

No. 1-10-2008

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DIVISION  
May 13, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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CERMAK AUTO AUCTION, LLC, an Illinois Limited Liability Company,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	
THE ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; MAUREEN T. O'DONNELL, Director Illinois Department of Employment Security; J. HUNT BONAN, Chairman of the Board of Review; STANLEY L. DRASSLER, JR., Member of the Board of Review; WILLIAM J. NOLAN, Member of the Board of Review; CONSTANTINE M. ZAGRAFOPOULOUS, Member of the Board of Review; ELWOOD FLOWERS, SR., Member of Board of Review; and KATIMAHMUD I. GOLDSMITH;	)	No. 09 CH 48605
	)	
Defendants-Appellees.	)	Honorable James C. Murray, Judge Presiding.

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JUSTICE HOWSE delivered the judgment of the court.  
Presiding Justice Fitzgerald Smith and Justice Epstein  
concurred in the judgment.

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**O R D E R**

HELD: When an employee left his job for good cause attributable to his employer, i.e., his wages were inconsistent and untimely, he was eligible for unemployment benefits.

Plaintiff Cermak Auto Auction LLC (Cermak) appeals from an order of the circuit court affirming a decision of the Board of Review of the Illinois Department of Employment Security (Board), finding that defendant Katimahmud Goldsmith was eligible for unemployment benefits pursuant to section 601(A) of the Unemployment Insurance Act (Act) (820 ILCS 405/601(A) (West 2008)), because he left his job for good cause attributable to Cermak. On appeal, Cermak contends that it was denied due process when the hearing before a Board referee was argumentative and confusing. Cermak also contends the Board's finding that Goldsmith was eligible for benefits was against the manifest weight of the evidence. We affirm.

The record reveals that Goldsmith was employed by Cermak from August 2008 until February 2009. He then sought, and was deemed eligible for, unemployment benefits pursuant to section 601(A) of the Act when he left his employment for good cause attributable to Cermak, that is, inconsistencies in the payment of his wages. See 820 ILCS 405/601(A) (West 2008).

Cermak filed an administrative appeal. A Department referee conducted a telephone hearing during which both Goldsmith and Cermak manager Amir Nikpouri testified. Before testimony began,

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the Referee explained how the hearing would proceed, and asked whether either man had any procedural questions.

Goldsmith testified that as an auction representative he was responsible for putting cars "on line" and was paid salary plus commission. He would also sell the cars. Sometimes, when potential customers called, a secretary would either make the sale or hand the customer off to another person. When he brought this issue to management, it was not addressed. After Goldsmith spoke to Nikpouri and Kareem,<sup>1</sup> he was told that there would be discussion regarding his rate of pay. However, he felt that he was being "played with." He left after he was not paid for the three pay periods between December 17, 2008, and February 2009.

Upon the Referee's questioning, Goldsmith indicated that during the three pay periods in question he made more sales than he had previously, and that he had produced documentation in order to resolve his final pay. However, Goldsmith asserted that he did not get what he deserved. He indicated that there were 20 cars upon which he was owed a commission.

Goldsmith acknowledged that his commission varied. He had been paid \$50 per car, but after talking to Nikpouri, his commission was to increase to \$100. Believing the \$100 commission was set, he then sold 20 cars. Although he indicated he had an agreement to this effect, upon questioning from the

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<sup>1</sup> Kareem's first name does not appear in the record.

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Referee, he clarified that the "agreement" indicated that he would be paid \$400 per week. Kareem subsequently said Goldsmith would be paid a commission of \$75 per car.

The Referee then inquired whether Nikpouri had any questions. When Nikpouri began to make a statement, the Referee asked whether he had questions regarding Goldsmith's testimony. Nikpouri then cross-examined Goldsmith. Goldsmith indicated that his last paycheck was dated November 21, 2008, but that he worked until February 2009. When Goldsmith attempted to offer additional testimony, the Referee reminded him that this was the employer's time for questions.

Nikpouri then testified that Goldsmith was paid regularly and on time when he worked, but was not paid when he did not work. Goldsmith was paid a \$50 commission for sales less than \$5,000, and \$100 for sales more than \$5,000. With regard to Goldsmith's conflict with the secretary, Nikpouri told him that another team member would take sales when he was not working.

Goldsmith then cross-examined Nikpouri. He stated that he had been hired to perform computer duties, but had also been asked to sell cars, fix overhead doors, shave concrete, work after hours, and mop floors. He asked why he was not paid for these tasks and why he had to fight Cermak on his final pay.

Nikpouri responded that no one asked Goldsmith to shave the floor. When Goldsmith attempted to explain his actions, the

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Referee reminded him to ask questions and instructed Nikpouri not to answer questions with questions.

Goldsmith then asked why he was assigned duties other than selling cars. Nikpouri admitted that he asked Goldsmith to mop, then testified that he would never ask Goldsmith to perform such duties when the company employs someone to do that. When Goldsmith attempted to explain what had happened, the Referee again reminded Goldsmith to ask questions rather than testify. The Referee then asked whether Goldsmith had any further questions, and he indicated that he did not.

In rebuttal, Goldsmith indicated that he left Cermak because he was not paid on time and "games" were being played with money. Although he was not told he would be paid for the additional tasks, either Nikpouri or Kareem instructed him to perform them and management had indicated he would be taken care of.

He also disputed that his wages were timely. While employees were to be paid weekly, in reality, they were paid whenever Kareem met with the accountant. He asserted that although he was a salaried employee, he worked 60 hours a week. His rough calculation of his hours in February 2009 indicated that he was earning approximately \$4.02 an hour, which led to the request for an increased commission. Upon receiving his last paycheck, Goldsmith signed a contract to that effect. The contract also stated that Goldsmith would no longer appear in

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company commercials. The Referee indicated that he could not consider this contract because he did not have a copy of it.

Nikpouri responded that Goldsmith actually owed the company \$1,250 when he left because of a December 2008 loan. He explained that the "loan" was a check with "loan" written on the memo line. During this explanation, Goldsmith repeatedly tried to speak, and the Referee threatened to end the hearing if he was not quiet. When Nikpouri began discussing the commercial, the Referee stopped him, stating it was not relevant to the proceeding.

Goldsmith explained that the check was for repairs to a car he had purchased from Cermak and that the check did not say "loan." Nikpouri responded that his copy of the check had "loan" written on it.

The Referee found that Goldsmith's separation from work was caused by Cermak's actions in that Goldsmith left because his paychecks were often late and wrong. The Referee determined that the prompt payment of wages for work performed was a material factor in an employee's condition of hire, and Cermak's continued failure to pay Goldsmith his wages in a timely manner was a compelling circumstance rendering the work unsuitable. Thus, the late payment of wages constituted good cause for leaving attributable to Cermak, which rendered Goldsmith eligible for unemployment benefits pursuant to section 601(A) of the Act (see

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820 ILCS 405/601(A) (West 2008)). Cermak appealed.

The Board determined that the Referee's decision was supported by the record and law, incorporated it as part of its decision, and found Goldsmith eligible for benefits.

Cermak then filed a complaint for administrative review in the circuit court. The court affirmed the decision of the Board and dismissed the complaint.

Before reaching the merits of this appeal, this court must address Cermak's contention that it was denied due process when the hearing before the Referee was so argumentative and confusing that the Referee was deprived of a coherent, orderly presentation of the evidence and, therefore, could not competently adjudicate the matter.

Our supreme court has held that while proceedings before an administrative agency are governed by the requirements of due process, due process is a flexible concept and requires only such procedural protections as the situation and the fundamental principles of justice demand. *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 92 (1992). In an administrative proceeding, due process does not require a full judicial proceeding. *Williams v. Board of Trustees*, 398 Ill. App. 3d 680, 691 (2010). Rather, a "fair hearing" before an administrative agency includes the opportunity to be heard, the right to cross-examine adverse witnesses, and impartiality in

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ruling on the evidence. *Abrahamson*, 153 Ill. 2d at 95. On review, this court must examine the procedures employed during the administrative hearing to determine whether they were fair and impartial. *Williams*, 398 Ill. App. 3d at 691. A claim of a due process violation will be sustained only upon a showing of prejudice in the proceeding itself. *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 825 (2009). As the question of whether Cermak was denied due process presents a question of law, our review is de novo. *Sudzus*, 393 Ill. App. 3d at 824.

Here, the record reveals that at the commencement of the proceeding, the Referee explained how the hearing would progress. Goldsmith was permitted to testify, then Nikpouri was permitted to cross-examine Goldsmith and testify. After Goldsmith presented additional testimony, Nikpouri was given an opportunity to respond. Before proceeding to closing arguments, each witness was permitted an additional chance to speak.

This court rejects Cermak's contention that the Referee was unable to control the hearing. While the Referee reminded the parties not to testify while asking questions and vice versa, each witness presented his case and cross-examined the other. Although the Referee had to remind the parties not to interrupt each other and to stay on-topic, there is no indication that the Referee was unable understand the testimony presented. See

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Abrahamson, 153 Ill. 2d at 95 (absent a showing to the contrary, state administrators are assumed to be capable of judging a case fairly on the basis of its individual circumstances). In fact, the record indicates that the Referee questioned the parties to clarify and develop certain testimony. This court notes that Cermak does not assert that the Referee made a biased determination on the evidence in violation of due process.

Sudzus, 393 Ill. App. 3d at 825. Accordingly, the administrative hearing met the requirements of due process and provided Cermak with a full and fair opportunity to be heard. Abrahamson, 153 Ill. 2d at 95.

Cermak next contends that the Board's finding that Goldsmith was eligible for unemployment benefits was against the manifest weight of the evidence because the record is devoid of evidence supporting the award of benefits.

This court reviews the decision of the Board, rather than that of the circuit court. Sudzus, 393 Ill. App. 3d at 819. The Board is the trier of fact in cases evaluating unemployment benefits claims, and its findings of fact are considered prima facie true and correct. Acevedo v. Department of Employment Security, 324 Ill. App. 3d 768, 771 (2001). When reviewing the Board's factual findings, this court must determine whether they are against the manifest weight of the evidence, the fact that an opposite conclusion may be reasonable is insufficient grounds to

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reverse. *Acevedo*, 324 Ill. App. 3d at 771-72. The Board's decision regarding an employee's eligibility for unemployment benefits is reviewed using a manifest weight of the evidence standard. *Grafner v. Department of Employment Security*, 393 Ill. App. 3d 791, 797 (2009).

The question of whether an employee left work for good cause attributable to his employer involves a mixed question of law and fact to which this court applies a "clearly erroneous" standard of review. *Childress v. Department of Employment Security*, 405 Ill. App. 3d 939, 942 (2010). An agency's decision is reversed as clearly erroneous only when a review of the record leaves this court with a definite and firm conviction that a mistake has been made. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001).

Pursuant to section 601(A) of the Act, a person is ineligible for unemployment benefits if he voluntarily left work without good cause attributable to the employer. See 820 ILCS 405/601(A) (West 2008). "Good cause" results from circumstances that create real and substantial pressure to terminate employment that would compel a reasonable person, in the same circumstances, to act in the same way. *Childress*, 405 Ill. App. 3d at 943; *Acevedo*, 324 Ill. App. 3d at 772 (good cause justifies an employee leaving "the ranks of the employed"). An employee has good cause to leave a position when, for example, a unilateral

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change in the terms and conditions of employment renders the job unsuitable. *Childress*, 405 Ill. App. 3d at 943. Generally, an employee's dissatisfaction with either his hours or his wages does not constitute good cause. *Acevedo*, 324 Ill. App. 3d at 772.

Here, Goldsmith testified that (1) employees were not paid in a timely manner, (2) he was not paid for three pay periods, and (3) he performed additional duties, at management request, for which he was never compensated. While Nikpouri initially admitted he asked Goldsmith to mop the floor, he then asserted that Cermak had employees to perform such duties. With regard to Goldsmith's final paycheck, Nikpouri asserted that Goldsmith owed the company money because of a previous loan, whereas Goldsmith testified that Cermak owed him money and that the "loan" actually consisted of funds from Cermak to repair a car that he had purchased from the company. The Board found Goldsmith's testimony that his wages were not paid in full in a timely manner to be credible, as evidenced by its decision; it is not this court's purview to reweigh the evidence presented to the administrative agency. *White v. Department of Employment Security*, 376 Ill. App. 3d 668, 672 (2007) (a reviewing court does not judge the witnesses' credibility or reweigh the evidence).

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Here, the record reveals that Goldsmith left his employment with Cermak when his position was rendered unsuitable by the late and inaccurate payment of his wages. *Childress*, 405 Ill. App. 3d at 943. As the uncertain nature of the amount and timing of paychecks created a real and substantial pressure upon Goldsmith to leave his employment (*Childress*, 405 Ill. App. 3d at 943), the Board's finding that Goldsmith left his position for good cause attributable to Cermak was not clearly erroneous (*AFM Messenger Service*, 198 Ill. 2d at 395). Accordingly, the Board's decision finding Goldsmith eligible for unemployment benefits pursuant to section 601(A) of the Act was not against the manifest weight of the evidence. *Grafner*, 393 Ill. App. 3d at 797.

Affirmed.