

2019 IL App (1st) 181458-U

No. 1-18-1458

Order filed June 18, 2019

Second 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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ESTHER Q. WILLIAMS,)
) Appeal from the
) Circuit Court of
 Plaintiff-Appellant,) Cook County.
)
 v.)
)
 THE DEPARTMENT OF EMPLOYMENT SECURITY;)
) THE DIRECTOR OF EMPLOYMENT SECURITY; THE)
) BOARD OF REVIEW OF THE DEPARTMENT OF) No. 18 L 50215
) EMPLOYMENT SECURITY; and T.J. MAXX OF)
) ILLINOIS, LLC, c/o EQUIFAX (Talx UCM SERVICES),)
)
 Defendants)
)
)
 (The Department of Employment Security, the Director of) Honorable
) Employment Security, and the Board of Review of the) James M. McGing,
) Department of Employment Security, Appellees).) Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Hyman and Mason concurred in the judgment.

ORDER

¶ 1 *Held:* The Board of Review of the Department of Employment Security did not abuse its discretion in affirming the Illinois Department of Employment Security

referee's decision to dismiss plaintiff's administrative appeal due to her failure to appear at a scheduled telephone hearing.

¶ 2 Plaintiff, Esther Q. Williams, filed a complaint for administrative review seeking to reverse a decision by the Board of Review of the Department of Employment Security (Board), which affirmed the decision of an Illinois Department of Employment Security (IDES) referee to dismiss plaintiff's administrative appeal due to her failure to appear at the scheduled telephone hearing. The circuit court affirmed the Board's decision. Plaintiff challenges the propriety of that order in this *pro se* appeal.

¶ 3 The record shows that plaintiff was employed as a cashier at a retail store run by her employer, T.J. Maxx of Illinois, LLC, but was discharged on January 24, 2018. Plaintiff applied for unemployment benefits from IDES, stating in her questionnaire that she forgot she was supposed to work on the day in question and was discharged for being a "no call, no show." Plaintiff also stated in the questionnaire that she knew her employer had a policy that employees must call when not coming in to work, but she was not aware she could be discharged for not complying with that policy.

¶ 4 The employer protested plaintiff's application for benefits. In the protest letter, the employer stated that plaintiff "no called, no showed" for a scheduled shift on January 23, 2018, which exceeded company policy. The employer also stated that plaintiff had past corrective actions for her attendance issues.

¶ 5 An IDES claims adjudicator interviewed plaintiff and the employer separately. Plaintiff told the adjudicator that she did not show up for her scheduled shift because she had written down the wrong day. She reported that she knew of a company rule that employees could not have more than three absences in a year, that she had received a verbal warning about similar

conduct once before, and that she had been told to pay more attention to her schedule. The employer told the adjudicator that plaintiff had been written up several times for “no call no shows” and was on a final warning. Specifically, the employer stated that plaintiff had committed “no call no shows” two other times in the same week that she was discharged. According to the employer, employees were not allowed more than two “no call no shows” in a 180-day period. The employer also stated that plaintiff was made aware that she could be discharged for not complying, and was instructed to be aware of her schedule and call if she had to be absent.

¶ 6 The IDES claims adjudicator found that plaintiff was discharged for violation of her employer’s attendance policies, as she committed several “no call no show” infractions. The adjudicator concluded that plaintiff’s conduct constituted misconduct under section 602A3 of the Illinois Unemployment Insurance Act (820 ILCS 405/602(A) (West 2016)). As such, the adjudicator determined plaintiff was ineligible for unemployment benefits and denied her claim. Plaintiff sought reconsideration, but the claims adjudicator affirmed its decision.

¶ 7 Plaintiff filed an administrative appeal to an IDES referee, who scheduled a telephone hearing for 9:30 a.m. on March 7, 2018. Plaintiff was sent a written notice of the hearing. The notice informed her, among other things, of the telephone number at which she would be called, how to make a request to be called at a different number, and how to request a continuance. The notice also stated, “Your failure to answer the phone when the [referee] calls may result in a finding against you.” At the date and time of the hearing, the referee called plaintiff, but got her voicemail. The referee left a message and called back. Again, the call went to voicemail and the

referee left a message. The next day, the referee issued a decision dismissing the administrative appeal due to plaintiff's failure to appear at the hearing despite being called twice.

¶ 8 Plaintiff sought rehearing of the referee's decision. In the section of the rehearing request form designated for an explanation of why she failed to appear, plaintiff wrote, "I had tried to call back but was not able." The referee denied plaintiff's request for rehearing. In the written decision, the referee noted that plaintiff offered no explanation for missing the hearing. The referee further found that plaintiff's failure to appear was not due to one or more of the "exceptional reasons" set forth in the administrative code, that plaintiff had not made a request for a continuance what was improperly denied, and that plaintiff had not shown her failure to request a continuance was caused by reasons outside her control or circumstances which could not be reasonably foreseen and avoided.

¶ 9 Plaintiff appealed to the Board. This time, in the section of the appeal form designated for explaining why she did not attend the referee's hearing, plaintiff wrote, "Due to my phone was not working right, I am asking for new call date on my rehearing meets [*sic*]. I am [*sic*] had tried to call back but was not able to get throu[gh]." Plaintiff also listed a new telephone number.

¶ 10 The Board affirmed the referee's dismissal. The Board stated that plaintiff failed to appear at a referee hearing that was scheduled pursuant to notice, and that plaintiff had indicated her failure to appear occurred because of difficulty with her telephone. The Board explained that if a party has missed a hearing with good cause, for reasons outside the party's control and through circumstances that could not have been foreseen and avoided, and then makes a timely request to be heard, another hearing should be granted. But, the Board further explained, when a party gives no reason or an unacceptable reason for failing to appear, it must affirm the dismissal of

the appeal. The Board then concluded that plaintiff lacked good cause for failing to appear at the scheduled hearing and that no basis existed for setting aside the referee's decision.

¶ 11 Plaintiff filed a *pro se* complaint for administrative review in the circuit court. As an answer to the complaint, the Board filed a certified copy of the administrative record. Following a hearing, the circuit court entered a written order affirming the Board's decision. Plaintiff filed a timely notice of appeal.

¶ 12 In her *pro se* appellate brief, plaintiff contends that the circuit court made a mistake by "not having the right scheduled hearing" and asserts that this court may grant her "a new call." On the same date plaintiff filed her brief, she filed a separate *pro se* motion "to add more evidence supplement record," specifically, with a receipt dated March 24, 2018, for the purchase of a phone she claimed to have bought "at the time when my old phone had malfunction, act up, fail to cease to function / work right." We denied the motion, as the appellate court cannot consider evidence that is not properly in the record, that is, any evidence that was not introduced in the trial court. *Williams v. Department of Employment Security*, No. 1-18-1458 (2019) (order denying leave to supplement record on appeal) (citing *Garvy v. Seyfarth Shaw LLP*, 2012 IL App (1st) 110115, ¶ 26).

¶ 13 In administrative cases, our review is of the decision of the Board, not the referee or the circuit court. *Petrovic v. Department of Employment Security*, 2016 IL 118562, ¶ 22. As such, the question before us in this case is whether the Board properly affirmed the referee's decision to dismiss plaintiff's appeal of the claim adjuster's decision, which the referee based on plaintiff's failure to appear at the telephone hearing. See *Tiggens v. Department of Employment Security*, 2013 IL App (1st) 121677, ¶ 9. We review this decision for an abuse of discretion. *Id.* ¶

10; see also *Three Angels Broadcasting Network, Inc. v. Department of Revenue*, 381 Ill. App. 3d 679, 699 (2008) (decisions regarding the conduct of an administrative agency's hearing are reviewed for an abuse of discretion). An abuse of discretion occurs when a ruling is so arbitrary or fanciful that no reasonable person would agree with it. *Tiggens*, 2013 IL App (1st) 121677, ¶ 9.

¶ 14 Section 2720.255 of title 56 of the Illinois Administrative Code governs IDES administrative hearings, including telephone hearings. 56 Ill. Adm. Code 2720.255 (1997). Pursuant to subsection (a) of that provision, an appellant's failure to appear at a scheduled hearing before a referee "will result in a dismissal of the appeal." 56 Ill. Adm. Code 2720.255(a) (1997). In the case of a telephone hearing, a party's failure to answer the telephone at the number provided to the referee will cause the referee to issue a decision based on the evidence introduced by the appellant at the hearing and the evidence in the record. 56 Ill. Adm. Code 2720.255(b), (c) (1997).

¶ 15 Where a party fails to appear at a hearing and an adverse decision is rendered, that party may request a rehearing from the referee. 56 Ill. Adm. Code 2720.255(e) (1997). A request for rehearing must state facts showing that the party's failure to appear at the scheduled hearing was either due to not having received timely notice of the hearing, or due to "an 'exceptional reason' as set forth in Section 2720.240." 56 Ill. Adm. Code 2720.255(e)(1) (1997). These "exceptional reasons" are specifically limited to: (1) compassionate grounds, such as documented medical reasons or a death in the family; (2) unforeseen circumstances such as accident, flood, fire, civil disorder, public utility emergency, or military necessity; (3) a demand by a party to obtain legal representation or to inspect the case file; (4) time conflicts caused by employment; (5) when a

party's attorney has scheduling conflict; (6) when the employer's representative is unable to appear due to a contract agreement or custom; (7) when a party has a conflicting legal or regulatory requirement, such as jury duty; and (8) when a party's representative is scheduled to participate in another hearing. 56 Ill. Adm. Code 2720.240 (1997). When requesting rehearing, a party must also show either that he or she had requested a continuance, but it was improperly denied, or that he or she failed to make a request for a continuance due to reasons outside of his or her control and circumstances which could not be foreseen or avoided. 56 Ill. Adm. Code 2720.255(e)(1) (1997).

¶ 16 If the requirements for rehearing are not met, the regulations provide that the request for rehearing "shall be denied." 56 Ill. Adm. Code 2720.255(e)(2)(B) (1997). If a party disagrees with the referee's denial of the request for rehearing, he or she may appeal to the Board. 56 Ill. Adm. Code 2720.255(e)(5) (1997). The regulations regarding appeals to the Board provide that such an appeal must "set forth the parts of the decision with which the appealing party disagrees and the specific reasons for that disagreement." 56 Ill. Adm. Code 2720.300(b)(3) (2011).

¶ 17 Here, plaintiff was given notice of the date and time of her telephone hearing. The notice informed plaintiff of the telephone number the referee would call to reach her, how to make a request to be called at a different number, and how to request a continuance. The notice also warned plaintiff that her failure to answer the telephone could result in a finding against her. Despite this notice, plaintiff failed to request a continuance and failed to appear at her telephone hearing, causing the referee to dismiss her case. When plaintiff requested a rehearing, she stated only that she "tried to call back but was not able." She did not assert that her failure to request a continuance prior to the hearing date was due to reasons outside her control or due to

circumstances which could not be foreseen or avoided, and did not assert that her failure to appear was due to any of the “exceptional circumstances” listed in the regulations. Then, when plaintiff appealed to the Board, her only assertions were that her “phone was not working right” and that she “had tried to call back but was not able to get throu[gh].” She did not set forth her specific reasons for disagreement with the referee’s decision.

¶ 18 Plaintiff failed to abide by the regulations governing continuances, appearances at telephone hearings, requests for rehearing, and appeals to the Board. In these circumstances, the Board’s decision to affirm the referee’s dismissal was not so arbitrary or fanciful that no reasonable person would agree with it. See *Tiggins*, 2013 IL App (1st) 121677, ¶ 14 (where the plaintiff failed to appear at a telephone hearing, request a continuance or a rehearing, address her failure to appear in her appeal to the Board, or provide an “exceptional circumstance” as a reason for her failure to appear at a telephone hearing, the Board did not abuse its discretion in dismissing her appeal). We find no abuse of discretion.

¶ 19 For the reasons explained above, we affirm the determination of the Board and the judgment of the circuit court.

¶ 20 Affirmed.