2014 IL App (1st) 123543-U

FIRST DIVISION
March 10, 2014

No. 1-12-3543

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WINDY R. DOUGLAS, Plaintiff-Appellee, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, DIRECTOR OF ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, and BOARD OF REVIEW, Defendants-Appellants, and DEBORAH'S PLACE, Defendant.	)	Appeal from the Circuit Court of Cook County. No. 12 L 50985 Honorable Daniel Gillespie, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justice Cunningham and Justice Rochford concurred in the judgment.

ORDER

¶ 1 ***Held***: The Board of Review's decision that the plaintiff was ineligible for unemployment benefits because she was discharged for misconduct for violating her employer's policies on insubordination and confidentiality was clearly erroneous.

¶ 2 Defendants Illinois Department of Employment Security (Department) and its Director and Board of Review (board)—the State Parties—appeal from an order of the trial court reversing a decision by the board finding plaintiff Windy Douglas ineligible to receive benefits under the Unemployment Insurance Act (Act). 820 ILCS 405/100 *et seq*. (West 2010). The board found Douglas ineligible for benefits because she was dismissed from her employment as a case manager for defendant Deborah's Place for misconduct. The board determined that Douglas violated her employer's policies on insubordination and confidentiality and she had received prior warnings for violating those policies. The trial court then reversed the board's decision finding that Douglas did not deliberately and willfully violate the employer's policies. On appeal, the State Parties contend that the trial court's decision was erroneous. For the reasons set forth below, we affirm the judgment of the trial court and reverse the board's decision.

¶ 3 BACKGROUND

¶ 4 I. Claim for Benefits

¶ 5 In January 2012, Douglas filed a claim for benefits based on her employment with Deborah's Place from January 2010 to December 2011. Deborah's Place filed a protest, claiming that Douglas was discharged for cause, specifically for violating its policies on insubordination and confidentiality by failing to obtain a release of information each time she wished to give out information regarding the clients, and that she had received prior warnings for violating these policies.

¶ 6 A claims adjudicator for the Department concluded that Douglas was eligible for benefits and that her conduct was neither deliberate nor willful. Deborah's Place appealed, precipitating a formal administrative hearing on the matter.

¶ 7 II. Administrative Hearing

¶ 8 The administrative hearing was held on April 20, 2012 before a Department referee. Darius Morris, Human Resources Manager for Deborah's Place, testified that Douglas was discharged from her employment as a case manager because she repeatedly violated the employer's policies regarding insubordination and confidentiality. He explained that the last incident concerned incorrectly completed release of information forms, which were pre-signed but otherwise blank. Morris testified that, on December 27, 2011, he met with Douglas to tell her she was discharged and gave her a letter explaining the reasons for her discharge. He stated that the meeting was brief and that Douglas offered no explanation for her actions.

¶ 9 Betty Washington testified that Deborah's Place is a social service agency that works with formerly homeless women referred to as "tenants." She explained that a tenant's file is confidential and a case manager is required to obtain a release of information from the tenant when dealing with outside agencies. Washington testified that each year an outside agency conducts a yearly audit of the files. She stated that, if the agency discovered partially prepared forms in a tenant's file, the agency could lose some of its funding. Washington explained that "the funding is very competitive now, so * * * we would get a * * * bad grade on our audit. And then we'd have a six-month period, or they would give us a time to have it corrected. But that * * * on the

extreme end, we could lose funding." As a result, Washington indicated she generally reviews the files yearly as well.

¶ 10 Regarding Douglas's discharge, Washington indicated that Douglas sent an email to her staff stating that she was going to call the probation officer for a tenant, R. P., and she had a release of information in order to do so. Washington explained, however, that contacting the probation officer was not part of Douglas's job. As a result, Washington asked Douglas's supervisor to retrieve the release of information form. When the supervisor could not find it, Washington asked the supervisor to bring the file to Douglas so that she could pull out the release form, but Douglas could not find it. After going through the file, Washington and the supervisor discovered several releases of information that had the tenant's name, a date, and a signature from the tenant, but was otherwise blank. Along with the original pre-signed release form, there were several photocopies of the release.

¶ 11 Washington then contacted the human resources department in December 2011 and she and Morris met with Douglas to discuss the incident. When Morris and Washington showed Douglas the blank, pre-signed release of information forms, she said that she was not aware that she could not have the forms pre-signed. Washington explained to Douglas that she had informed her during prior meetings that she could not prepare blank release forms. Thus, according to her testimony, Washington did not instruct Douglas to prepare the releases in that manner and it was against the employer's policy. After reviewing one file, Washington reviewed others and found similar release of information forms in other tenant files as well. At the meeting, Morris

reminded Douglas that she had been on probation for violating the employer's policies on insubordination and confidentiality.

¶ 12 Washington testified that Douglas had been previously warned about similar conduct on September 14, 2011 and September 16, 2011. For example, on September 14, Washington and Morris met with Douglas to discuss the employer's confidentiality policy and procedures as well as her probation. The written confidentiality policy was reviewed and given to Douglas. The policy was entered as an exhibit at the administrative hearing.

¶ 13 Two days later, on September 16, 2011, Douglas approached Washington asking for clarity regarding the confidentiality policy and release of information procedures. Douglas asked if she would need a new release of information if a tenant's caseworker changed. Washington responded that every time a tenant's service provider changed, Douglas must obtain a new release of information before having a conversation with that provider and "it couldn't be a blanket release of information just for an agency, it had to have a specific person." Washington stated that there must be a release for every person an employee talks to about a tenant at an agency no matter how many people work at the agency and she believed that she made this clear to Douglas. Washington stated that this was not a new process to Douglas, and that the employer had not had this particular problem of her using pre-signed, blank releases before. Washington also explained that before a tenant signs a release of information, the release should have the tenant's name, his or her date of birth, and the name of the person who is receiving the information as well as the type of information and the purpose of its release.

¶ 14 In June 2011, the agency sent Douglas a letter notifying her that she was being placed on probation for three months for discussing tenants with other tenants in violation of the confidentiality policy. The employer explained that "there have been multiple formal and informal complaints concerning the nature of your discussion with tenants regarding other tenants" and "[t]his issue has been discussed within the context of boundaries and confidentiality during supervision, your performance evaluation, and through progressive disciplinary action." The letter further detailed that, as a result, a plan for corrective action had been created to aid Douglas in meeting her job expectation, which included meeting with Morris and Washington to review the confidentiality policy and demonstrate her ability to comply with it. The release of information forms were admitted as exhibits at the hearing.

¶ 15 Also, in February 2011, Douglas received a warning for violating the employer's confidentiality policy. That warning indicated that Douglas was observed telling a tenant about an interaction she had with another tenant, which violated the policy "to keep confidential any and all information about participants"; and that "[b]y speaking in detail to another participant about an interaction you had with another participant you are violating the participant's confidentiality." This issue had been discussed "in great detail" with Douglas during her annual performance evaluation in December 2010.

¶ 16 At the hearing, Douglas testified regarding the incident that led to the December 20, 2011 meeting. She explained that she sent an email to her program administrator and program coordinator but she denied that she stated in the email or her status report that she was going to contact the tenant's probation officer. According to Douglas, she asked if she should contact the

probation officer. Douglas stated that, when the probation officer called the employer, she transferred him to the program administrator and did not speak to him. When asked whether she stated she had a release of information to talk to the probation officer, Douglas said she did have a release, indicating the progress notes in the file noted the probation officer had signed a release of information when he came to visit. Douglas claimed the tenant also signed a release. When asked why the release for the probation officer was not in the file, Douglas claimed the file had been missing for several days and the release was in the file when the program coordinator took it. Douglas explained she was sure she told Washington about this situation.

¶ 17 Douglas testified that she had blank releases in tenant R. P.'s file because Lisa Spravka, a program administrator, had instructed her to find an assisted living or nursing home for R. P. Douglas said she found quite a few to contact and Spravka "instructed me that as long as I put information in with the agency, that I could make the copies." Douglas stated that, in accordance with these instructions, she would fill in the agency name and person she spoke to on the release when she contacted the agencies. Douglas did not relay this information to Morris or Washington when she was discharged because these releases were not at issue; only the releases related to the probation officer were addressed.

¶ 18 Douglas denied that Washington told her in September 2011 that she was prohibited from using blank releases. Instead, Douglas claimed she had simply asked Washington "if the caseworker change[s] for DHS for a tenant, do I still use the same DHS with the same address," and Washington told her to put the specific caseworker on the release. She acknowledged that Washington told her that she needed a new release for each person to whom she spoke. Douglas

said they did not discuss whether she could maintain blank releases in a file. Instead, Douglas claimed she was given conflicting information regarding the preparation of the releases.

¶ 19 Douglas testified that she did not prepare a written response to her termination letter because she did not "think it would've make a difference." She explained she did not speak to the probation officer except when he actually came to see the tenant to let her know he was her new probation officer. In a progress note, Douglas stated "I had a signed release that mysteriously just disappeared out [of] the file after it was missing for a couple of days."

¶ 20 III. Administrative Decision

¶ 21 On April 24, 2012, the referee issued a decision setting aside the claims adjudicator's decision and finding that Douglas was ineligible for benefits because she was discharged for misconduct. The referee found that Douglas knowingly violated the employer's confidentiality policy by maintaining blank release of information forms signed by the employer's client and that she had been previously warned about the employer's confidentiality policy. The referee noted that, while Douglas testified that a supervisor told her she could use blank releases, she never told this to the manager who discharged her. Regarding her testimony, she "provided materially inconsistent statements as to what reason she was given for the discharge, materially impacting her credibility overall." Douglas then appealed the referee's decision to the Board and, in support, submitted numerous new documents, including a list of clients and services she provided to them.

¶ 22 On July 24, 2012, the board affirmed the referee's decision and adopted it as its own, concluding that it was supported by the record. Furthermore, the board noted that Douglas sought to submit additional evidence to support her appeal, but it would not consider her request because

she failed to comply with the Department's rules for submitting additional evidence. In any event, the board noted that most of the documents did not address the issue resulting in Douglas's discharge and that "it is somewhat telling, that she chose to include with the documentation for her appeal, pages of names of clients with details about services that she provided to each individual," but "did not provide any evidence that the clients, whose names and information is reportedly protected, permitted her to use their personal information in a public way."

¶ 23 IV. Circuit Court Proceedings

¶ 24 On July 16, 2012, Douglas filed a complaint in circuit court seeking judicial review of the board's decision. On October 30, 2012, the circuit court reversed the board's decision, finding that Douglas did not deliberately and willfully violate the employer's policy and "the [b]oard should not have relied upon documents submitted to the [b]oard by [Douglas]." The State Parties then filed a timely appeal. Deborah's Place did not appeal.

¶ 25 After the case was fully briefed, we noted that the fact that the State Parties appealed but the employer raised a jurisdictional issue, and we requested the parties to submit additional briefs on the issue. We did the same in a similar case, *Shaw v. Dept. of Employment Security*, No. 1-12-2676. Upon consideration of the additional briefs, we issued a published opinion in *Shaw* finding that we had no jurisdiction to consider the State Parties' appeal because they had no standing to appeal from a reversal of their own decision when the real party in interest (the employer) did not. In doing so, we relied on a line of cases holding that administrative agencies have no standing to appeal from reversals of their own decisions. *See, e. g., Speck v. Zoning Board of Appeals*, 89 Ill. 2d 482 (1982); *Kozenczak v. Du Page County Officers Electoral Board*,

299 Ill. App. 3d 205, 207-08 (1988); *Greer v. Illinois Liquor Control Comm'n*, 185 Ill. App. 3d 219 (1989); *Wallman v. Zoning Board of Appeals*, 181 Ill. App. 3d 680 (1989); and *Carbondale Liquor Control Comm'n v. Illinois Liquor Control Comm'n*, 227 Ill. App. 3d 71 (1992). We noted a contrary line of cases allowing pension boards to prosecute such appeals on their own because they do not merely adjudicate disputes but also have "extensive managerial responsibilities" which they can vindicate through the appellate process. *See Braun v. Retirement Board of the Firemen's Annuity & Benefit Fund*, 108 Ill. 2d 119 (1985). Upon review of the applicable statutes governing the Department of Employment Security, the briefs, and the record, we determined that the matter so primarily and exclusively involved only the financial interests of the employer, rather than the state, that the *Braun* exception did not apply. We issued a brief summary order dismissing this appeal, relying on our opinion in *Shaw*.

¶ 26 The State Parties filed petitions for rehearing in both cases, in which they provided extensive information regarding the additional monies, obtained through bond borrowing, used to bring the state unemployment fund to a level sufficient to pay benefits. According to the State, monies provided by employers are insufficient to pay all the required benefits. The State's petition also attacked the continued viability of the *Speck* line of cases, essentially arguing that they no longer represented current trends in administrative law. At the rehearing stage, Douglas was represented by new attorneys from the Legal Assistance Foundation, who provided a supplemental brief defending our earlier decision and setting forth an analysis of the due process implications involved when administrative agencies are allowed to appeal their own decisions without the involvement of the losing party in interest. Because the rehearing briefing on this

case more thoroughly addressed the issues than the rehearing briefing in *Shaw*, we set this case for oral argument and selected it as the new vehicle for the lead opinion in the two cases.

¶ 27 Upon reconsideration and review of the additional information provided, we believe that this case falls within the *Braun* exception more closely than it tracks the *Speck* line of cases. In so doing, we do not intend in any way to cast doubt on the continued viability of *Speck, Kozenczak*, and the related cases holding that administrative agencies must remain impartial and cannot simultaneously serve as impartial adjudicators while also appealing reversals of their own decisions. We will therefore not dismiss this appeal, but instead resolve it on the merits. We have vacated our original opinion in *Shaw* and disposed of it on the merits by a Rule 23 order, which we are issuing contemporaneously with this decision.

¶ 28 ANALYSIS

¶ 29 On appeal, the State Parties contend that the board properly found that Douglas was ineligible for benefits because she was discharged for willful misconduct when she violated the employer's confidentiality policy. Here, the State Parties rely on the evidence showing that Deborah's Place had a reasonable policy requiring its employees to first obtain a release of information before sharing information about a tenant and requiring the release to be filled out before it was signed by the tenant. According to the State Parties, Douglas willfully violated this policy by maintaining blank, pre-signed release of information forms in tenant files and, as such, caused harm to the employer.

¶ 30 In response, Douglas requests that we either affirm the circuit court's conclusion that the evidence shows that she did not willfully violate the employer's confidentiality policy, or vacate

the decision of the board because of its treatment of the evidence she tendered to it. Here, Douglas complains that the board violated her constitutional rights to due process and free speech in finding that she willfully violated the confidentiality policy. She further claims that the only communication or prior warning from her employer's management about her improper creation of the release of information forms came in mid-September 2011, which was over a month after she had created the pre-signed forms and two months before management actually discovered the forms and terminated her employment. Thus, according to Douglas, the board and referee should be instructed, on remand, to consider the timing of the creation of the pre-signed release of information forms in relation to the September 2011 meeting and to consider all of the evidence tendered without incorrectly characterizing that evidence as "protected" or "confidential."

¶ 31 Section 602(A) of the Act provides that a person is ineligible for unemployment insurance benefits when she was "discharged for misconduct connected with h[er] work." 820 ILCS 405/602(A) (West 2010). Misconduct is:

> "the deliberate and willful violation of a reasonable rule or policy of the employing unit, governing the individual's behavior in performance of h[er] 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." *Id.*

¶ 32 To show misconduct under the Act, three elements must be proven: " (1) that there was a deliberate and willful violation of a rule or policy of the employing unit; (2) that the rule or policy of the employing unit was reasonable; and (3) that the violation either has harmed the employer or

was repeated by the employee despite previous warnings." *Pesoli v. Department of Employment Security*, 2012 IL App (1st) 111835, ¶ 29. A claimant's conduct was willful or deliberate if she was aware of but consciously disregarded a rule of the employer. *Id.*, ¶ 30. A reasonable rule concerns standards of behavior that an employer has a right to expect from an employee and thus must appropriately relate to the workplace, but a rule or policy need not be written down or otherwise formalized, so that this court can make a common-sense recognition that certain conduct intentionally and substantially disregards an employer's interests. *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 827 (2009). Furthermore, we must determine whether an employee's violation harmed the employer or whether the violation was repeated despite prior warnings. *Pesoli*, ¶ 32.

¶ 33 We review the decision of the board, not the circuit court. *Pesoli*, ¶ 20. Here, because the board's decision presents a mixed question of fact and law as to whether Douglas was discharged for willful misconduct, we apply the clearly erroneous standard of review. *Id.* We will "reverse only if our review of the entire record leaves us with the definite and firm conviction that the decision was a mistake." *Id.* This court has a duty to reverse the board's decision when it is based upon misinterpretation of misapplication of the law. *Wrobel v. Department of Employment Security*, 344 Ill. App. 3d 533, 536 (2003); *Katten Muchin & Zavis v. Department of Employment Security*, 279 Ill. App. 3d 794, 799 (1996).

¶ 34 It continues to be the law in Illinois that the Act is to be liberally construed in favor of awarding benefits. *Czajka v. Department of Employment Security*, 387 Ill. App. 3d 168, 174 (2008); *Stovall v. Department of Employment Security*, 262 Ill. App. 3d 1098, 1102 (1994). It is

for this reason that an employer and the board may not put their subjective interpretation on a given set of facts, thereby denying benefits without satisfying the three pronged analysis of the claimant's conduct.

¶ 35 The employer's confidentiality policy provides that "[r]elease of any information pertaining to a staff, participant and/or tenant to anyone outside of the agency, requires a signed release form from the staff, participant/tenant or her guardian authorizing release of such information prior to its actual release" and "[f]ailure to adhere to this policy or to obtain the release of information form before releasing information is considered to be a breach of confidentiality and the employee committing the breach is subject to discipline up to and including immediate termination."

¶ 36 Our review of the record establishes that Douglas's misconduct entailed multiple violations of the employer's confidentiality policy for which she received a number of verbal and written warnings. For example, in November 2010, Douglas received a verbal warning for violating the employer's policies, including the confidentiality policy. Douglas received this warning after Washington asked her to complete a tenant's file because she did not want it left in the meeting room overnight, but the file was later found in that room 24 hours later in the same condition. In the warning, Douglas was instructed that she should follow her superiors' directives in a timely manner and that "it would be beneficial to her and the agency to understand and work to eliminate breaches in tenants' confidentiality." It was further noted that Douglas "should not leave tenant's files in an area where someone may have access to [a] tenant's personal information."

¶ 37 In February 2011, Douglas received another warning for violating the employer's confidentiality policy. At that time, Douglas was informed that she was observed telling a tenant about an interaction she had with another tenant and this was a violation of the employer's policy "to keep confidential any and all information about participants" and that "[b]y speaking in detail to another participant about an interaction [she] had with another participant [she was] violating the participants' confidentiality." Additionally, it was noted that "[t]his issue was discussed in great detail during [her] annual performance evaluation on [December 7, 2010]."

¶ 38 In June 2011, the employer gave Douglas a letter notifying her that she was being placed on probation for three months for among other things the "nature of [her] dialogue with tenants regarding other tenants that may potentially violate their confidentiality." The employer explained that "there have been multiple formal and informal complaints concerning the nature of [her] discussions with tenants regarding other tenants" and "[t]his issue has been discussed within the context of boundaries and confidentiality during supervision, [her] performance evaluation, and through progressive disciplinary action." The letter detailed a plan of corrective action that had been created to aid Douglas in meeting her job expectations, which included meeting with the Human Resources Manager and Director of Programs to review the confidentiality policy and demonstrate her ability to comply with the policy.

¶ 39 As a result of these violations, the employer reviewed the confidentiality policy with Douglas. Washington testified that, on September 14, 2011, she and Morris met with Douglas to follow up regarding her probation. At that meeting, Washington specifically discussed the confidentiality procedures with Douglas; she did not just hand the policy to Douglas without any

explanation. At that time, Washington also explained to Douglas the necessity and importance of obtaining a release of information form each time she wished to either exchange or give out any information about the employer's tenants.

¶ 40 Two days later, on September 16, 2011, Douglas approached Washington to obtain clarity about the proper release of information procedure when a tenant's case worker changed at an agency. At that time, Washington informed Douglas that she must obtain a new release of information every time a tenant's service provider changes at an agency indicating Douglas "would need a signed [release of information] for every individual person [she] communicate[d] with regarding each tenant."

¶ 41 According to Washington, in December 2011, after Douglas sent an email indicating that she was going to contact a tenant's probation officer and she had a release of information to do so, Washington reviewed the tenant's file for the appropriate release. She found several release of information forms that contained the tenant's name, a date, and the tenant's signature, but were otherwise blank. She also found, along with the original releases, several photocopies of the release. Additionally, some of the releases were signed by the tenant but some of the requested information was left blank. Washington further testified that, after reviewing the first file, she reviewed other files and found release of information forms in another tenant file, which also had been signed by the tenant but had requested information left blank. As a result of violations of the employer's confidentiality policy along with other reasons, Douglas was ultimately terminated on December 27, 2011.

¶ 42 While it is clear from the record that Douglas violated the employer's confidentiality policy, there is no evidence that she willfully and deliberately violated the policy *after being warned.* The State Parties seem to assert that Douglas's willful misconduct was her continued maintenance of pre-signed blank release of information forms in tenants' files after receiving warnings not to do so. But here the record is unclear regarding the *specific* transgression which was the catalyst for Douglas's termination. In other words, we are unable to determine from the record whether any new and presumably intentional and willful violation(s) occurred after Douglas was initially warned that she should not maintain pre-signed, blank release of information forms in her files. Because the record is unclear, we do not know if the same pre-signed, blank release of information forms that Washington originally warned Douglas about in September 2011 were the basis for finding she willfully and deliberately violated the confidentiality policy again in December 2011.

¶ 43 During oral argument before this court, counsel for the board did not give a definitive answer to the question of what specific action triggered Douglas's termination after she had been warned. The failure to point to any particular action, coupled with the facts in the record, leads us to the conclusion there was no specific, intentional, willful, repeated, act of policy violation or any insubordination which occurred *after* the September 2011 meeting in which Douglas was counseled regarding her work performance.

¶ 44 In our view, the employer needed to provide facts such as specific examples of Douglas's willful, deliberate, and offensive behavior, which post-dated the warnings the employer issued to her regarding the unacceptability of her actions. We find no evidence in the record that the

employer met this burden. While we acknowledge that an employee's poor performance and inability to follow an employer's directives can justify an employee being terminated from employment, those reasons alone do not justify the withholding of benefits. The employer must establish that Douglas acted willfully and deliberately in violating the employer's policy after being warned. *Pesoli*, ¶ 29.

¶ 45 The employer in the case has not satisfactorily delineated the facts in such a manner as to show that Douglas meant to violate the confidentiality policy after being warned. On the contrary, at most, the record shows that Douglas did not understand the parameters of her job and remained unsure of the specific nuances of the confidentiality policy as it relates to completing the release of information forms. This is supported by the fact that Douglas sought clarification from Washington two days after the September 2011 meeting in which she was advised she had violated the confidentiality policy. Furthermore, the facts suggest that there was continued ambiguity even after Douglas was counseled regarding the completion of the release of information forms.

¶ 46 Accordingly, because the record does not support a finding that Douglas willfully and deliberately violated the employer's confidentiality policy by maintaining pre-signed, blank release of information forms in tenant files, she is not disqualified from receiving employee compensation benefits under the Act. *Pesoli*, ¶ 20 (we "will reverse only if our review of the entire record leaves us with the definite and firm conviction that the decision was a mistake"). Thus, without misconduct, as defined by Illinois law, there can be no denial of benefits. *Czajka*, 387 Ill. App. 3d at 174-76; *Wrobel*, 344 Ill. App. 3d at 536-38.

¶ 47 We do not reach Douglas's other contention that the board violated her constitutional rights by denying her request to submit additional evidence because we reverse on other grounds.

¶ 48 For the foregoing reasons, we reverse the board's denial of benefits and affirm the judgment of the circuit court of Cook County.

¶ 49 Circuit court affirmed; Board of Review reversed.