plaintiff argues that any policies or rules prohibiting a nurse from dating a patient, are not reasonable as applied to this situation. Finally, she asserts that even if the rules do prohibit a nurse from dating a patient under these circumstances, the Board of Review cannot deprive her of unemployment benefits on this basis because to do so would violate her right to freedom of intimate association under the Illinois and the United States constitutions (see Ill. Const. art. I, § 2; U.S. Const. amend. XIV).

¶ 26 Before reaching the merits of the plaintiff's contentions, we begin by addressing the proper standard of review. It is well-established that in administrative cases, our role is to review the decision of the Board, rather than the circuit court or the referee. *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010). Judicial review of a decision of the Board is governed by the Administrative Review Law (735 ILCS 5/3-101 et seq. (West 2000)). 820 ILCS 405/1100, 2205 (West 2000); see also *AMF Messenger Service, inc., v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001). Under the Administrative Review Law, the scope of judicial review extends to all questions of law and fact presented by the record before the court. 735 ILCS 5/3-110 (West 2000); see also *AMF Messenger Service, Inc.*, 198 Ill. 2d at 395.

¶ 27 The applicable standard of review, which determines the degree of deference afforded to

an agency's decision, depends upon whether the question presented is one of fact, one of law, or a mixed question of law and fact. *AMF Messenger Service, Inc.*, 198 Ill. 2d at 395; see also *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 531 (2006) (*per curiam*); *Kouzoukas v. Retirement Board of the Policemen's Annuity & Benefit Fund*, 234 Ill. 2d 446, 463 (2009); *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204 (1998) ("[t]he standard of review applicable to the agency's decision depends upon whether the question presented is one of fact or law"). An administrative agency's findings on questions of fact are deemed to be *prima facie* true (735 ILCS 5/3-110 (West 2010)), and a reviewing court will reverse the Board's factual determinations only if it concludes that they were contrary to the manifest weight of the evidence. *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 819 (2009); see also *Illinois Fraternal Order of Police Labor Council v. Illinois Local Labor Relations Board*, 319 Ill. App. 3d 729, 736 (2001) ("[T]he decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident."). The Board's conclusions of law, however, are not entitled to the same deference, and we review them *de novo*. *Village Discount Outlet v. Department of Employment Security*, 393 Ill. App. 3d 814, 819 (2009)). If the question presented for review is one of mixed law and fact, then a yet third standard applies, and we review the Board's decision to determine if it was clearly erroneous. *AMF Messenger Service, Inc.*, 198 Ill. 2d at 395. An agency's decision is clearly erroneous when the entire record leaves the reviewing court with the definite and firm conviction that a mistake has been made. *AMF Messenger Service, Inc.*, 198 Ill. 2d at 395; see also *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 327 (2009).

¶ 28 In the present case, the plaintiff was disqualified from unemployment benefits for misconduct pursuant to section 602A of the Act (820 ILCS 405/602A (West 2010)). This issue presents a mixed question of law and fact, which is subject to the clearly erroneous standard of review. *AMF Messenger Service, Inc.*, 198 Ill. 2d at 395. Accordingly, we may reverse the decision of the Board only if the record before us leaves us with a definite and firm conviction that a mistake has been made. *AMF Messenger Service, Inc.*, 198 Ill. 2d at 395; see also *Hurst,* 393 Ill. App. 3d at 327. For the reasons that follow, we are compelled to find that this is not such a case.

¶ 29 We initially find no basis to disturb the Board's factual findings. At the hearing, the employer testified and the plaintiff admitted that she was discharged for having an affair with one of the employer's clients. The employer testified that it became aware of the affair after the patient's wife called the employer to complain about the plaintiff. The plaintiff testified at the hearing that the alleged "wife" was merely "a roommate" "some 20 years older than the patient" and that the employer should have investigated further to determine who was telling the truth. The plaintiff also averred that she began dating the patient only after her specific assignment with him ended, and that she read the employer's policy handbook and found nothing in there that would prevent her from engaging in such a relationship. The plaintiff admitted, however, that she was aware that the patient had a follow-up clinic appointment with the employer in a couple of months and that he therefore remained a patient of the employer when they began dating.

¶ 30 It is the responsibility of the administrative agency to weigh the evidence, determine the credibility of the witnesses, and resolve conflicts in testimony. See *Hurst*, 393 Ill. App. 3d at

329. Here, the Board found that "[t]he employer credibly testified about the events which led to [the plaintiff's] discharge for her inappropriate relationship with a client," and that the plaintiff "failed to offer competent and compelling evidence in order to rebut the employer's statements and substantiate her own allegations." The Board further explained that while the plaintiff "stated that her temporary assignment involving the patient was over, she admitted that the patient continued to be involved with and maintained a relationship with the employer." Accordingly, the Board settled this issue in favor of the employer. After reviewing the record in this case, and deferring to the Board's assessment, we cannot say that this conclusion was against the manifesto weight of the evidence. *Sudzus*, 393 Ill. App. 3d at 819; see also *Illinois Fraternal Order of Police Labor Council*, 319 Ill. App. 3d at 736 ("[T]he decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident.").

¶ 31 Considering the Board's factual findings as *prima facie* true and correct, for the reasons that follow, we further find that the Board's determination that the plaintiff was ineligible for unemployment benefits was not clearly erroneous. The Act (820 ILCS 405/100 *et seq*. (West 2010)) provides economic relief to alleviate economic distress caused by involuntary unemployment. *AMF Messenger Service*, 198 Ill. 2d at 396. "While unemployment insurance benefits are a conditional right and the burden of establishing eligibility rests with the claimant, the Act must be liberally interpreted to favor the awarding of benefits." *Czajka v. Department of Employment Sec.*, 387 Ill. App. 3d 168, 174 (2008). Nevertheless, section 602A of the Act explicitly disqualifies a former employee from being eligible for unemployment benefits if she was discharged for misconduct in the performance of her work. 820 ILCS 405/602A (West

2010); see also *Czajka*, 387 Ill. App. 3d at 174; see *Phistry*, 405 Ill. App. 3d at 607; see also 820 ILCS 405/602A (West 2010).

¶ 32 Misconduct requires proof of three elements: (1) that there be a deliberate and willful violation of a rule or policy of the employer; (2) that the rule or policy be reasonable; and (3) the violation of the rule or policy harmed the employer or was repeated by the employee despite a warning or other explicit instruction from the employer. 820 ILCS 405/602A (West 2010).

¶ 33 In the present case, all three elements were met. With respect to the first element, our courts have repeatedly stated that willful conduct stems from an employee's "awareness of, and conscious disregard for, a company rule." *Pesoli v. Department of Employment Security*, 2012 IL App (1st) 111835, ¶ 30 (quoting *Livingston v. Department of Employment Security*, 375 Ill. App. 3d 710, 716 (2007); see also *Phistry*, 405 Ill. App. 3d at 607 ("Conduct is deemed willful where it constitutes a conscious act made in knowing violation of company rules."). Contrary to the plaintiff's assertion, the record below unequivocally establishes that she, at the very least, had constructive knowledge of the employer's policy prohibiting her from engaging in a sexual relationship with Carmona.

¶ 34 First, it is well-established that "a rule or policy need not be written down or otherwise formalized." *Sudzus*, 393 Ill. App. 3d at 827; see also *Czajka*, 387 Ill. App.3d at 177.

¶ 35 More importantly, in the present case, the employer's executive director of human resource management testified that the code of conduct prohibiting nurses from engaging in unprofessional relationships with clients is articulated both in the employer's policies and the ANA Code of Ethics for Nurses. The executive director explained that the plaintiff signed off on

the employer's policy handbook when she was employed, and that she later received additional training from the employer on ethics and proper codes of conduct for nurses. In addition, the executive director explained that as a nurse, required to renew her license periodically, the plaintiff had to abide by the ANA Code of Ethics for Nurses. Both the ANA Code of Ethics for Nurses and the Illinois Administrative Code, cited to in the employer's termination letter, explicitly prohibit nurses from engaging in: (1) "behavior that crosses professional boundaries" and (2) "sexual conduct with a patient." See 68 Ill. Admin. Code 1300.90 (2012); see also "Public Health Nursing, Scope and Standards of Practice"; Standard 12-Ethics; §2.4 (ANA 2007) ("In all encounters, nurses are responsible for retaining their professional boundaries. When those professional boundaries are jeopardized, the nurse should seek assistance from peers or supervisors or take appropriate steps to remove her/him from the situation."). Under this record, the plaintiff cannot, nor does she attempt to, argue that she was not aware of the employer's policy prohibiting her from engaging in a relationship with the patient.

¶ 36 Nevertheless, on appeal, she asserts that the term "patient" is too vague, and that since it is not defined in any of the policies/regulations cited to by the employer in the termination letter, it was reasonable for her to assume that Carmona ceased to be her "patient" after her last scheduled assignment with him, so that she was free to date him. We, however, find this argument unavailing, since the plaintiff admitted at the administrative hearing that she was aware that when Carmona asked her out, he had a future clinic visit scheduled with the employer and therefore remained one of its patients.

¶ 37 We next turn to the second element of misconduct to determine whether the employer's

policy or rule was reasonable. 820 ILCS 405/602A (West 2010). A work rule or policy is reasonable if it "appropriately relate[s] to the workplace" and "concerns standards of behavior which an employer has a right to expect from an employee." *Czajka*, 387 Ill. App. 3d at 176-77. In determining whether a rule is reasonable a reviewing court "may make a commonsense determination that certain conduct intentionally and substantially disregards an employer's interest." *Sudzus*, 393 Ill. App. 3d at 827

¶ 38 Beck contends that the policy is not reasonable when applied to this particular set of circumstances because any misconduct (the affair with Carmona) took place outside of work, was initiated by Carmona and involved two consenting adults. Beck contends that under these circumstances we should find that the misconduct was not "connected to [her] work" or done in "performance of [her] work," as is required by the statute. See 820 ILCS 405/602A (West 2010) ("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." (Emphasis added.)) "connected to [her] work" or in "performance of [her] work."

¶ 39 While we recognize that "[t]here must be some nexus between the rule and the employment (*Jackson v. Board of Review of the Department of Labor*, 105 Ill. 2d 501, 513 (1985)); see also *Garner v. Department of Employment Sec.*, 269 Ill. App.3d 370, 375-76 (1995) ("a rule is not reasonable unless it provides guidelines that are or should be known by the employee")), we fail to see how the plaintiff can avail herself of this defense, since she admitted

that she was aware that Carmona continued to be a patient of the employer at the time they began their relationship. We see nothing unreasonable in the employer's expectation that its nurses refrain from engaging in intimate relationships with patients currently under its care, since any such relationship could create future "conflicts of interest," as well as embarrass the employer and jeopardize its reputation in the community.

¶ 40 What is more, to determine whether there is a nexus between the activity (that constitutes misconduct) and the performance of an employee's work, the few courts that have had the opportunity to address this issue have relied on the following factors: (1) whether the conduct happened outside the actual place of work; (2) whether the conduct related directly to the performance of one's job; and (3) whether the conduct had any actual direct or indirect effect on the performance of one's job duties. See *Caterpillar, Inc. v. Fehrenbacher*, 286 Ill. App. 3d 614, 623 (1997); see also *Czajka*, 387 Ill. App. 3d at 176; see also *Phistry*, 405 Ill. App. 3d 604.

¶ 41 In the present case, the Board determined, based upon the plaintiff's own testimony, that since Carmona remained a patient of the employer, it was possible that the plaintiff would be "called to service [him] again in the future." As such, the plaintiff cannot contend that her conduct had no direct or indirect effect on the performance of her job duties, so as to place her conduct outside of the sphere of "performance of [her] work." See *Manning v. Department of Employment Sec.*, 365 Ill. App. 3d 553, 558 (2006) ("Misconduct may be found even if the abusive conduct occurred off work premises").

¶ 42 We finally turn to the third element of misconduct, to determine wether the alleged violation of the employer's policy or rule harmed the employer. 820 ILCS 405/602A (West

2010); see also *Phistry*, 405 Ill. App. 3d at 607; see also *Sudzus*, 393 Ill. App. 3d at 826. In that respect, we note that "harm to an employer is not limited to actual harm, but can be established by showing potential harm." *Pesoli*, 2012 IL App (1st) 111835 at ¶ 32. In the present case, the plaintiff's relationship with the patient caused embarrassment to the employer when the patient's wife contacted the employer to complain that one of their home-care nurses was having an affair with her husband. It does not take much of a mental leap to conclude that if such information regarding its home-care nurses became public, the employer's reputation in the community would suffer, potentially jeopardizing its business interests. *Livingston*, 375 Ill. App. 3d at 718 (holding that the Board properly determined that the employee was discharged for misconduct where the employee's actions cause "potential damage to [employer's] reputation"); see also *Pesoli*, 2012 IL App (1st) 111835 at ¶ 32 (accessing confidential health information could have resulted in lawsuits against a hospital and loss of business); *Hurst*, 393 Ill. App. 3d at 329 (not having a valid driver's license could have exposed the employer to liability resulting from any injuries caused by the plaintiff). What is more, Beck's lack of judgement in crossing professional boundaries with a patient could reasonably have caused her employer to lose trust in her, a harm that has been recognized by our courts as sufficient under section 602A of the Act (820 ILCS 405/602A (West 2010). See *Phistry*, 405 Ill. App. 3d at 608 (finding that "plaintiff's conduct harmed the practice by the loss of trust that had been placed in her by the employer").

¶ 43 For all of the foregoing reasons, we find that the Board's decision that the plaintiff was ineligible for unemployment benefits on the basis of her misconduct was not clearly erroneous.

¶ 44 At the end of her brief, the plaintiff attempts to assert that even if she was discharged for

misconduct, the Board's decision that she is ineligible for unemployment benefits on the basis of her intimate relationship with a current patient of her employer, violates her right to freedom of association under both the Illinois and United States constitutions (see Ill. Const. art. I, § 2; U.S. Const. amend. XIV). The plaintiff, however, is barred from raising this issue on appeal, since she failed to argue it anywhere during the proceedings before the Board. See *Pesoli*, 2012 IL App (1st) 111835 at § 23 (citing *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill.2d 200, 212 (2008) ("It is well-settled that if an argument, issue, or defense is not presented in an administrative hearing, it is procedurally defaulted and may not be raised for the first time on administrative review."); see also *Hurst*, 393 Ill. App. 3d at 328 ("issues or defenses not raised before the administrative agency will not be considered for the first time on administrative review") (citing *Carpetland U.S.A., Inc. v. Illinois Department of Employment Security*, 201 Ill. 2d 351, 396-97 (2002)); see also 735 ILCS 5/3-110 (2010) ("No new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court.").

¶ 45 III. CONCLUSION

¶ 46 For the foregoing reasons, we find that the plaintiff has failed to demonstrate that the Board's decision denying her unemployment benefits on the basis of her relationship with the employer's patient was clearly erroneous. Accordingly, we affirm the judgment of the circuit court upholding the decision of the Board.

¶ 47 Affirmed.