2012 IL App (1st) 1110628-U

FOURTH DIVISION
February 6, 2012

No. 1-11-0628

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEGGY A. TERRY, Plaintiff-Appellant, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; DIRECTOR OF THE ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; BOARD OF REVIEW; and SOUTH HOLLAND SCHOOL DISTRICT 151, Defendants-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 10 L 51228 The Honorable Elmer James Tolmarie, III, Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Sterba concurred in the judgment.

ORDER

Held: Plaintiff failed to establish she was eligible for unemployment benefits under section 601(A) of the Illinois Unemployment Insurance Act (Act) (820 ILCS 405/601(A) (West 2008)) because she voluntarily left her employment as a school teacher without cause attributable to her employer when she retired rather than complete a three-step "remediation" process. The evaluation process did not cause her leave-taking, and plaintiff's failure to comply with the conditions of employment by earning satisfactory ratings could not be attributable to her employer. This court affirmed the decision of the circuit court of Cook County, which affirmed the decision of the Board determining that plaintiff was ineligible for unemployment benefits.

¶ 1 Plaintiff Peggy A. Terry 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). The Board ruled plaintiff was ineligible for unemployment benefits under section 601(A) of the Illinois Unemployment Insurance Act (Act) (820 ILCS 405/601(A) (West 2008)) because she voluntarily left work without good cause attributable to her employer when she retired. On appeal, plaintiff claims that she did not voluntarily leave work without cause attributable to her employer and is entitled to receive unemployment benefits. We affirm.

¶ 2 Plaintiff was employed by South Holland School District 151 (School District) as a tenured teacher for about 20 years until June 9, 2009, when she resigned from her position pursuant to a retirement agreement. Plaintiff reported that during her 20-year employment, she received satisfactory performance evaluations. The record shows that in April 2008, however, plaintiff received an unsatisfactory rating for the 2007-2008 school year, and the School District placed her on a remediation plan as required by the School Code (105 ILCS 5/1-1 *et seq*. (West 2008)). Under that plan, plaintiff was to be evaluated three times within a period of 90 school days at 30-day intervals. See 105 ILCS 5/24A-5 (West 2008).[1] Successful completion of the plan would have resulted in continued employment, and unsuccessful completion, in dismissal pending the school board's approval. See *Id*.; 105 ILCS 5/24-12 (West 2008). The remediation plan, itself,

[1] The parties agree that article 34 of the School Code (105 ILCS 5/34-1 *et seq*. (West 2008)), which applies to districts with populations of over 500,000, is not relevant here.

does not appear in the record.

¶ 3 Plaintiff was observed in September 2008, and received her first remediation evaluation on October 3, 2008. The principal gave plaintiff unsatisfactory ratings in the eight evaluated areas, with accompanying notes. With regard to "planning and preparation," for example, the principal evaluator noted that plaintiff had failed to follow the remediation plan and only once in four weeks had she consulted with her evaluating administrator. Under "subject matter preparation," the principal noted that plaintiff had failed to follow building-wide instructional directives, procedures, and initiatives including posting learning objectives, bell work, guided reading groups, and research strategies. The principal stated, in reference to "classroom management," that students were not engaged in the lesson plans, with some drawing during a lesson, and these students went unnoticed by plaintiff. Regarding use of "preparation time," the principal added that plaintiff had failed to collaborate and communicate with staff at meetings or communicate concerns regarding team meetings, as required by her remediation plan.

¶ 4 Plaintiff was evaluated a second time on November 20, 2008, and again received unsatisfactory marks. That evaluation does not appear in the record. The third evaluation was scheduled for January 20, 2009.

¶ 5 At this point, the teachers union suggested that plaintiff resign in order to protect her employment record, and in early December 2008, a union attorney approached the School District to discuss plaintiff's options. On December 23, 2008, plaintiff entered into a retirement agreement with the School District and pursuant to that agreement submitted

her employment resignation, effective at the end of the school year. The remediation process ceased, and plaintiff did not receive her third and final evaluation. Plaintiff's last day of work was June 9, 2009. Following plaintiff's resignation, she sought employment elsewhere, but was unsuccessful.

¶ 6 Plaintiff then applied for unemployment benefits claiming her termination "was forced *** do [*sic*] to the poor evaluations" she received from the principal. A claims adjudicator conducted an interview of both parties. In the interview, plaintiff added that she was being "set up" for termination, harassed by the principal, and further, that she had written letters to the principal expressing concerns about the remediation plan. Although plaintiff apparently submitted these letters for review, they do not appear in the record on appeal. Plaintiff stated, "being that I was unsuccessfully completing the remediation plan," and on advice of the union, "it was best that I terminate my services with the district."

¶ 7 The School District protested plaintiff's claim. The School District alleged that plaintiff was ineligible for benefits because she voluntarily resigned for "retirement purposes," and received an $8,000 retirement incentive under a collective bargaining agreement. The School District attached plaintiff's resignation letter, the relevant portion of the collective bargaining agreement, and payroll records showing the payment had issued.

¶ 8 On January 23, 2010, a claims adjudicator for the Department determined that plaintiff was ineligible for unemployment benefits because she left work voluntarily without good cause attributable to her employer when she retired. Plaintiff filed a motion to reconsider,

which was denied, and then appealed.

¶ 9 On March 31, 2009, a Department referee conducted a telephonic hearing in the matter. Both parties appeared represented by counsel. Plaintiff testified that she had received two unsatisfactory evaluations under the remediation plan and the "District was moving to terminate me" after the third and last evaluation. She thus testified that she was forced to leave her employment in order to protect her professional status. She testified that given the content of the previous two evaluations, she believed her final evaluation would be unsatisfactory as well, and thereafter she would have been terminated. Plaintiff could not identify a particular person who told her she would be terminated; she testified it was merely "evident" based on her evaluations. Plaintiff acknowledged that it was her attorney who approached the School District prior to the final evaluation to discuss her options.

¶ 10 Douglas Hamilton, the School District superintendent, testified that had plaintiff not submitted her resignation, continuing work would have been available. Hamilton further testified that the School District was still in the process of evaluating plaintiff when she resigned. As a result, Hamilton could not determine whether plaintiff would have been terminated following the remediation plan period. He testified that had plaintiff's third evaluation been rated satisfactory, she could have continued in her employment.

¶ 11 On April 1, 2010, the referee affirmed the claims adjudicator’s determination, finding that plaintiff was ineligible to receive unemployment benefits under section 601(A) of the Act because she voluntarily left work without good cause attributable to her employer. The

referee concluded there was insufficient evidence to establish the School District subjected plaintiff "to such conditions of abuse as would have rendered the job unsuitable for her." The referee concluded plaintiff's reason for leaving work was "purely personal" and not attributable to her employer.

¶ 12 Plaintiff appealed to the Board. On July 12, 2010, the Board affirmed the referee's decision. The Board concluded that, although plaintiff's decision to resign to protect her employment record may have been "for a good personal reason," it did not constitute good cause attributable to the employer for voluntarily leaving work. The Board noted that good cause exists when evidence establishes that a condition at work becomes so incompatible with the employee's well-being, so as to compel her to quit. The Board concluded that the School District's decision to exercise "its prerogative to conduct, with notice, certain scheduled evaluations of [plaintiff's] teaching expertise" was not such a condition. Likewise, the Board concluded that the School District had not violated any of the conditions agreed to at the time of hire and so plaintiff's leave-taking could not be attributable to her employer. The Board found that plaintiff failed to establish that she was "coerced, forced or manipulated into leaving her employment." The Board further concluded that plaintiff only suspected discharge, but mere suspicion was not enough to establish imminent threat of discharge, and leave-taking in such a case would be considered voluntary. The Board added that even if plaintiff had received a final unsatisfactory evaluation, she still maintained alternative administrative remedies to challenge the discharge. Based on the foregoing, the Board determined that plaintiff

voluntarily left work without good cause attributable to her employer and therefore was not entitled to unemployment benefits.

¶ 13 Plaintiff subsequently filed a complaint for administrative review in the circuit court of Cook County, and the court affirmed the Board's decision.

¶ 14 *ANALYSIS*

¶ 15 Plaintiff has appealed and now challenges the Board's determination. The Illinois Attorney General has filed a brief in response on behalf of the Department, its Director, the Board, and the School District. The School District also has filed a separate brief in response. Defendants collectively contend the Board's decision that plaintiff left work voluntarily without good cause attributable to her employer was neither against the manifest weight of the evidence nor clearly erroneous. They argue the judgment of the circuit court therefore should be affirmed.

¶ 16 Our review of an administrative law proceeding is limited to the propriety of the Board's decision. *Oleszczuk v. Department of Employment Security*, 336 Ill. App. 3d 46, 50 (2002). Although defendants, at various points in their briefs, argue plaintiff has raised a factual question requiring a manifest weight of evidence standard of review, we disagree. Plaintiff has asked this court to examine the legal effect of facts established during administrative proceedings, *i.e.* whether plaintiff's potential dismissal following teacher evaluations compelled her retirement and rendered her decision to leave work involuntary. The question of whether plaintiff voluntarily left work without good cause attributable to her employer therefore involves a mixed question of law and fact to which

we apply the "clearly erroneous" standard of review. See *Childress v. Department of Employment Security*, 405 Ill. App. 3d 939, 942 (2010), citing *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001); *Horton v. Department of Employment Security*, 335 Ill. App. 3d 537, 540 (2002). Under this significantly deferential standard, an agency decision may be deemed clearly erroneous only where a review of the record leaves the reviewing court with a definite and firm conviction that a mistake has been made. *AFM Messenger Service*, 198 Ill. 2d at 393-395. For the following reasons, we cannot say the Board's decision was clearly erroneous.

¶ 17 Receipt of unemployment benefits is conditioned on eligibility under the Act, and the burden of proving eligibility rests with the claimant. *Grigoleit Co. v. Department of Employment Security*, 282 Ill. App. 3d 64, 68 (1996); *Collier v. Department of Employment Security*, 157 Ill. App. 3d 988, 991 (1987). Section 601(A) of the Act disqualifies a former employee from receiving unemployment benefits if she left work voluntarily without good cause attributable to the employer. 820 ILCS 405/601(A) (West 2008). 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. *Collier*, 157 Ill. App. 3d at 992. An example of good cause is a substantial and unilateral change in employment that renders the job unsuitable. *Collier*, 157 Ill. App. 3d at 992. The salient question is whether the conduct of the employer caused the termination of the employment to occur. *Jaime v.*

Department of Employment Security, 301 Ill. App. 3d 930, 936 (1998).

¶ 18 Plaintiff argues that she established "cause" because an unsatisfactory rating on her third and final evaluation was inevitable, and her dismissal under the School Code essentially foreordained. According to plaintiff, the school district used the remediation process "as a hammer to pummel" plaintiff out of her position. She thus argues her employer created a real and substantial pressure to terminate employment that would have compelled any reasonable person to act as she did.

¶ 19 We disagree. In this case, plaintiff did not complete the remediation process. Rather, before her third and final evaluation, plaintiff approached school officials through her attorney to discuss what ultimately resulted in her retirement. Plaintiff could not identify a particular person who told her she would be dismissed, and superintendent Hamilton testified that plaintiff's position remained available. Hamilton could not determine whether plaintiff would have been terminated following her final evaluation because she did not complete it. While plaintiff testified that she believed her third and final evaluation would be unsatisfactory, and thus she would be dismissed, the Board resolved the conflict in testimony against her. Consistent with the referee's decision, the Board found plaintiff failed to establish she was "coerced, forced or manipulated into leaving her employment" and that a dismissal, although possible, was not certain. The Board's findings and conclusions on such factual questions are deemed *prima facie* true and correct; this court will not reweigh the evidence or substitute its judgment for that of the agency. See 735 ILCS 5/3-110 (West 2008); *Cinkus v. Village of Stickney Municipal*

Officers Electoral Board, 228 Ill. 2d 200, 210 (2008). Plaintiff does not now cite any facts in the record that would contradict the Board's findings or challenge the basis for the unsatisfactory ratings she earned in her evaluations. We thus reject plaintiff's hint that some foul play forced her resignation or that the evaluation system and unsatisfactory ratings were somehow tantamount to constructive discharge. Given the evidence and law, we defer to the Board's conclusion that plaintiff's work had not "become so unsuitable as to affect her well being," such that it created substantial pressure to terminate employment. See *Zbiegien v. Department of Labor*, 156 Ill. App. 3d 395, 401 (1987) (suggesting future change in employment insufficient for cause). Plaintiff failed to establish cause.

¶ 20 We further conclude that even if plaintiff had established "cause," she still cannot show it was "attributable to her employer." As the Board noted, it was the school district's "prerogative to conduct, with notice, certain scheduled evaluations of claimant's teaching expertise." Earning satisfactory marks as a school teacher clearly was a condition of plaintiff's employment and, the remediation process, an aid to correct her shortfallings. See 105 ILCS 5/24A-5 (West 2008) (90-day remediation plan, with evaluations every 30 days, designed to "correct deficiencies cited" in teaching). The evidence shows that plaintiff was unable to comply with the remediation plan dictates. The remediation evaluation in the record states more than once that plaintiff was not following the recommended course of action. In cases like the present, employees are required to make reasonable efforts to resolve employment conflicts. *Henderson v. Department of*

Employment Security, 230 Ill. App. 3d 536, 539 (1992); see also *Childress*, 405 Ill. App. 3d at 944 (holding same). Plaintiff had three chances to correct her teacher deficiencies. She failed to do so the first and second time and did not even try the third. It was plaintiff's actions, not those of her employer, that created cause and plaintiff who voluntarily retired. See *Hawkins v. Department of Employment Security*, 268 Ill. App. 3d 927, 931 (1994) (holding, plaintiff bus driver lacked qualification for continued employment because of own inaction for failing to obtain required commercial driver's license, rather than action attributable to employer). Plaintiff has failed to fulfill her burden of proving eligibility under the Act.

¶ 21 In reaching this conclusion, we reject as disingenuous plaintiff's contention that the Board failed to take into account the School Code. While the Board did not cite the specific statute at issue, it set forth its requirements clearly and cogently, noting the 90-day remediation period with three evaluations at 30-day increments. The Board noted if a teacher does not receive satisfactory evaluations, she may be subject to discharge. Plaintiff's claim fails.

¶ 22 Plaintiff also contends this case is controlled section 2840.125 of the Administrative Code (Code) (56 Ill. Adm. Code §2840.125, added at 17 Ill. Reg. 17929 (eff. October 4, 1993)), which provides that an employee who accepts a buyout package or enters into early retirement is eligible for benefits under section 601(A) when she knows or reasonably believes that, within the proximate future, her employment will be terminated under terms or conditions less favorable to those of the offer. An example of reasonable

belief is when the employee seeks, but does not receive, assurances from her employer that employment will not soon be terminated. Plaintiff argues that she did just that, but was "rebuffed."

¶ 23 Defendants respond that plaintiff failed to raise this specific argument or cite this provision of the Administrative Code during proceedings below. They note the established rule that arguments not raised before an agency are waived for purposes of administrative review. See *LeCompte v. Zoning Board of Appeals for the Village of Barrington Hills*, 2011 IL App (1st) 100,423, ¶51; *International Brotherhood of Electrical Workers v. Illinois Labor Relations Board*, 2011 IL App (1st) 101,671, ¶44, n. 7.

¶ 24 Relying on *Nykaza v. Department of Employment Security*, 364 Ill. App. 3d 624 (2006), an unemployment case, plaintiff counters that a factual basis exists in the record to raise the claim that she accepted early retirement over discharge and sought assurances from her employer. In *Nykaza*, however, the plaintiff not only set forth a factual basis for his claim at the benefits hearing, but also cited the relevant statute in his appeal to the Board, stating the referee had failed to make mention of it. *Nykaza*, 364 Ill. App. 3d at 627-28. The Board declined to consider the statute, and this court affirmed the circuit court's reversal and remand to the Board for its consideration. *Id*. at 628.

¶ 25 Plaintiff's reliance on *Nykaza* is misplaced. Unlike in that case, here, plaintiff failed to cite section 2840.125 at any time during administrative proceedings, and it did not factor into the Board's decision. Moreover, the record does not demonstrate, as plaintiff argues,

that she sought assurances from her employer that she could remain in continued employment. That plaintiff approached her employer to discuss options, without more, is not the equivalent of obtaining assurance. Likewise, in her testimony, plaintiff did not specify whether she communicated concerns to the proper administrative authorities. Under these circumstances, we agree that plaintiff has forfeited her claim. See *LeCompte*, 2011 IL App (1st) 100,423, ¶51; *International Brotherhood of Electrical Workers*, 2011 IL App (1st) 101,671, ¶44, n. 7.

¶ 26 Even forfeiture aside, we question whether section 2840.125 of the Administrative Code would apply in this case. Given the illustrative examples cited in 2840.125, it appears to apply to scenarios where an employer's fiscal concerns require a number of employees to retire or resign, not to a scenario like the present involving work performance. See 56 Ill. Adm. Code §2840.125, added at 17 Ill. Reg. 17929 (eff. October 4, 1993), and examples cited therein. Plaintiff has not cited any cases suggesting section 2840.125 applies to work performance scenarios.

¶ 27 Finally, plaintiff challenges the Board's conclusion that even if plaintiff's final evaluation had been unsatisfactory, she still had other administrative avenues to challenge her dismissal. This was clearly alternative "even if" reasoning and not based on facts in evidence. Because we affirm the Board's decision on the basis of its primary holding, we need not consider the propriety of the Board's reasoning on that point.

¶ 28 Based on the foregoing, we affirm the judgment of the circuit court of Cook County affirming the decision of the Board, which found plaintiff ineligible for unemployment

benefits.

¶ 29 Affirmed.