

2017 IL App (1st) 170917-U  
No. 1-17-0917

Order filed December 26, 2017

FIRST DIVISION

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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LINDA GAWRYCH,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	No. 16 L 50787
DEPARTMENT OF EMPLOYMENT SECURITY;	)	
DIRECTOR OF EMPLOYMENT SECURITY; BOARD	)	
OF REVIEW; and FOODS BY ME IV, LLC,	)	Honorable
	)	James M. McGing,
Defendants-Appellees.	)	Judge Presiding.

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JUSTICE HARRIS delivered the judgment of the court.  
Presiding Justice Pierce and Justice Simon concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Where plaintiff voluntarily left her employment without good cause attributable to her employer the Board of Review's denial of unemployment benefits is affirmed.
- ¶ 2 Plaintiff Linda Gawrych appeals from an order of the circuit court of Cook County affirming a final administrative decision by defendant, the Board of Review of the Department of

Employment Security (Board). The Board found that plaintiff left her employment voluntarily without good cause attributable to her employer, and thus, was ineligible for unemployment insurance benefits. On appeal, plaintiff contends that she was denied a fair and full hearing because the administrative law judge (ALJ) failed to ask questions to solicit additional evidence from her. Plaintiff also contends that the Board erred when it found her ineligible for benefits because she left her employment to care for her mother. We affirm.

¶ 3 The record shows that plaintiff was employed as a server at The Melting Pot restaurant, owned by defendant Foods By Me IV, LLC, from June 1, 2012, until June 10, 2016. She left her job after her manager denied her request for days off. Plaintiff applied to the Department of Employment Security (Department) for unemployment insurance benefits.

¶ 4 Foods By Me protested plaintiff's claim for benefits. Steven Huebner, general manager of The Melting Pot, submitted a written statement to the Department on behalf of Foods By Me. Therein, Huebner stated that plaintiff came to work on June 10 and said she was unable to work that weekend, June 11 and 12, as scheduled. Plaintiff had another full-time job as a dance instructor and claimed that she had dance recitals both days. Huebner told plaintiff that they needed her to work her shifts, and if she was off, she would have to find someone to cover for her. Plaintiff was told that she could call the restaurant's other locations to try to find someone to cover for her, as was done in the past for both her and other employees. Plaintiff refused to find someone to cover her shifts. She left the building and never returned, thus abandoning her shift.

¶ 5 A Department claims adjudicator conducted an initial telephone interview with plaintiff to assess her eligibility for benefits. During that interview, plaintiff stated that the restaurant manager was very hostile and unprofessional, and refused to grant her requests for days off. The

final incident occurred after there had been a fire in the apartment above hers on June 7. Smoke had spread into her apartment and she needed to air it out. A manager told her to take off the following day, and she did. When she returned to work, she informed Huebner that her apartment was going to be aired out the next day, and she needed to take that day off. Huebner refused and told her that she already took her one day off. Huebner also scheduled plaintiff to work on Sundays, and she continued to work them, even though she had informed him that she was not available on Sundays because she taught dance classes that day. Plaintiff told the claims adjudicator “I quit because I needed time off for [the] fire and he refused.” Plaintiff further stated that on June 10, she again told Huebner that she needed to take time off. He refused, and told her that if she did not like it “there was the door.” Plaintiff stated “since he was not going to give me the days I needed he would have fired me, so instead I quit.”

¶ 6 After speaking with plaintiff, the claims adjudicator conducted a telephone interview with a man named Mike from Foods By Me. Mike stated that plaintiff had a pattern of requesting days off after the work schedule had been posted. If plaintiff was unable to work, there were two other restaurants she could call to try to find a replacement. Plaintiff’s application indicated that she was available to work on Sundays, and she had done so, even though she claimed that was supposed to be her day off. Plaintiff was never told that she did not have to work on Sundays. Management had already given plaintiff days off for her dance classes, which appeared to be more important to her than her restaurant job. The last day plaintiff came in to work, she said “I quit.”

¶ 7 The claims adjudicator issued a written determination finding that plaintiff voluntarily quit her job when she could not work her assigned schedule due to personal reasons. The

adjudicator found that the evidence thus showed that plaintiff voluntarily left her employment with Foods By Me because she considered the working conditions hazardous or unsatisfactory. The adjudicator further found that, because the employer was aware of the conditions and had the ability to control the conditions or acts, plaintiff's reason for leaving was attributable to the employer. However, because plaintiff did not exhaust reasonable alternatives in an effort to correct the situation prior to leaving, plaintiff left work voluntarily without good cause attributable to the employer. Consequently, the claims adjudicator concluded that plaintiff was ineligible for unemployment insurance benefits.

¶ 8 Plaintiff appealed that decision to the Department referee. In her written appeal, plaintiff claimed that she exhausted reasonable alternatives in an effort to correct the situation prior to leaving. Plaintiff stated that she attempted to speak with Huebner on several occasions, but he made no attempt to listen or make any reasonable adjustments. On June 9, plaintiff attempted to notify Huebner that she had no choice but to "put [her] 2 weeks in" due to the scheduling issues and his unwillingness to grant her necessary time off with no opportunity to find a replacement. He ignored her, took a call, and mouthed "[w]e'll talk about this tomorrow." The next day, June 10, Huebner refused to discuss time off and yelled "[t]here's the door." Plaintiff stated that she tried to find replacements for her shifts, but none were available. She stated that she needed the days off "due to the fire in my condo building that needed attention and my mom's cancer surgery." Plaintiff said she did not abandon her shift, but was told to leave and felt unsafe when Huebner yelled at her. She further stated that she had no choice because she would have been fired if she did not come to work.

¶ 9 An ALJ for the Department conducted a telephone hearing to consider plaintiff's appeal. Foods By Me did not provide the ALJ with a contact number as required, and therefore, did not participate in the hearing. Plaintiff testified under oath that she quit her job on June 10 due to a scheduling issue that Huebner was unwilling to resolve. Plaintiff was at work on Monday, June 6, when she was notified that there was a fire in her apartment building directly above her unit. The fire department was not allowing anyone into her building, so she finished her shift. The manager on duty, Pat, told plaintiff to take Tuesday off to address the fire situation, and she did. On Tuesday, Pat texted plaintiff that it was fine with him if she took the weekend off "to get situated," but she needed to speak with Huebner to confirm and get his approval. Plaintiff did not work on Wednesdays. On Thursday, June 9, plaintiff told Huebner that there had been a fire in her condo and that she needed Saturday off to take care of the smoke damage. Huebner denied her request. Plaintiff reminded Huebner that she was not available to work on Sundays, but he had scheduled her to work. She requested Sunday off as an "extra precaution." Huebner shook his head and told her that there were no substitutes available because everyone was scheduled to work. Plaintiff testified "at this point I didn't say it, but my mom was having cancer surgery." At the end of the night, plaintiff told Huebner that she would have to quit because she could not find a replacement. He ignored her, answered a phone call, and walked away. He mouthed to her that they would discuss it the next day, and she left.

¶ 10 Plaintiff further testified that on Friday, June 10, she again asked Huebner about taking the days off. Huebner yelled at plaintiff. She gathered her belongings and left. Plaintiff knew the policy was that if you did not work your scheduled shift, you would be fired.

¶ 11 Plaintiff acknowledged to the ALJ that she did not attempt to contact the owners after the incident. She had emailed them a month earlier, telling them that she could not continue working on Sundays. Management had started scheduling plaintiff to work on Sundays about three months before she quit. Huebner had told plaintiff that she was helping him out until he hired more people. She did not refuse to work Sundays at that time because she needed the job. Management was aware that she was a dance instructor and occasionally needed days off for performances. The fact that she was not available to work on Sundays was a stipulation for her getting hired and working there.

¶ 12 Plaintiff testified that she left her job on June 10 because she knew she would be fired if she did not work her shift. She further testified “my mom was having cancer surgery on Monday the 13th, which I tried letting him know about, too. I needed off for that.”

¶ 13 As the hearing concluded, the ALJ asked plaintiff if she had anything else to add. She testified “there’s a lot of other reasons. It wasn’t really a suitable work environment, but pertaining to what actually happened, yes, that’s everything.” In closing, plaintiff argued that she had exhausted all reasonable alternatives in an effort to correct the situation prior to leaving. She attempted to speak with Huebner on several occasions, but he did not listen or make any reasonable adjustments for her. She testified that she had no recourse other than to leave because she would have been fired anyway.

¶ 14 The ALJ issued a written decision affirming the denial of benefits to plaintiff. The ALJ found that plaintiff quit due to job dissatisfaction. She requested to be off work for Sunday, June 12, to address personal issues, and when the general manager denied her request, she became upset and quit. The ALJ noted that plaintiff did not address her concerns to the owners prior to

leaving. The ALJ found that plaintiff did not establish good cause because she did not show that her leaving was necessary due to the work becoming unsuitable and attributable to the employer. The ALJ concluded that plaintiff left work voluntarily without good cause attributable to her employer, and therefore, she was not eligible for unemployment benefits.

¶ 15 Plaintiff appealed the ALJ's decision to the Board. She asserted that she was eligible for benefits under section 601(B)(1) of the Unemployment Insurance Act (Act) (820 ILCS 405/601(B)(1) (West 2016)) because she left work to care for her mother. Plaintiff claimed that she testified at the hearing that she told Huebner that her mother was having cancer surgery and that she needed to care for her during and after, requiring time off work, but he refused. Plaintiff attached documents to her appeal to verify her mother's surgery and medical leave. Plaintiff stated that she could not produce the documents at the hearing because her mother was not mobile and could not search for them at that time. Plaintiff also alleged that she was eligible for benefits because Huebner created a hostile work environment that was no longer tolerable. In addition, plaintiff attached a fire department report for the incident at her building. She did not believe it was necessary to submit the report as evidence at the hearing because she was prepared to cross-examine Huebner to demonstrate his unfounded mistrust of her and his hostility in the work environment. Plaintiff also asserted that she addressed her concerns to the general manager prior to leaving. She did not raise her concerns with the owners because they were not located at the restaurant and their contact information was not provided to employees.

¶ 16 The Board reviewed the record, including the transcript from the telephone hearing, and considered the claims raised in plaintiff's appeal. The Board noted that plaintiff sought to submit documents as additional evidence on appeal. However, it did not consider her request because

she failed to demonstrate that, for reasons not her fault and beyond her control, she was unable to produce the evidence at the hearing before the ALJ, as required by the benefit rules. The Board also found that the record adequately set forth the evidence and that no further evidentiary proceedings were necessary.

¶ 17 In its factual findings, the Board found that the evidence showed that plaintiff sought to take a weekend off work due to a fire where she lived. Plaintiff believed the employer would allow her to be off, but denied her request. The evidence further showed that plaintiff informed the general manager that she was leaving her job due to a scheduling issue. The Board quoted plaintiff's statement to the claims adjudicator "I quit because I needed time off for fire and he refused." The Board found that plaintiff voluntarily left her employment due to a scheduling issue. The evidence failed to show that there was a substantial breach of the hiring terms or working agreement by the employer, or that plaintiff was subjected to conditions that would have rendered the job unsuitable for her. The Board therefore found that plaintiff voluntarily left her employment for personal reasons which were not attributable to the employer. The Board concluded that plaintiff was not eligible for benefits, and affirmed the ALJ's decision.

¶ 18 Plaintiff appealed the Board's ruling to the circuit court of Cook County. The circuit court held a hearing and found that the Board's decision was not clearly erroneous. Accordingly, the court affirmed the Board's decision denying plaintiff unemployment benefits.

¶ 19 On appeal, plaintiff first contends that she was denied a fair and full hearing because the ALJ failed to ask questions to solicit additional evidence from her. Plaintiff claims that it was the ALJ's duty to ask her questions to determine whether the proximate cause of her separation was Huebner's denial of her request for leave related to her mother's cancer treatment, and whether



that denial violated the Family and Medical Leave Act (FMLA) (29 U.S.C. § 2601 *et seq.* (2016)).

¶ 20 Defendants respond that plaintiff has forfeited her contention because she did not raise this argument before the Board, but instead, raised it for the first time in the circuit court. Alternatively, defendants argue that plaintiff's claim is without merit because she was given a full and fair opportunity to present her testimony and evidence, which showed that she requested the weekend off to address the fire damage.

¶ 21 It is well established that an issue or argument not presented at an administrative hearing is waived and cannot be raised for the first time on administrative review. 735 ILCS 5/3-110 (West 2016); *Carpetland U.S.A., Inc. v. Illinois Department of Employment Security*, 201 Ill. 2d 351, 396-97 (2002). This court's review is confined to the issues, arguments and evidence that were presented before the Board. *Texaco-Cities Service Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 278-79 (1998).

¶ 22 Here, the record shows that plaintiff never raised any issue before the Board alleging that she was denied a fair hearing by the ALJ. Nor did plaintiff raise any issue regarding a possible violation of the FMLA before either the ALJ or the Board. Accordingly, plaintiff has waived this issue for review, and we decline to consider it any further. See *Texaco-Cities*, 182 Ill. 2d at 278.

¶ 23 Plaintiff next contends that the Board erred when it found her ineligible for benefits. Plaintiff asserts that she left her employment due to Huebner's denial of her request for a day off to drive her mother to cancer surgery. Plaintiff claims that on June 10 she told Huebner that she needed to drive her mother to cancer surgery on June 13, and he angrily denied her request. Plaintiff argues that Huebner never provided her with an opportunity to present medical

documentation, nor did he offer her a reasonable accommodation. She argues that because Foods By Me did not accommodate her need to assist her mother, she qualified for benefits under section 601(B)(1) of the Act.

¶ 24 Defendants respond that the Board's decision denying plaintiff benefits was not clearly erroneous because her dissatisfaction with Huebner's denial of her request for time off was not good cause attributable to her employer. Defendants argue that the Board's factual finding that plaintiff left her employment because Huebner refused to grant her the weekend off to tend to the fire damage was not against the manifest weight of the evidence. Defendants assert that it is unclear whether plaintiff ever told Huebner about her mother's surgery and requested the day off for June 13. Defendants argue that even if she did, plaintiff's request to be off on June 13 was irrelevant given the fact that Huebner had denied her request to be off on June 11 and 12.

¶ 25 This court reviews the final decision of the Board rather than that of the circuit court. *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010). The Board's factual findings are considered *prima facie* true and correct, and will not be disturbed unless they are against the manifest weight of the evidence. *520 South Michigan Avenue Associates v. Department of Employment Security*, 404 Ill. App. 3d 304, 312 (2010). Under this standard, the Board's factual findings "must stand unless 'the opposite conclusion is clearly evident.'" *Id.* at 313 (quoting *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204 (1998)). Reviewing courts are precluded from reweighing the evidence, resolving conflicts in the testimony, or evaluating the credibility of the witnesses. *Woods v. Illinois Department of Employment Security*, 2012 IL App (1st) 101639, ¶ 16. Nor may a reviewing court substitute its judgment for that of the Board. *520 South Michigan Avenue*, 404 Ill. App. 3d at 317. Where the

record contains any evidence that supports the Board's factual findings, they are not against the manifest weight of the evidence and must be sustained. *Woods*, 2012 IL App (1st) 101639, ¶ 16.

¶ 26 The ultimate question of whether an employee voluntarily left work without good cause attributable to her employer is a mixed question of fact and law, reviewed under the clearly erroneous standard. *Lojek v. Department of Employment Security*, 2013 IL App (1st) 120679, ¶ 32. The Board's decision will be found clearly erroneous only where a review of the entire record leaves the reviewing court with a definite and firm conviction that that a mistake has been made. *Id.*

¶ 27 Pursuant to section 601(A) of the Act, a person who leaves her job voluntarily and without good cause attributable to her employer is not eligible for unemployment insurance benefits. 820 ILCS 405/601(A) (West 2016); *Nykaza v. Department of Employment Security*, 364 Ill. App. 3d 624, 625 (2006). "Good cause results from circumstances that produce pressure to terminate employment that is both real and substantial and that would compel a reasonable person under the circumstances to act in the same manner." *Childress v. Department of Employment Security*, 405 Ill. App. 3d 939, 943 (2010). Generally, a plaintiff's dissatisfaction with her hours does not constitute good cause to leave her employment. *Lojek*, 2013 IL App (1st) 120679, ¶ 36.

¶ 28 Section 601(B) allows benefits for voluntarily leaving in certain situations, including where an individual left work because her assistance was necessary to care for her parent who, as reasonably verified, was in poor physical or mental health, or has a physical or mental disability, and the employer is unable to accommodate the employee's need to provide that assistance. 820

ILCS 405/601(B)(1) (West 2016). It is plaintiff's burden to establish that she satisfies the eligibility requirements for benefits. *Lojek*, 2013 IL App (1st) 120679, ¶ 34.

¶ 29 Here, the record shows that the Board found that plaintiff left her employment due to a scheduling issue related to the fire, not her mother's cancer surgery. The Board expressly found that the evidence showed that plaintiff had requested the weekend off due to a fire at her residence. The Board quoted plaintiff's statement to the claims adjudicator "I quit because I needed time off for fire and he refused." The record shows that during her interview with the claims adjudicator, plaintiff only discussed her request to take time off to address the smoke damage in her apartment. She never mentioned that she requested a day off to take her mother for cancer treatment.

¶ 30 The record further shows that during her hearing with the ALJ, plaintiff testified that on Thursday and Friday she told Huebner that she needed to take the weekend off to take care of the smoke damage in her apartment, and he denied her request. Plaintiff also testified "at this point I didn't say it, but my mom was having cancer surgery." This testimony shows that plaintiff did not mention her mother's surgery to Huebner at that time. Plaintiff testified that she left her job on Friday, June 10, because she knew she would be fired if she did not work her shift. She then testified "my mom was having cancer surgery on Monday the 13th, which I tried letting him know about, too. I needed off for that." At no point during the hearing did plaintiff testify that she informed Huebner that she needed the day off for Monday, June 13 to take her mother to her cancer surgery. The record shows that when plaintiff appealed to the Board, she then asserted for the first time that the reason she left her employment was to care for her mother.

¶ 31 The record therefore shows that the evidence presented to the claims adjudicator and the ALJ supported the Board's factual finding that plaintiff left her employment because her employer denied her request to take the weekend off to tend to the fire damage. *Woods*, 2012 IL App (1st) 101639, ¶ 16. Accordingly, the Board's finding that the scheduling issue was related to the fire was not against the manifest weight of the evidence. *Id.*

¶ 32 Furthermore, plaintiff's dissatisfaction with her work hours, including her denied request for days off, did not constitute good cause to leave her employment. *Lojek*, 2013 IL App (1st) 120679, ¶ 36. The record thus shows that plaintiff failed to meet her burden of establishing her eligibility for benefits under the Act. *Id.* ¶ 34. Based on this record, the Board's determination that plaintiff was not eligible for unemployment benefits because she voluntarily left her employment without good cause attributable to her employer was not clearly erroneous. *Id.* ¶ 32.

¶ 33 For these reasons, we affirm the final administrative decision of the Board of Review.

¶ 34 Affirmed.