2012 IL App (2d) 110809-U
No. 2-11-0809
Order filed May 1, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MONA MUSTAFA, Plaintiff-Appellant, v. THE DEPARTMENT OF EMPLOYMENT SECURITY, DIRECTOR OF THE DEPARTMENT OF EMPLOYMENT SECURITY, BOARD OF REVIEW OF THE DEPARTMENT OF EMPLOYMENT SECURITY, MICHAEL PENDOLA, RICHARD KRAKOWSKI, MS. MELLOW, DIANE OROZCO, JOYCE R., and GREAT AMERICA, LLC, Defendants-Appellees.	)	Appeal from the Circuit Court of Lake County. No. 11-MR-579 Honorable Margaret J. Mullen, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

Held: The Department properly denied plaintiff's claim for unemployment benefits: its ruling that plaintiff was unavailable for work when she was out-of-state during the relevant period was not clearly erroneous, and her various other contentions were without merit.

¶ 1 The Board of Review (Board) of the Department of Employment Security (Department) denied the claim of plaintiff, Mona Mustafa, for unemployment benefits for part of July 2010. Plaintiff filed a complaint in the circuit court of Lake County for administrative review of the Board's decision. The trial court affirmed the decision and denied a motion by plaintiff for a rehearing. Plaintiff raises the following issues in her *pro se* appeal from the trial court's decision: (1) whether the Board's determination that plaintiff was not available for work from July 15, 2010, to July 22, 2010, and that her unemployment benefits should be reduced as a result, is clearly erroneous; (2) whether the Board's decision was based on the erroneous belief that plaintiff was on vacation rather than attending to personal business; (3) whether plaintiff's due process rights were violated because, during the administrative and judicial proceedings below, her reputation was tarnished, she was humiliated, and her self-esteem suffered; (4) whether the denial of unemployment benefits violated plaintiff's constitutional right to travel; (5) whether a Department employee misinformed plaintiff about a procedural matter; (6) whether a Department employee improperly combined plaintiff's request for reconsideration with her appeal; (7) whether the Department tampered with the administrative record; and (8) whether the Board erred in not admitting into evidence tape-recordings made by plaintiff of the administrative proceedings.[1] We affirm.

[1]In her brief, plaintiff also discusses the issues of whether the second, fifth, and fourteenth amendments to the United States Constitution afford her the right to tape-record the proceedings of an administrative agency. However, she expressly states that she addresses these issues "for the sole purpose of preserving her right, in good faith, to prosecute this cause of action in the appropriate jurisdiction, believed to be federal court, either in New York or Illinois." She specifically states that she "does not request an opinion on [these] issues," and so we have no occasion to consider them.

¶ 2 After the termination of her employment as regional vice president of sales with NSI International, Inc., plaintiff began receiving unemployment benefits in the amount of $350 per week. Thereafter, in 2010, plaintiff obtained seasonal employment at Six Flags Great America (Great America) as a loss prevention investigator. In those weeks in which her wages from Great America were less than $350, she remained eligible to receive either a full or a reduced benefit. See 820 ILCS 405/402 (West 2010). Great America submitted a written request to the Department for a determination of plaintiff's eligibility for benefits during a portion of July 2010 when, according to Great America, plaintiff had requested time off from work. The Department notified plaintiff that a question had been raised concerning her eligibility for benefits and that she would be interviewed by telephone. An adjudicator conducted the interview and subsequently issued a determination that plaintiff was ineligible for benefits during the period from July 15, 2010, to July 22, 2010, because she was "geographically absent from her labor market area" and had thus "made herself unavailable to work at her current employer."

¶ 3 Plaintiff requested reconsideration of the adjudicator's determination. The adjudicator affirmed the determination and filed an appeal on plaintiff's behalf to a referee for the Department. See 56 Ill. Adm. Code 2720.160(c)(1), amended at 29 Ill. Reg. 1909 (eff. Jan. 24, 2005). The referee conducted a telephone hearing. Plaintiff testified that she had requested time off from work from July 15, 2010, to July 20, 2010. Her supervisor, Vince Giacinto, asked if plaintiff could work on July 20, 2010. Plaintiff agreed, but she was able to find a coworker who was willing to take her shift on that day. Plaintiff testified that from July 15, 2010, to July 22, 2010, she was in New York and New Jersey on "legal business" and to seek work. Giacinto testified that work schedules for a particular month were prepared the preceding month. Because plaintiff had asked for time off from

July 15, 2010, to July 22, 2010, Giacinto did not schedule her to work on those days. Near the conclusion of the hearing, plaintiff revealed that she had been tape-recording the proceedings. The referee advised her that doing so was a violation of the law.

¶ 4 The referee affirmed the adjudicator's determination. Plaintiff appealed the referee's decision to the Board, and the Board affirmed the decision.

¶ 5 In an appeal from a judgment in an administrative review proceeding, the appellate court reviews the administrative agency's final decision. *Abbott Industries, Inc. v. Department of Employment Security*, 2011 IL App (2d) 100610, ¶ 15. Accordingly, we review the Board's decision, not the trial court's. *Id.* The Board's findings of fact are *prima facie* correct and will not be disturbed unless they are against the manifest weight of the evidence. *Id.* The Board's conclusions of law are reviewed *de novo*. *Id.* A determination by the Board on a mixed question of fact and law will be upheld unless it is clearly erroneous. *Id.* "[A] mixed question is one 'in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or *** whether the rule of law as applied to the established facts is or is not violated.' " *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 391 (2001) (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)). An administrative agency's decision will be held to be clearly erroneous "only where the reviewing court, on the entire record, is 'left with the definite and firm conviction that a mistake has been committed.' " *Id.* at 395 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

¶ 6 The Unemployment Insurance Act (Act) (820 ILCS 405/100 to 3200 (West 2010)) is the product of "the considered judgment of the General Assembly that in order to lessen the menace to

the health, safety and morals of the people of Illinois, and to encourage stabilization of employment, compulsory unemployment insurance upon a statewide scale providing for the setting aside of reserves during periods of employment to be used to pay benefits during periods of unemployment, is necessary." 820 ILCS 405/100 (West 2010). "The Act 'must be liberally construed so as to provide sustenance to those who are unemployed through no fault of their own and who are willing, anxious, and ready to work if given the opportunity.' " *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141, 155 (1997) (quoting *Shell Oil Co. v. Cummins*, 7 Ill. 2d 329, 339 (1955)).

¶ 7 In order for an unemployed individual to be eligible to receive unemployment benefits for a given week, the Director of the Department must find that the individual "is able to work, and is available for work; provided that during the period in question he was actively seeking work and he has certified such." 820 ILCS 405/500(C) (West 2010). Section 239 of the Act provides that "[a]n 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." 820 ILCS 405/239 (West 2010). Section 402(3) of the Act provides, in pertinent part:

> "Each eligible individual who is unemployed in any week, as defined in Section 239, shall be paid, with respect to such week, a benefit in an amount equal to his weekly benefit amount *** less that part of wages (if any) payable to him with respect to such week which is in excess of 50% of his weekly benefit amount, provided that such benefit for any benefit week shall be reduced by: *** (3) one-fifth of the weekly benefit amount for each normal workday during which such individual is unable to work or unavailable for work ***." 820 ILCS 405/402(3) (West 2010).

¶ 8 At issue is whether plaintiff was "available" for work from July 15, 2010, through July 22, 2010, within the meaning of section 402, where, as is undisputed, she was in New York and New Jersey during that period and, according to the testimony of her supervisor, she had requested that she not be scheduled for work on those days. " 'Available for work' means that the claimant stands ready and willing to accept suitable work." *Moss v. Department of Employment Security*, 357 Ill. App. 3d 980, 985 (2005). Whether an individual is available for work depends on the facts of each case. *James v. Illinois Department of Labor*, 119 Ill. App. 3d 524, 527 (1983). Whether the facts satisfy the statutory standard of availability is a mixed question of fact and law, so, as discussed above, the Board's determination will be upheld unless it is clearly erroneous. Here, plaintiff could not have been "ready" to accept work at Great America while she was visiting New York and New Jersey. Moreover, because she had asked for time off from her Great America job to travel to those states, she did not manifest the willingness to work that the Act contemplates. Accordingly, we cannot say that the Board's decision on the question of availability is clearly erroneous.

¶ 9 In an effort to avoid this result, plaintiff relies on a regulation promulgated by the Department providing that "[a]n individual is available for work—even if he imposes conditions upon the acceptance of work—unless a condition so narrows opportunities that he has no reasonable prospect of securing work." 56 Ill. Adm. Code 2865.110(a), amended at 14 Ill. Reg. 18466 (eff. Nov. 5, 1990). Plaintiff argues that, because she did not *demand* time off, she did not impose a condition that left her with no reasonable prospect of obtaining work, and she was therefore available for work within the meaning of this regulation. We believe that the application of this regulation is properly limited to those cases where a job seeker does, in fact, impose a condition on the acceptance of work, in contrast to cases like this one, where an unemployed individual expresses a preference not to work

on a particular day. To hold otherwise would create a conflict between the administrative definition of "available" and the statutory definition of that term discussed above, and would thereby call the validity of the regulation into question. See *Hadley v. Illinois Department of Corrections*, 224 Ill. 2d 365, 385 (2007) ("Where an administrative rule conflicts with the statute under which it was adopted, the rule is invalid."). To permit the Department to redefine "available" so as to give the word the meaning plaintiff advocates would, in effect, allow the Department, through its rulemaking power, to extend the substantive provisions of the Act and create substantive rights. That is something an administrative agency may not do. *Fahey v. Cook County Police Department Merit Board*, 21 Ill. App. 3d 579, 583 (1974).

¶ 10 Plaintiff further argues that the decision to deny her claim for benefits "was based upon a clearly erroneous understanding of the facts of this case." She notes that, whereas Great America had advised the Department that she had requested time off from work, the initial notice she received from the Department states, "YOUR EMPLOYER STATES YOU ARE ON VACATION." Plaintiff argues that her trip to New York and New Jersey was for "personal business" and was not a "vacation." Plaintiff fails to explain the significance of the distinction for purposes of the Act, nor does she claim that she suffered any prejudice as a result of the wording of the notice. Moreover, the Board's decision incorporated the referee's decision, and the referee specifically found that plaintiff had indicated that she had personal business in New York and New Jersey and had requested time off from her job at Great America. Any error in the wording of the initial notice was therefore harmless and does not justify disturbing the Board's decision. See *Gregory v. Bernardi*, 125 Ill. App. 3d 376, 378 (1984) ("The concept of harmless error is applicable to judicial review of unemployment compensation administrative proceedings.").

¶ 11 According to plaintiff, her due process rights were violated in several respects during the administrative proceedings and the proceedings in the trial court. She contends that the referee implied that she had falsely certified her right to benefits and he thereby harmed her good name and reputation. Plaintiff maintains that she has a protected liberty interest in her good name and reputation. She also contends that an assistant Attorney General accused her of committing a crime by surreptitiously tape-recording the hearing before the referee. In essence, plaintiff claims that she was defamed by State officers. Without more, however, this does not constitute a violation of her due process rights. See *Paul v. Davis*, 424 U.S. 693, 711-12 (1976). Plaintiff also contends that she "was forced, by economic circumstances, to seek State aid, which humiliated her and damaged her self[-]esteem." The claim is essentially that she suffered emotional distress. Infliction of emotional distress, standing alone, does not implicate a constitutionally protected liberty interest. See *Williams v. City of Boston*, 784 F.2d 430, 435 (1st Cir. 1986).

¶ 12 Plaintiff appears to suggest that the Board's decision interfered with her constitutionally protected right to travel. There is no merit to any such notion. The Act does not directly restrict travel. It only places an incidental burden on travel to the extent that travel renders a person claiming benefits unavailable for work, and therefore ineligible benefits during the period of travel. As the high court of a sister state has observed, "[i]ndirect or incidental burdens on travel resulting from otherwise lawful government action have not been recognized as impermissible infringements of the right to travel ***." *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1163-64 (Cal. 1995).

¶ 13 Plaintiff complains that an employee of the Department, "Joyce R.," told her that the adjudicator would not reconsider the determination regarding benefits for the period from July 15, 2010, to July 22, 2010. Plaintiff has failed to cite anything in the record documenting that Joyce R.,

made such a statement. In any event, plaintiff fails to explain how the alleged misstatement harmed her, given that plaintiff requested reconsideration and the adjudicator acted on the request. Plaintiff also complains that a Department employee "combined" her request for reconsideration with a request for an appeal. It is possible, although not altogether clear, that plaintiff is referring to the adjudicator's written decision affirming the original determination. That decision states, "an appeal has been filed to the Referee." We note that the adjudicator acted in accordance with the Department's rules, which provide that, upon affirming an original determination, the adjudicator shall "unless otherwise instructed by the party, process an appeal to the Referee on behalf of the *** party [who requested reconsideration]." 56 Ill. Adm. Code 2720.160(c)(1), amended at 29 Ill. Reg. 1909 (eff. Jan. 24, 2005). In her request for reconsideration, plaintiff did not instruct the adjudicator not to process an appeal.

¶ 14 Plaintiff accuses the Department of misconduct, including tampering with the record. Plaintiff made the same accusation in her motion for rehearing in the trial court. The trial court denied the motion. The record on appeal contains no transcript of the hearing on that motion. It is axiomatic that "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). In denying plaintiff's motion for rehearing, the trial court necessarily concluded either that the allegation of tampering was unfounded or that any irregularities in the record were factually or legally insufficient to justify disturbing the Board's decision. In the absence of a complete record, we must presume that the trial court's conclusion was correct.

¶ 15 Plaintiff also complains that the Board did not admit into evidence the tape-recordings she had made of the proceedings. Where (as is the case here) a party has requested a transcript of the hearing before the referee, the Department's rules specify that a request to submit additional evidence to the Board must be filed within 10 days after the transcript was mailed to the requesting party. 56 Ill. Adm. Code 2720.315(b), amended at 33 Ill. Reg. 9623 (eff. Aug. 1, 2009). The record shows that plaintiff did not comply with this requirement.

¶ 16 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 17 Affirmed.