IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

PAULOS S. TIRFE,

Appellant,

-vs-

DIRECTOR, OHIO DEPARTMENT OF JOB AND FAMILY SERVICES, ET AL.,

Appellees.

Case No: 11CVF-06-6954

JUDGE SHEWARD

DECISION AND ENTRY
AFFIRMING THE DECISION DISALLOWING REQUEST FOR REVIEW AS MAILED ON MAY 25, 2011

SHEWARD, JUDGE

The above-styled case is before the Court on an appeal of the Decision Disallowing Request for Review issued by the Unemployment Compensation Review Commission (hereinafter referred to as Commission) that terminated Paulos S. Tirfe's (hereinafter referred to as Appellant) administrative appeal. The Commission dismissed the Appellant's appeal by its Decision mailed May 25, 2011. In this appeal, the Appellant named the Ohio Department of Job and Family Services (hereinafter referred to as the Appellee) and Appellant's former employer, Germain, Inc. (hereinafter referred to as the Employer)

Appellant initially failed to file his Brief while he was representing himself *pro se*. Eventually, the Appellant retained counsel and a new briefing schedule was produced. The Appellant filed his merit Brief on October 21, 2011. The Appellee responded with its Brief on November 3, 2011. The Appellant did not file a Reply Brief. (This Court reviewed the docket on 12-7-11 and there was no indication that a reply brief had been filed by the deadline of November 18, 2011.) The Employer has not filed any pleading in this case.

After a review of the pleadings, briefings, and certified record, this Court holds that the Commission's Decision Disallowing Request for Review of May 25, 2011 is

AFFIRMED.

I. STATEMENT OF THE CASE

This appeal arises as a result of the Commission's Decision that denied unemployment compensation benefits to the Appellant and ordered the return of benefits paid.

II. STATEMENT OF THE FACTS

The Appellant had been employed by the Employer as an auto mechanic. He stared on March 1, 2000 and was terminated on August 16, 2010. Prior to his termination, in February of 2010 he was given a written warning because he had performed work on a vehicle without a written repair order. That was an act which was a violation of company policy.

Please note the following undisputed facts as contained within the Hearing Officers Decision that followed the March 10, 2011 hearing:[1]

Claimant worked for Germain Motor Co. from March 1, 2000, through August 16, 2010, as a Service Technician

Service Technicians are instructed not to perform any service on a vehicle without first creating a repair order. One of the purposes of the policy is to prevent technicians from repairing vehicles for friends and family without charging them.

On February 11, 2010, claimant performed service on a vehicle without a repair order. It was later discovered that the vehicle belonged to a family member. Claimant received a written warning.

The following finding is partially in dispute:

On August 13, 2010, claimant was observed by three co-workers changing the oil in a vehicle for which there was no repair order. The vehicle belonged to a family member. Claimant admitted that he had a family member's vehicle in a service bay, but denied that he had changed the oil. The Service Manager chose to believe the co-workers version of events and discharged claimant.

Appellant only contested this finding. The nature of the conflict was Appellant's assertion that he did not work on the car. In fact the Appellant's chief argument at the hearing was his

[1] The darker printing comes from a 'copy image' of the certified record.

belief that he was fired due to the fact that he was an American of Ethiopian descent.

The Hearing Officer issued a Decision that reversed the prior holding that the Appellant was entitled to benefits. The following comes from the 'Reasoning' section of the decision:

> **Claimant understood the shop rule which required a repair order before any vehicle could be serviced. Among other things, this policy was designed to prevent technicians from performing service on vehicles owned by friends and family without charging them. Claimant violated the policy on two occasions in 2010. After the first violation, he received a written warning. The employer was justified in terminating claimant's employment after the second violation. It will be held that claimant was discharged by Germain Inc. for just cause in connection with work.**

The Appellant timely appealed that Decision to the Commission and that led to the Commission's Decision Disallowing Request for Review as mailed on May 25, 2011.

Appellant timely appealed that Decision to this Court and the matter has now been fully briefed. The Court has conducted a review of the pleadings; briefs and certified record. This appeal is ready for a determination.

III. STANDARD OF REVIEW

R.C. 4141.282(H) sets forth the standard of review that this Court must apply when considering appeals of decisions rendered by the Commission. R.C. 4141.282(H) provides:

> If the court finds that the decision of the commission was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse, vacate, or remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission.

The Ohio Supreme Court stated that "[t]he board's role as fact finder is intact; a reviewing court may reverse the board's determination only if it is unlawful, unreasonable, or against the manifest weight of the evidence." *Tzangas, Plakas & Mannos v. Ohio Bur. Of Emp. Serv.* (1995),73 Ohio St.3d 694,697. The Hearing Officer and the Commission are primarily responsible for the factual determinations and judging the credibility of the witnesses. *Brown-Brockmeyer Co. v. Roach* (1947), 148 Ohio St. 511; *Angelkovski v.*

Buckeye Potato Chips (1983), 11 Ohio App.3d 159,162.

More specifically:

> The Commission and its referees are the triers of fact. See Feldman v. Loeb (1987), 37 Ohio App.3d 188, 190, 525 N.E.2d 496. Therefore, the common pleas court acts as an appellate court and is limited to determining whether the Commission's decision was supported by some competent and credible evidence. Id. The common pleas court may not substitute its judgment for that of the hearing officer or the board. Simon v. Lake Geauga Printing Co.(1982), 69 Ohio St.2d 41, 45, 23 O.O.3d 57, 430 N.E.2d 468.

Hence, this Court will defer to the Hearing Officer's and the Commission's determination of purely factual issues when said issues address the credibility of the witnesses and the weight of the evidence. *Angelkovski v. Buckeye Potato Chips, Id*., at 162.

From within this framework, this Court will render its decision.

IV. ANALYSIS:

The main contention between the parties concerns whither or not the Appellant was terminated for just cause. The following statutory language gives this Court guidance:

> § 4141.29. Eligibility for benefits:
> (D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:
> (2) For the duration of the individual's unemployment if the director finds that:
> (a) The individual quit work without just cause or has been discharged for just cause in connection with the individual's work . . .

The Appellee has asserted that the findings of the Hearing Officer clearly have established just cause. Please note the following definition of 'just cause':

> Unemployment compensation can be denied if the claimant quit his/her job without just cause or was discharged for just cause. R.C. 4141.29(D)(2)(a). "Just cause" is defined as "that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act." Irvine v. Unemployment Compensation Board (1985), 19 Ohio St.3d 15, 17, quoting Peyton v. Sun T.V. (1975), 44 Ohio App.2d 10, 12. The Irvine court at 17 further stated "each case must be considered upon its particular merits." In reviewing such a determination, we are not permitted to reinterpret the facts or put our "spin" to the facts. *Taralla v. Union Hospital Association, Inc*., 2011-Ohio-4006 at ¶10.

The Hearing Officer found that the Appellant failed to follow the Employer's rules concerning providing free work to family members and friends. The Appellant was disciplined prior for the same infraction. Furthermore, the Appellant admitted that the vehicle belonged to a family member and that that vehicle was located in the service bay on the date in question. However, Appellant defense was his claim that he did not work on it.

Appellant argued that his testimony was not contested by any valid direct testimony at the hearing. Appellant claimed that the three witness statements against him were all hearsay and that hearsay evidence could not be used by the Hearing Officer to refute his version of the facts. To that end the Appellant cited to the case of *Taylor v. Board of Review*, 20 Ohio App.3d 297, 485 N.E.2d 827.

Appellant relied upon the following *syllabus* language from *Taylor* to support his view that his direct testimony must outweigh the hearsay testimony advanced at his hearing:

> In an unemployment proceeding pursuant to R.C. Chapter 4141, where the sworn testimony of a witness is contradicted only by hearsay evidence, to give credibility to the hearsay statement and to deny credibility to the claimant testifying in person is unreasonable. Id. at ¶4 of the *syllabus*.

The *Taylor* case is from the Eight District Court of Appeals and was decided on November 5, 1984. However, the fourth paragraph of the *syllabus* in *Taylor* case is not an accurate statement as to the law in administrative appeals. *Taylor* was significantly limited by subsequent cases including *Fisher v. Buick*, 2006-Ohio-457 another Eight District decision rendered on February 2, 2006.

The *Fisher* court was aware of the *Taylor* language and its apparent oversight. Please note the following from *Fisher*:

> Furthermore, even if some of Lake's testimony were hearsay, such testimony is admissible at administrative hearings. R.C. 4141.281(C)(2) governs the conduct of hearings in administrative appeals and states, "Hearing officers are not bound by common law or statutory rules of evidence or by technical

or formal rules of procedure." In reviewing this language, found in former R.C. 4141.28(J), the Supreme Court of Ohio stated:

> "This court previously has not analyzed this specific segment of R.C. 4141.28(J), however, its meaning is apparent: the Board of Review and the referee need not apply stringent rules in determining the admissibility of evidence into the record. The logical corollary is such evidence placed in the record is not only admissible but also must be weighed and considered when making a decision. If evidence which is inadmissible in a court of law is to be disregarded when and if reviewed, there is no reason to admit such evidence at the administrative level or for purposes of subdivision (J) of R.C. 4141.28." Simon v. Lake Geauga Printing Co. (1982), 69 Ohio St.2d 41, 43.

Thus, as this court has recognized:

> "It is well settled that a referee may use hearsay evidence in making unemployment compensation decisions. 'As a general rule, administrative agencies are not bound by the strict rules of evidence applied in a court. The hearsay rule is relaxed in administrative hearings; however, the discretion to consider hearsay evidence cannot be exercised in an arbitrary manner.'" Cully v. Administrator (Oct. 13, 1994), Cuyahoga App. No. 66187, quoting Haley v. Ohio State Dental Bd. (1982), 7 Ohio App.3d 1, 6 .

In Taylor v. Bd. of Review (1984), 20 Ohio App.3d 297, this court found that it is unreasonable to give credibility to a hearsay statement and deny credibility to the claimant testifying in person where the sworn testimony of the claimant is contradicted only by hearsay testimony. Fisher argues that we should follow Taylor in this case and find his sworn testimony credible while disregarding William Lake's testimony as hearsay.

Taylor is easily distinguishable from this case, however. Unlike Taylor, not all of William Lake's testimony was hearsay. Furthermore, in an administrative hearing such as this, the fact-finder is not required to blindly accept sworn testimony over otherwise inadmissible evidence. Hansman v. Director, ODJFS, Butler App. No. CA2003-09-224, 2004-Ohio-505. Rather, the duty of the fact-finder is to weigh and consider the reliability of the evidence and the credibility of the witnesses. Id. See, also, Simon, supra. *Fisher* at ¶¶ 16 – 20.

Clearly, the Hearing Officer was allowed to accept the hearsay testimony. The Hearing Officer was also under no duty to believe everything that the Appellant said just because he

was present and under oath. (See, O.J.I. §305.05(4))

Oddly, the only conflict between the testimony of the Appellant and the admitted hearsay statements was the Appellant's statement that he did not perform any work on the vehicle. Appellant admitted that he had the car in the shop; up on the lift; the car belonged to a friend or family member; and he had no work order for the car. That was all consistent with the hearsay statements of the other workers.

The Appellant also contested the use of the statements because he felt that the issue was racially motivated and that one of his coworkers was a racist and was out to get him. He claimed that only one of the three coworkers had behaved inappropriately. Therefore, even if the claim of the Appellant had merit, it only addressed one of the three statements damning to his case. Yet it was clear from the record that the Appellant only filed his claim with the Ohio Civil Rights Commission after his termination from his Employer. That fact alone was sufficient to weaken his credibility as it relates to that claim.[2] It also did not change the fact that the Appellant admitted to almost all of the material elements of the Employer's claim that he worked on a car without getting a written repair order.

The Hearing Officer's holding is consistent with the evidence at the hearing; i.e., the Appellant violated a policy of his Employer and was terminated for cause. After a review of the documents, Briefs and the certified record, this Court holds that the decision of the Appellee was lawful, reasonable, and was not against the manifest weight of the evidence. Therefore the Commission's Decision of May 25, 2011 is **AFFIRMED**.

V. DECISION:

The Commission's Decision Disallowing Request for Review of May 25, 2011 is **AFFIRMED**.

[2] There was no holding by the OCRC until after the administrative process had run its course.

THIS IS A FINAL APPEALABLE ORDER

Copies to:

Terri Jamison
580 South High Street, Suite 200
Columbus, Ohio 43215
Counsel for the Appellant

Michael DeWine, Esq.
Ohio Attorney General
PATRIA V HOSKINS
30 E BROAD, 26TH FL
COLUMBUS, OH 43215-3428
Counsel for Appellee Ohio Department of Job
And Family Services

GERMAIN INC
5777 SCARBOROUGH BLVD
COLUMBUS, OH 43232
Appellee pro se

Franklin County Court of Common Pleas

Date: 01-24-2012

Case Title: PAULOS S TIRFE -VS- GERMAIN INC

Case Number: 11CV006954

Type: ENTRY

It Is So Ordered.

Judge Richard S. Sheward