FOURTH DIVISION
March 13, 2014

No. 1-12-3344

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMES G. SINGH,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 12 L 50302
	)	
ILLINOIS DEPARTMENT OF EMPLOYMENT, SECURITY, JAY ROWELL, BOARD OF REVIEW, WILLIAM H. McCLUSKY and CHICAGO PUBLIC SCHOOLS,	)	Honorable
	)	Daniel T. Gillespie,
Defendants-Appellees.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Board's decision denying plaintiff unemployment insurance benefits affirmed where he had a reasonable assurance of employment in his substitute teaching position for the following academic year.

¶ 2 Plaintiff James Singh, *pro se*, appeals from an order of the circuit court of Cook County, affirming the ruling of the Board of Review of the Illinois Department of Employment Security

(Board) that he was ineligible for benefits for the summer of 2011 under section 612(B) of the Illinois Unemployment Insurance Act (Act) (820 ILCS 405/612 (West 2010)). He contends that he was not disqualified from receiving benefits during that period when he had previously been awarded and received benefits based on his layoff from his full-time teaching position, and had no reasonable assurance of a full-time teaching position after the summer vacation months of 2011.

¶ 3 The record shows that plaintiff was hired by the Chicago Public Schools (CPS) as a full-time teacher in March 2010, and was paid during the summer months of 2010. On August 31, 2010, he was laid off, and applied for and was awarded unemployment insurance benefits in the amount of $423 per week for the period of November 28, 2010, through November 27, 2011. The benefits amount was based on the third and fourth quarters of 2009 and the first and second quarters of 2010.

¶ 4 In February 2011, plaintiff was rehired by CPS as a part-time substitute teacher, and continued to collect unemployment benefits for the weeks in which his wages were less than the full benefit amount. At the end of the 2011 school year, plaintiff continued to certify his eligibility for benefits, but on July 1, 2011, CPS protested payment of benefits to plaintiff during the summer of 2011. CPS alleged that plaintiff was disqualified from receiving benefits under section 612 of the Act (820 ILCS 405/612 (West 2010)) because he was currently employed with the CPS, and reasonably assured of the same employment position upon returning from summer vacation.

¶ 5 The Illinois Department of Employment Security (IDES) notified plaintiff that a question

had been raised regarding his eligibility to receive benefits for the period beginning June 19, 2011. The IDES adjudicator interviewed plaintiff who indicated that he has not been rehired as a full-time teacher, is a substitute teacher with no salary during the summer months, and has no assurance of employment. The unemployment analyst for CPS was also interviewed and indicated that plaintiff was reasonably assured the same employment position, *i.e.*, substitute teacher, upon his return from the 2011 summer vacation.

¶ 6 On July 22, 2011, IDES sent plaintiff a letter informing him that the evidence showed that he had earned wages from an educational institution during his base period and has reasonable assurance that he will perform such services in the next academic year. Accordingly, he was ineligible for benefits starting June 19, 2011, pursuant to section 612 of the Act.

¶ 7 This section provides, in relevant part, that an individual is ineligible for benefits on the basis of wages for service of employment in an instructional, research or principal administrative capacity performed for an educational institution during a period between two successive academic years if the individual performed such service in the first of such academic years and if there is reasonable assurance that the individual will perform service in any such capacity for any educational institution in the second of such academic year. 820 ILCS 405/612(B)(1) (West 2010).

¶ 8 On August 28, 2011, plaintiff filed an appeal with the Board maintaining that the decision to terminate his benefits was inconsistent with the December 4, 2010, determination that he was eligible for benefits until November 27, 2011. He alleged that he was laid off as a full-time teacher, and had not been rehired in that position; and further, that substitute teachers are not

paid during vacation and do not have guaranteed employment.

¶ 9 On September 1, 2011, a hearing was held before an administrative law judge (ALJ) with only plaintiff present. Plaintiff testified that he was not employed as a substitute teacher in the summer of 2011, and, therefore, was not paid during that time unlike full-time teachers who are paid throughout the year. He also indicated that he was able to sign up for work in the fall of 2011 as a substitute teacher.

¶ 10 Plaintiff maintained that section 612(B)(1) of the Act was inapplicable to substitute teachers because they do not have an academic term, and only covers full-time teachers who get paid during the summer for not working. He pointed out that a substitute teacher is unemployed during the summer, and that according to the United States Department of Labor (Department), if a full-time teacher is not called back as a full-time teacher, there is no reasonable assurance of employment. Plaintiff maintained that this reasoning was applicable to his situation in that he had been laid off as a full-time teacher, was not provided reasonable assurance of such employment following the summer months of 2011, and the fact that he was rehired as a substitute teacher did not give him reasonable assurance of employment.

¶ 11 The ALJ found that plaintiff was an academic employee as defined in section 612 of the Act, that he was employed in the first of two successive years, that he did not receive any notification from CPS that he would not be able to work in the year following the vacation period on an as needed basis as a substitute teacher, and, accordingly, that he was ineligible for benefits.

¶ 12 On September 21, 2011, plaintiff appealed the ALJ's decision to the Board alleging that it

was inconsistent with federal law, as well as with the interpretation of the relevant law by many other states. Plaintiff maintained that the language "such service" in section 612(B)(1) of the Act does not refer to academic service, or instructional capacity, but service that was performed in the "base period," namely, the third and fourth quarters of 2009 and the first and second quarters of 2010, which are used to determine the amount of benefits. Since he only worked as a substitute teacher for 6 out of the 24 weeks of the 2011 academic year, he claimed that this could hardly be considered as "such service" under the Act.

¶ 13 Plaintiff further alleged that the ALJ's decision was inconsistent with federal law, and attached the unemployment insurance program letter no. 04-87, 52 Fed. Reg. 3889-01 (Feb. 6, 1987) issued by the U.S. Department of Labor to all state employee security agencies (Department letter). This letter provides guidance to states on the interpretation of "reasonable assurance" as it relates to section 3304(a)(6)(A) of the Federal Unemployment Tax Act (FUTA) (26 U.S.C. §3301, *et seq*. (1988)). In this letter, the Department indicated that for purposes of interpreting reasonable assurance under FUTA, reasonable assurance does not exist where a full-time teacher for the first academic year is placed on an on-call list for substitute teaching for the second academic year.

¶ 14 On November 9, 2011, plaintiff, through the Legal Assistance Foundation, filed a supplemental memorandum of law arguing that when a teacher is laid off from a full-time teaching position and qualifies for benefits, his subsequent sporadic work as a substitute teacher is irrelevant in determining his eligibility for benefits. Plaintiff alleged that the only employment that may disqualify a teacher from receiving benefits is the employment that supplied the wages

on which the claim is based.

¶ 15 Plaintiff further argued that his case was similar to *Whitley v. Board of Review*, 116 Ill. App. 3d 476 (1983), a case in which a full-time career counselor was laid off, and the reviewing court found that the counselor's work as a substitute teacher was irrelevant in determining her eligibility for benefits because these were two separate jobs. Plaintiff likewise maintained that his benefits were not based on his work as a substitute teacher, and thus the disqualification did not apply to him.

¶ 16 The Board affirmed the ALJ's decision finding that plaintiff worked as a full-time teacher, then as a substitute teacher, and that the period under review was between the two school years. The Board found that plaintiff had reasonable assurance that he would perform work for an educational institution in any such capacity in the subsequent school year, and distinguished *Whitley* where the plaintiff was a career counselor, and subject to section 612(B)(2) of the Act, which provides that an individual shall be ineligible for benefits, on the basis of wages for service in employment in any capacity other than those referred to in paragraph 1, performed for an institution of higher learning, during a period between two successive academic years, if the individual performed such service in the first of such academic years, and there is a reasonable assurance that the individual will perform such service in the second of such academic years. 820 ILCS 405/612(B)(2) (West 2010). The Board further noted that although the plaintiff in *Whitley* could work as a substitute teacher in the subsequent school year, she did not have reasonable assurance of returning to work as a career counselor in the subsequent school year.

¶ 17 Plaintiff filed a complaint for administrative review of the Board's decision in the circuit court. He also filed a memorandum of law in which he alleged that he was qualified for benefits due to his layoff from his job as a full-time teacher for which he did not receive reasonable assurance of employment for the following academic year. He maintained that his subsequent sporadic work as a substitute teacher did not disqualify him from receiving benefits, even if there is reasonable assurance that he would continue as a substitute teacher.

¶ 18 Defendants filed a response alleging that *Marzano v. Department of Employment Security*, 339 Ill. App. 3d 858 (2003), was controlling on this issue, where plaintiff, who was a substitute teacher, was found unqualified for benefits because the plain language of section 612 of the Act does not differentiate between full-time and substitute teachers, but, rather, refers to individuals employed in an instructional capacity. Under this reasoning, defendant maintained that plaintiff was not entitled to benefits. Plaintiff replied that *Marzano* did not address the issue here of whether a full-time teacher, who is let go and qualifies for benefits, but later accepts work as a substitute teacher is then disqualified from receiving benefits during the summer months.

¶ 19 The circuit court affirmed the Board's decision. In doing so, the court relied on *Marzano*, which held that section 612 of the Act does not distinguish between full-time and substitute teachers, but focuses on individuals in an instructional capacity who have a reasonable assurance of continued employment in the same capacity following the intermission of the educational institution. The court noted that in a letter dated July 1, 2011, CPS indicated that plaintiff had a reasonable assurance that he would retain the same employment as a substitute teacher upon the

resumption of fall classes. This appeal follows.

¶ 20 As an initial matter, we note that plaintiff has filed a motion requesting this court to take judicial notice that IDES was in full possession of its initial determination, dated December 4, 2010, but ignored it in determining that plaintiff was not entitled to benefits for the summer of 2011. He also requests this court to take judicial notice of the contents of the IDES finding of December 4, 2010, and, in particular, the following facts: that he was unemployed based on lack of work, the date of his claim for unemployment insurance benefits was November 28, 2010, his benefit year began November 28, 2010, and ended November 27, 2011, his weekly benefit amount was $423, and of "qualifying period quarters and wages paid."

¶ 21 Judicial notice may be taken of *factual evidence* where the facts are capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy. (Emphasis added.) *Kennedy v. Edgar*, 199 Ill. App. 3d 138, 143 (1990). However, a reviewing court will not take judicial notice of critical evidentiary material that was not presented to the court below, particularly where the evidence may be significant in the proper determination of the issues between the parties. *Edgar*, 199 Ill. App. 3d at 143.

¶ 22 We initially allowed plaintiff's motion, *in toto*, and, after reviewing the parties' briefs, we find that plaintiff's *allegation* that the IDES ignored its prior determination is *not factual evidence*, and we, therefore, cannot take judicial notice of it. *Edgar*, 199 Ill. App. 3d at 143. However, we may take judicial notice of the initial IDES finding dated December 4, 2010, a public document, which plaintiff attached as an exhibit to his motion for judicial notice in support of his reply brief to defendant's brief. *May Department Stores Co. v. Teamsters Union*

Local No. 743, 64 Ill. 2d 153, 159 (1976); *Kennedy*, 199 Ill. App. 3d at 143. Such document falls within the category of readily verifiable facts which are capable of instant and unquestionable demonstration. *May Department Stores Co.*, 64 Ill. 2d at 159. The remaining facts are listed in the IDES finding dated December 4, 2010, and therefore may also be noticed.

¶ 23 Turning to the substantive matter, plaintiff maintains that section 612(B)(1) of the Act does not disqualify him from receiving benefits for the summer months of 2011. He maintains that his eligibility to receive benefits is derived from the base-period of his full-time service for which he originally claimed benefits, *i.e.* the third and fourth quarters of 2009 and the first and second quarters of 2010. He further maintains that because the statute in question is ambiguous our review should be *de novo*, and that the clearly erroneous standard should only be applied after the meaning of the applicable statute has been settled.

¶ 24 Our review of an administrative proceeding is limited to the propriety of the Board's decision, not that of the circuit court. *Odie v. Department of Employment Security*, 377 Ill. App. 3d 710, 713 (2007). The Board's decision to deny benefits is a mixed question of fact and law which we review under the clearly erroneous standard. *Marzano v. Department of Employment Security*, 339 Ill. App. 3d 858, 862 (2003). A decision is clearly erroneous if the record leaves the reviewing court with the firm and definite conviction that a mistake has been made. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001). For the reasons which follow, we do not find this to be such a case.

¶ 25 Plaintiff maintains that the language in section 612(B)(1) of the Act is ambiguous, particularly citing, "such service," "in any such capacity," and "reasonable assurance." He

claims that these words can refer to not just performing any instructional, research or principal administrative services for the following year, but also whether the employment is full-time or part-time and in the same economic capacity as the service that initially qualified him for benefits. We disagree.

¶ 26 The statute clearly provides that "such service" and "any such capacity" refers to service in an instructional, research or principal administrative capacity, and that "reasonable assurance" refers to whether the individual has been assured of employment the following year in instructional, research or principal administrative services. It does not refer to reasonably assuring the employee the same economic level of service. Thus, we find no ambiguity in the statute as claimed by plaintiff. As noted in *Marzano*, the plain language of section 612(B)(1) of the Act does not differentiate between full-time and substitute teachers, but, rather, refers to individuals employed in an instructional capacity. *Marzano*, 339 Ill. App. 3d at 862. As a substitute teacher, plaintiff is within that category. *Marzano*, 339 Ill. App. 3d at 862.

¶ 27 Plaintiff concedes that he might be ineligible for benefits during the summer of 2011 for the portion of benefits which were based on his part-time sporadic substitute teaching position; however, he maintains that he was entitled to benefits for the summer of 2011 based on his base-period employment as a full-time teacher. The base period of employment is defined as the first four of the last five completed calendar quarters immediately preceding the benefit year, and is used to determine the benefits amount. 820 ILCS 405/237(A) (West 2010). The period of time in question in this case, the summer of 2011, is considered by section 612(B)(1) of the Act to be between the two academic years. *Doran v. Department of Labor*, 116 Ill. App. 3d 471, 475-76

(1983). The Act clearly provides that the time considered is between "two *successive* academic years" (emphasis added) 820 ILCS 405/612(B)(1) (West 2010); thus, making the relevant comparison between the academic years immediately preceding and following the break between years, *i.e.,* the 2011 summer months.

¶ 28 Here, the record shows that plaintiff was employed as a substitute teacher in the academic year of 2010-2011, and was given reasonable assurance that he would be employed as such the following academic year, 2011-2012. As noted above, this court held in *Marzano*, 339 Ill. App. 3d at 862, that the plain language of section 612 does not differentiate between full-time and substitute teachers, but, rather, refers to individuals employed in an instructional capacity. Since plaintiff was employed as a substitute teacher for the first and second academic years, he fell within that category, and was thus ineligible for benefits for that interim period. We therefore conclude that the Board's decision that plaintiff was ineligible for benefits for the summer of 2011 was not clearly erroneous.

¶ 29 Plaintiff, nonetheless, contends that the Act must be construed in favor of awarding benefits. We observe that the purpose of the Act is to provide compensation benefits to an unemployed individual to relieve the economic distress caused by involuntary unemployment. See *Kelley v. Department of Labor,* 160 Ill. App. 3d 958, 962 (1987). However, given the circumstances in this case, where plaintiff was employed as a substitute teacher for the first academic year, and reasonably assured of such employment for the second academic year, he is not involuntarily unemployed so as to trigger the award of benefits under the general purpose. After reviewing the record and considering the issues raised by plaintiff we cannot say that we

are left with a definite and firm conviction that a mistake has been made by the Board in deciding that plaintiff was ineligible for benefits for the summer months of 2011. *AFM Messenger Service, Inc.*, 198 Ill. 2d at 395.

¶ 30 In reaching this conclusion, we find plaintiff's reliance on *Whitley*, *Butler v. Board of Review*, 136 Ill. App. 3d 1079 (1985), and *Rodgers v. Department of Employment Security*, 186 Ill. App. 3d 194 (1989) misplaced. In *Whitley*, 116 Ill. App. 3d at 477, the Fifth District found that plaintiff's primary job was that of a career counselor, and although she substituted occasionally, that fact was irrelevant to her eligibility for benefits due to her counseling work as they were essentially two separate jobs. *Whitley*, 116 Ill. App. 3d at 479. *Whitley* is factually inapposite to the instant case where plaintiff's job as a substitute teacher was his primary and sole position in the academic year preceding the 2011 summer for which he was seeking unemployment insurance benefits. Moreover, plaintiff's eligibility was properly determined based on his substitute teaching position preceding the summer of 2011 and the reasonable assurance of receiving that same employment again in the next academic year. 820 ILCS 405/612(B)(1) (West 2010).

¶ 31 In *Butler*, 136 Ill. App. 3d at 1080, the reviewing court held that the fact that plaintiff held a part-time job that he voluntarily left, did not preclude him from receiving benefits for the termination from his full-time job under section 239 of the Act (820 ILCS 405/239 (West 2010)). *Butler*, 136 Ill. App. 3d at 1081. In *Rodgers*, 186 Ill. App. 3d at 195, the Second District found that the fact that plaintiff left her part-time job voluntarily had no impact on her entitlement of benefits due her as a result of her involuntary layoff from a full-time position she held pursuant

to section 601(A) of the Act. *Rodgers*, 186 Ill. App. 3d at 200. Here, plaintiff was found ineligible for benefits pursuant to section 612(B)(1) of the Act, not sections, 239 or 601(A) of the Act, and we thus find *Butler* and *Rodgers* distinguishable on that basis. Moreover, and contrary to plaintiff's contention, sections 612(B)(1) and 239 of the Act do not conflict where section 612 deals specifically with employment in academic institutions.

¶ 32 Plaintiff also cites to foreign jurisdictions which interpret laws similar to section 612 of the Act. However, those cases are not binding on this court, and we, accordingly, find them unpersuasive. *Klitzka ex rel. Teutonico v. Hellios*, 348 Ill. App. 3d 594, 599 (2004). Moreover, in those cases the teachers were found eligible for unemployment insurance benefits during the summer months where they held full-time teaching positions in the first academic year and were then only reasonably assured of a substitute teaching position the second academic year. See *Leissring v. Department of Industry, Labor & Human Relations*, 115 Wis. 2d 475 (1983); *Sulat v. Board of Review*, 176 N.J. Super. 584 (1980); see also *Mallon v. Employment Division*, 41 Or.App. 479 (1979) (plaintiff held full-time and part-time academic positions and when his full-time position was terminated, he qualified for benefits for the full-time job loss but not for his part-time job). Plaintiff in this case was a substitute teacher the academic year immediately preceding the 2011 summer and was reasonably assured of such employment the following academic year. Thus, the Board's finding that plaintiff did not qualify for benefits during the 2011 summer was not clearly erroneous.

¶ 33 Notwithstanding, plaintiff further maintains that IDES rules 56 Ill. Admin. Code §§2915.5, and 2915.25 (eff. Nov. 4, 1987), which provide further information as to the eligibility

to receive unemployment insurance benefits between academic years and the situations in which there is reasonable assurance, are invalid. He maintains that section 2915.5 does not have the "such service" conditions of the Act, but refers to merely type of service, *i.e.*, instructional, administrative, and research, and that under section 2915.25, an educational institution can offer an individual a substitute teaching position before summer vacation, then use that fact to disqualify him from benefits, even if he was full-time, had been laid off from that position, and had no reasonable assurance of full-time employment. This issue was not raised before the administrative agency, and, accordingly, cannot be raised for the first time on appeal. *North Avenue Properties, L.L.C. v. Zoning Board of Appeals of City of Chicago*, 312 Ill. App. 3d 182, 185, 187 (2000).

¶ 34 Plaintiff also contends for the first time that the rules and regulations of IDES violate due process and equal protection. A party's failure to raise a constitutional challenge in the circuit court in a civil case results in forfeiture of that challenge on appeal. *Forest Preserve District of DuPage County v. First National Bank of Franklin Park*, 2011 IL 110759, ¶27; *Jackson v. Retirement Bd. of Policemen's Annuity and Benefit Fund of the City of Chicago*, 293 Ill. App. 3d 694, 698 (1997). Accordingly, we find that plaintiff has forfeited these constitutional challenges on appeal.

¶ 35 In light of the foregoing, we affirm the Board's decision denying plaintiff unemployment insurance benefits.

¶ 36 Affirmed.