2013 IL App (1st) 112122-U

THIRD DIVISION
March 27, 2013

No. 1-11-2122

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MICHAEL DAY,	)	
	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 11 L 50368
	)	
	)	Honorable
ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; DIRECTOR OF THE ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; BOARD OF REVIEW; and PROVISO TOWNSHIP HIGH SCHOOL DISTRICT 209,	)	Alexander P. White,
	)	Judge Presiding.
Defendants-Appellees.	)	

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Neville and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* Plaintiff was not eligible for unemployment benefits where he worked as a substitute teacher during the 2009-2010 academic year and had a reasonable assurance of returning to work in the same capacity the following academic year. Circuit court also did not err in denying plaintiff's motion to amend his complaint that was not timely-filed.

¶ 2 Plaintiff, Michael Day, a high school substitute teacher, appeals from a circuit

court order confirming a decision by the Board of Review of the Illinois Department of Employment Security finding him ineligible for unemployment benefits under section 612 of the Illinois Unemployment Insurance Act (Act). 820 ILCS 405/612 (West 2008). Plaintiff also appeals the circuit court's order denying his motion to amend his complaint to add a claim for administrative review. For the following reasons, we affirm.

¶ 3 Plaintiff began working as a day-to-day, as-needed, substitute teacher for Proviso Township High School District 209 (District) in December 2008. In May 2010, plaintiff applied for unemployment insurance benefits with the Illinois Department of Employment Security (Department). On November 30, 2010, a claims adjudicator determined plaintiff was ineligible for benefits because he was not an "unemployed individual" under section 239 of the Act. 820 ILCS 405/239 (West 2008).[1] After a referee affirmed that decision, plaintiff appealed to the Board of Review (Board), which dismissed it as untimely.

¶ 4 In July 2010, plaintiff again applied to the Department for unemployment insurance benefits. On July 29, 2010, a claims adjudicator denied plaintiff's claim, finding him ineligible under section 612 of the Act. Section 612, which addresses unemployment benefits for "academic personnel," provides that an individual is ineligible

[1]Section 239 provides, in relevant part, "An individual shall be deemed unemployed in any week with respect to which no wages are payable to him and during which he performs no services or in any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount. The Director shall prescribe regulations applicable to unemployed individuals making such distinctions in the procedures as to total unemployment, part-total unemployment, partial unemployment of individuals, and other forms of short-time work as the Director deems necessary." 820 ILCS 405/239 (West 2008).

for unemployment benefits based on wages from an education institution for any week between two successive years if the individual has either a contract or a reasonable assurance he will perform services in the next academic year. 820 ILCS 405/612 (West 2008). The claims adjudicator found plaintiff worked during the 2009-10 academic year and had a reasonable assurance of returning as a substitute teacher during the 2010-2011 academic year after summer break. Plaintiff sought reconsideration of that determination asserting at the end of the 2009-2010 academic year, he heard nothing from the District about returning as a substitute teacher for the 2010-2011 academic year and had worked fewer days for the District in 2009-2010 than the previous year. The claims adjudicator denied reconsideration.

¶ 5 Plaintiff next filed an administrative appeal. On December 10, 2010, a Department referee conducted a telephone hearing with plaintiff and Kelly Brown, a human resources manager for the District. Testimony from the hearing showed the District had a list of substitute teachers it called when a full-time teacher was absent. For the 2010-2011 academic year, the list had 129 day-to-day substitute teachers, which was more than in previous years. The District tried to distribute the available work evenly among those on the list. Plaintiff's last day of work for the 2009-2010 academic year was May 21, 2010. After the academic year ended on June 4, 2010, the District did not inform plaintiff, either verbally or in writing, he could not return to work as a substitute the following year. The 2010-2011 academic year began on August 19, 2010. Plaintiff's first day as a substitute teacher that academic year was September 24, 2010. On several

occasions, the District called plaintiff to see if he was available to work, but he did not answer the phone. The District then told plaintiff to call when he was available to work to see if a substitute teacher was needed on that day. As of the hearing date, plaintiff worked five days since the beginning of the academic year, the last day being November 19, 2010. Plaintiff worked 20 days during the same period the previous academic year.

¶ 6 On December 11, 2010, the referee affirmed the claims adjudicator's determination, finding plaintiff was not eligible for benefits under section 612 of the Act, because he had worked for an educational institution in the 2009-2010 academic year, had a reasonable assurance of working in the 2010-2011 academic year, and indeed did work that year. The referee stated, "Although work for the [plaintiff] with the [District] may not be as plentiful as he would like, the preponderance of the evidence supports the conclusion that the [plaintiff] is ineligible for benefits under Section 612 of the Act, because he had reasonable assurance of returning to work." Plaintiff filed an administrative appeal to the Board, which issued a decision on February 25, 2011, affirming the referee.

¶ 7 On March 31, 2011, plaintiff filed a *pro se* complaint in the circuit court for administrative review of the Board's February 25, 2011 decision. Plaintiff attached a copy of that decision as well as a copy of the Board's February 24, 2011 decision dismissing his appeal of the referee's denial of his May 2010 application for benefits. Plaintiff's complaint made no reference to the February 24, 2010 decision, however. On June 16, 2011, plaintiff filed an emergency motion seeking to amend his complaint to add

the Board's February 24, 2011 decision for administrative review. Plaintiff asserted he was unable to exhaust his administrative remedies on that claim because the Board refused to hear his appeal.

¶ 8 On June 22, 2011, the circuit court entered an order denying plaintiff leave to amend his complaint and affirming the Board's February 25, 2011 decision. Plaintiff filed a timely *pro se* appeal. While the appeal was pending, plaintiff filed a motion in circuit court to supplement the record on appeal with a bystander's report of the June 22, 2011 proceedings. The circuit court denied the motion. Plaintiff did not appeal the circuit court order denying his motion to supplement the record, so to the extent respondent relies on facts in that report, which are not of record, we will disregard those portions of his argument. In re A.H., 359 Ill. App. 3d 173, 176 (2005). We also note plaintiff has not filed a reply brief. Under Supreme Rule 341(j), a reply brief is not required, and we proceed without benefit of a reply argument from plaintiff. 210 Ill.2d R. 341(j).

¶ 9 II. Analysis

¶ 10 Eligibility for Unemployment Benefits

¶ 11 Plaintiff contends the Board erred in finding him ineligible for unemployment benefits because although he worked as a substitute teacher in the 2009-2010 academic year, he did not have a "reasonable assurance" of performing the same service the following academic year since he did not work as a substitute teacher on the first day of the 2010-2011 academic year and worked fewer days in the 2010-2011 academic year than in 2009-2010 academic year.

¶ 12 Board decisions are reviewed in accordance with the Administrative Review Law. 820 ILCS 405/1100 (West 2008). We review the Board's decision, not the trial court's determination. *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010). It is the Board's responsibility to weigh the evidence, determine the credibility of witnesses, and resolve conflicts in testimony. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 329 (2010). We will reverse the Board's factual findings only where they are against the manifest weight of the evidence. *Young-Gibson v. Board of Education of City of Chicago*, 2011 IL App (1st) 103804 ¶ 56. Where the Board's ultimate determination is a mixed question of fact and law, *i.e.,* whether the facts satisfy the statutory standard, the "clearly erroneous" standard applies. *Livingston v. Department of Employment Security*, 375 Ill. App. 3d 710, 715-16 (2010). The clearly erroneous standard is only met where the reviewing court is left with the " 'definite and firm conviction that a mistake has been committed.' " *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 211 (2008).

¶ 13 The denial of unemployment benefits is governed by the Unemployment Insurance Act (Act) (820 ILCS 405/100 *et seq*. (West 2008)). The purpose of the Act is "to provide compensation for those persons who are involuntarily unemployed." *Bridgestone/Firestone v. Doherty*, 305 Ill. App. 3d 141, 147 (1999). But the Act places some restrictions on "academic personnel" who seek unemployment benefits. Section 612, which is the basis of the challenged decision, provides that academic personnel are not eligible for unemployment benefits between academic years or terms and states, in

relevant part:

> "2. An individual shall be ineligible for benefits, on the basis of wages for service in employment in any capacity * * * performed for an institution of higher learning, * * * during a period between two successive academic years or terms, if the individual performed such service in the first of such academic years or terms and there is a reasonable assurance that the individual will perform such service in the second of such academic years or terms." 820 ILCS 405/612(A)(2) (West 2008).

¶ 14 The Department defines "reasonable assurance" as follows:

"an inference or expectation based upon a sequence of previous conduct, practice, or course of dealing *** which is fairly to be regarded as establishing a common basis of understanding that the individual working in one year, term, or season, or prior to a vacation period or holiday recess may be expected, under normal circumstances to have continued employment in the next year, term or season, after an 'off-term' or 'off-season' interruption, or at the conclusion of the vacation period or holiday recess." 56 Ill. Adm. Code § 2915.1 (West 2008).

¶ 15 The Department's regulations further state:

"The reasonable assurance *** shall be presumed if such individual has a written, verbal, or implied agreement that covers or extends into the second academic year or term, or after the vacation period or holiday recess, to perform for any educational institution or educational service agency, academic or non-academic services. Continuation of service

in the second academic year or term or after the vacation period or holiday recess is implied if there has been a pattern of such continuation from one academic year or term to another or following vacation periods or holiday recesses over a number of years or when the individual has not been given a notice of termination by the educational institution or educational service agency providing employment in the first of the two academic years or terms or prior to vacation period or holiday recess." 56 Ill. Adm. Code § 2915.20 (West 2008).

¶ 16 Section 612 does not differentiate between full-time teachers and substitute teachers. Hence, substitute teachers, like plaintiff, are considered "individuals employed in an academic capacity." *Marzano v. Department of Employment Security*, 339 Ill. App. 3d 858, 862 (2003). In *Marzano*, the appellate court found a substitute teacher seeking unemployment benefits had a reasonable assurance of returning to work where he had received a letter every August inquiring about his interest in working as a substitute teacher the following academic year and was never notified he was laid off. *Marzano*, 339 Ill. App. 3d at 863.

¶ 17 Here, plaintiff did not receive a letter every year inquiring whether he wanted to work as a substitute teacher the following academic but the Board's finding that plaintiff had a reasonable assurance of returning during the 2010-2011 academic year was not clearly erroneous. Plaintiff had worked as a substitute teacher for the District since December 2008. He worked again during the 2009-2010 academic year and was never informed he could not work in the 2010-2011 academic year. Under these facts, plaintiff

had a reasonable assurance of future work as a substitute teacher during the 2010-2011 academic year.

¶ 18 Plaintiff argues, however, he was eligible for benefits because he did not work on the last day of the 2009-2010 academic year. As the evidence showed, the 2009-2010 academic year ended on June 4, 2010, and plaintiff's last day of work was May 21, 2010, while the first day of the 2010-2011 academic year was August 19, 2010 and his first day of work for the District was September 24, 2010. Therefore, he asserts, he was not "between two successive academic years or terms" as provided in section 612. Plaintiff relies on *Whitley v. Board of Review*, 116 Ill. App. 3d 476, 478-79 (1983) to support his argument.

¶ 19 First, we note the plain language of section 612 does not support plaintiff's argument. Section 612(b) refers to service "in" an academic year or term, rather than at the beginning or end of an academic year or term. 820 ILCS 405/612(b) (West 2008). Further, *Whitley* is factually distinguishable from this case and does not stand for the proposition asserted by plaintiff. In *Whitley*, the plaintiff had a contract for full-time employment as a high school career counselor from November to June. She also occasionally worked as a substitute teacher when needed. When the academic year ended, the plaintiff's position was eliminated.. She did not sign up for the next year's substitute list because she needed full-time employment, and the school did not tell her she would be hired for the coming academic year but told her she would be called if the employer needed her and if she did not have another job. *Whitley*, 116 Ill. App. 3d at

477.

¶ 20 The referee found plaintiff ineligible for unemployment benefits under section 612(b) of the Act, because she had been gainfully employed by an academic institution during the previous academic year, was currently unemployed because the school was on vacation between academic years, and had a reasonable assurance of being employed as a substitute teacher the following academic year, as she was in the past. *Id*. at 477-478. The Board of Review affirmed the referee's decision. *Id*. at 478. Petitioner filed a complaint for administrative review in the circuit court, which affirmed the Board's decision. *Id.* The appellate court reversed, finding plaintiff's position had been terminated due to lack of funding and she had no reasonable assurance of similar employment the following fall. "[T]he opposite conclusion is readily apparent," the court said. "Although she did substitute occasionally, that fact is not relevant to a determination of her eligibility for benefits due to her counseling work as these were essentially two separate jobs. Whitley did receive a definite notice of termination concerning the counseling work and thus, there is no 'reasonable assurance' that Whitley would 'continue to be employed in the same or substantially the same capacity' in the following academic year." *Id*. at 479.

¶ 21 Conversely, here plaintiff was working as a day-to-to day, as needed substitute teacher and had a reasonable assurance of returning to the similar employment the following year. The Whitley opinion did not turn on the fact that the plaintiff did not return to the work on the first day of the academic year but rather on the fact that her

position was terminated and she was not offered comparable work the following academic year.

¶ 22 Plaintiff also asserts a "reasonable assurance" was lacking because he was called to work as a substitute teacher less frequently in the 2010-2011 academic year than in the 2009-2010 academic year. The record shows plaintiff worked 20 days between August and December 2009, and only 5 days during the same period the following year. A decrease in the number of days of work, however, does not make plaintiff eligible for unemployment benefits.. Because plaintiff was still obtaining employment as a day-to-day, substitute teacher in the 2010-2011 academic year, he was ineligible for benefits under section 612 of the Act. But, a "teacher's eligibility [for unemployment benefits] is determined on a weekly basis." *Davis v. Board of Review*, 132 Ill. App. 3d 853, 855 (1985). If plaintiff's circumstances change and he finds he no longer has a reasonable assurance of employment as a substitute teacher, he may then be eligible for benefits. See 56 Ill. Admin. Code § 2915.30 . Because plaintiff had a "reasonable assurance" of employment as a substitute teacher in the 2010-2011 academic year, he was not eligible for benefits based on his July 2010 application, and the Board's February 25, 2011 decision was not clearly erroneous.

¶ 23 Denial of Plaintiff's Motion to Amend Complaint

¶ 24 Plaintiff next contends the circuit court erred in denying his motion to amend his complaint to obtain review of the Board's February 24, 2011 decision dismissing as

untimely his appeal of the referee's finding that he was ineligible for unemployment benefits under section 239 of the Act. 820 ILCS 405/239 (West 2008).

¶ 25 The decision to allow an amendment to a complaint rests within the sound discretion of the trial court and we will not be reversed absent an abuse of discretion. *I.C.S. Illinois, Inc. v. Waste Management of Illinois, Inc.*, 403 Ill. App. 3d 211, 219 (2010). The factors we consider are whether: (1) the proposed amendment would cure a defect in the pleadings; (2) the proposed amendment would prejudice or surprise other parties; (3) the proposed amendment is timely; (4) there were previous opportunities to amend the pleading. *Id*. at 219-220 (citing *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). Because plaintiff's motion to amend was not timely the circuit court did not abuse its discretion in denying it.

¶ 26 The Administrative Review Law provides "[e]very action to review a final administrative decision shall be commenced by the filing of a complaint and the issuance of a summons within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected by decision." 735 ILCS 5/3-103 (West 2008). The 35-day time period for filing a complaint for administrative review "is a jurisdictional requirement and that judicial review of the administrative decision is barred if the complaint is not filed within the time specified." *Rodriguez v. Sheriff's Merit Comm'n of Kane County*, 218 Ill. 2d 342, 350 (2006) (quoting *Fredman Brothers Furniture Co. v. Dep't of Revenue*, 109 Ill.2d 202, 211(1985)).

¶ 27 Plaintiff filed an appeal with the Board of Review on January 10, 2011. Because more than 30 days had passed since the referee issued a decision on November 30, 2010, the Board dismissed the appeal as untimely in a notice mailed on February 24, 2011. The notice informed plaintiff he had 35 days from the mailing date to seek administrative review in the circuit court. On March 31, 2011, plaintiff filed a timely complaint seeking review of the Board's February 25, 2011 decision denying benefits under section 612. Plaintiff attached the Board's February 24, 2011 decision but made no reference to it in the complaint. On June 26, 2011, in his emergency motion to amend, plaintiff sought to add for review the Board's February 24, 2011 decision. Because more than 35 days had passed, however, the circuit court did not have subject matter jurisdiction to hear the claim and did not abuse its discretion in denying the motion.

¶ 28 Plaintiff contends his failure to timely file a complaint for administrative review should be excused because he relied on the advice of someone from "legal aid" at the clerk's office, who prevented him from filing a complaint on his May 2010 claim. In short, plaintiff asserts on March 31, 2011, the last day to file an appeal of the Board's February 24, 2011 decision, he arrived at the clerk's office at 4:22 p.m. and was told to speak with someone from "legal aid" if he needed help filing a complaint. Plaintiff asserts the person from legal aid helped him prepare a complaint on the February 25, 2011 Board decision but told him "he could only do one." Plaintiff says he asked to speak to a supervisor but was told one was not in the office.

¶ 29 Plaintiff contends that because he relied on false information from a legal aid person at the clerk's office justice warrants an exception to the filing deadline. The appellate court has found in certain circumstances errors of a circuit court clerk will not deprive a litigant of their right to file an appeal. See, e.g., *Azim v. Department of Central Management Services*, 164 Ill. App. 3d 298, 301 (1999) (finding plaintiff's attorney in administrative review had right to rely on assurances of employee of clerk's office that complaint would be timely file-stamped). But, plaintiff offered no evidence, such as an affidavit, to support his assertion he was misled by an employee of the clerk's office. Absent evidence, there was no basis for finding the trial court abused its discretion in denying plaintiff's motion to amend his complaint.

¶ 30 The 35-day filing period is a jurisdictional requirement (*Fredman Brothers*, 109 Ill.2d at 211) and a delay of even one day would bar relief. In one instance, the appellate court refused to make an exception where a plaintiff attempted to file his complaint one hour before the close of the circuit court clerk's office on the 35th day, was refused by the clerk's office because the summons was improperly prepared, and did properly file a new complaint and summons on the 36th day. *Ellis v. Miller*, 119 Ill. App. 3d 579, 580-81 (1983). Here, where plaintiff waited well beyond that date to seek review of the Board's decision, an exception to the jurisdictional requirement is not warranted. Therefore, the circuit court did not abuse its discretion in denying plaintiff's motion to amend his complaint.

¶ 31 III. Conclusion

¶ 32 For the foregoing reasons, we affirm the circuit court.

¶ 33 Affirmed.