

FILED
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 MAURICE B. KELLY
 CLERK OF COURT

IN THE COURT OF COMMON PLEAS
 LAKE COUNTY, OHIO

TAMARAC APARTMENTS, LLC)	CASE NO. 11CV000534
)	
Plaintiff(s))	JUDGE EUGENE A. LUCCI
)	
vs.)	<u>ORDER AFFIRMING DECISION</u>
)	<u>OF UNEMPLOYMENT</u>
JOHN GARISEK, et al.)	<u>COMPENSATION REVIEW</u>
)	<u>COMMISSION</u>
Defendant(s))	

The court has considered: (1) the certified transcript of the record, filed April 11, 2011; (2) the appellant’s brief, filed July 26, 2011; and, (3) the appellee Director, Ohio Department of Job and Family Services’ brief, filed August 31, 2011.

Defendant/Appellee Garisek was employed by Appellant Tamarac Apartments, LLC as a maintenance technician and maintenance director from November 19, 2003 to March 11, 2010.¹ According to the appellant, Garisek was given a choice of resigning or being terminated after Tamarac’s legal counsel concluded that he lied to a manager about lost master keys, he participated in a scheme to conceal lost keys, and he awarded a company he owned contracts to paint apartments, all in violation of company policy. He chose to resign.

On April 27, 2010, Garisek applied for unemployment compensation benefits.² For reason for separation, he stated “discharge, unknown reasons.” On June 9th, the Ohio Department of Job and Family Services (ODJF) allowed the claim. In its decision, ODJF stated that the claimant was discharged for violating a company rule, but that the employer had not shown that he had done so due to negligence or willful disregard of the rule. Therefore, ODJF found that Garisek was discharged without just cause.³

On June 16th, Tamarac appealed that decision. On July 6th, the ruling was affirmed by director’s redetermination.⁴

¹ At the time Garisek worked there, the company was named S.D.C., Inc. For employment dates, see Certified Transcript of Record, Director’s File, Application Summary.
² *Id.*, Application Summary.
³ *Id.*, Determination of Unemployment Compensation Benefits, dated June 9, 2010.
⁴ *Id.*, Director’s Redetermination, dated July 6, 2010.

On July 12th, Tamarac appealed the director's redetermination.⁵ In its appeal, Tamarac's legal counsel outlined its claims that Garisek engaged in fraud by awarding his painting company a series of no-bid contracts. He also alleged that Garisek offered kick-backs to the property manager in an attempt to keep his painting arrangement secret. Finally, he alleged that Garisek actively engaged in a scheme to cover up missing master keys, leaving Tamarac "open to potentially disastrous consequences had any of the missing master keys been used to gain access to resident's apartments."⁶ He attached an affidavit from Karen Landau, Tamarac's manager, to support his claims. On September 2nd, the parties were notified that the appeal was transferred to the Unemployment Compensation Review Commission (UCRC).⁷

The appeal was heard telephonically on October 19, 2010 before Hearing Officer Shannon O'Brien. The appellant was represented by attorney Fred Carmen. Garisek appeared *pro se*. Prior to the hearing, Carmen submitted affidavits from Landau and Garisek to be entered into the record.⁸ In addition, Robert Murray and Phillip Credico appeared at the hearing and offered sworn testimony on behalf of Tamarac. Landau was subpoenaed to appear, but failed to do so.⁹

In her decision¹⁰, the hearing officer made the following findings of fact. Tamarac had a policy requiring that all master keys be kept secured. As part of that policy, master keys were stamped with numbers and assigned to specific individuals. Lost keys had to be reported to management. Landau was responsible for maintaining the master keys, and kept unused sets in a safe. Garisek was given a set in order to access buildings. On one occasion in the past, Landau learned that an employee lost his keys but she did not report it. Instead, she provided him with another set taken from the safe. In 2009, Garisek lost his keys and called a manager to report it. Landau, fearing she would get in trouble for failing to properly account for master keys, persuaded Garisek to call the manager back and say Credico, a maintenance technician, had taken them as a

⁵ *Id.*, Transfer to UC Review Commission.

⁶ Review Commission File, Letter from Fred Carmen, Esq., dated July 12, 2010.

⁷ *Id.*, Notice That An Appeal Has Been Transferred By the Director to the Review Commission.

⁸ *Id.*, Letter from Fred Carmen, Esq., dated October 13, 2010.

⁹ *Id.*, Subpoena of Witness Telephone Hearing, dated October 14, 2010. See also Transcript of Testimony, p. 4.

¹⁰ *Id.*, Decision, dated October 22, 2010.

practical joke but had since returned them. Landau then provided Garisek with another set of keys from the safe.

The hearing officer also found that later that year, Garisek discussed his pay rate with a manager. The manager suggested Garisek supplement his income by forming a company and painting apartments while not on company time. The manager was responsible for hiring outside contractors, and was aware of Garisek's activities. Garisek had no authority to hire contractors.

The decision went on to say that in 2010 problems with master keys arose at another apartment complex. To cover up her lax security, Landau gave Garisek an envelope of keys from the safe and asked him to stamp them so they had numbers corresponding to those on lost keys. She hoped this would make it appear that all the master keys were properly accounted for. Garisek took the envelope, but did not stamp the keys. Instead, he held on to them and eventually provided them to attorney Carmen.

The decision also states that Garisek was informed in March that he was going to be terminated because he had created a scheme to cover up missing master keys. He was not informed at that time of any problems relating to his painting company. He was given the choice of being fired or resigning in anticipation of inevitable discharge. As noted above, he chose to resign.

In her opinion, the issue before the hearing officer was whether Garisek resigned with just cause after being informed that he was going to be fired. "For unemployment compensation purposes, an employee who resigns in anticipation of being discharged must be judged by the same criteria as if the discharge had actually taken place. In such cases, the employee has just cause to quit employment only if the employer does not have just cause to discharge the employee"¹¹

Tamarac contends that Garisek lied about his keys to management in 2009 because he was afraid he would be fired when he lost his set. They cite Landau's affidavit as proof of this contention. However, the hearing officer found that there was credible testimony from Credico that lost keys did not result in termination. They only resulted in a fine. Therefore, she found that there was no reason for Garisek to think that his job was in jeopardy when he lost his master keys, and he had no reason to create a

¹¹ *Id.*, citing *Parks v. Health One* (Aug. 8, 1989), Franklin App. No. 88AP-982, unreported.

scheme to cover up their loss. Further, she stated that Landau's sworn affidavit regarding this incident was not believable, and that if the incident occurred the way Tamarac claimed, Credico should also have been fired because he also participated in the alleged cover up.

She further found that Garisek did not agree to stamp the keys Landau gave him in 2010. Instead, he retained them and turned them over to Tamarac's counsel when asked. Thus, he did not participate in Landau's scheme to cover up lost keys.

Finally, she found that Garisek provided sworn, credible testimony that one of Tamarac's managers had full knowledge that he set up a painting company to supplement his income. She also specifically found that testimony from Murray regarding this issue was not credible. For all these reasons, the hearing officer found that Garisek quit with just cause, because he quit in anticipation of being fired and Tamarac did not have just cause to discharge him.

The law regarding appeals of unemployment compensation claims is well-established in Ohio. This court's scope of review is limited both statutorily and by case law.¹² Pursuant to R.C. 4141.282(H), "[t]he court shall hear the appeal upon the certified record provided by the commission. 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 modify the decision, or remand the matter to the commission. Otherwise, the court *shall* affirm the decision of the commission." (Emphasis added). The court must give deference to the UCRC in its role as the finder of fact.¹³ It "is not permitted to make factual findings or to determine the credibility of witnesses."¹⁴ Nor can it reverse a decision simply because "reasonable minds might reach different conclusions."¹⁵ In fact, if an issue is close and the UCRC could conceivably decide either way, courts must affirm the commission.¹⁶ Therefore, the court's role is to decide whether the commission's decision is supported by the evidence in the certified record.¹⁷ If it determines that the decision is supported by some

¹² See *Tzangas, Plakas & Mannos v. OBES* (1995), 73 Ohio St.3d 694, 653 N.E.2d 1207.

¹³ *Fisher v. Bill Lake Buick* (Feb. 2, 2006), Cuyahoga App. No. 86338, 2006-Ohio-457 at ¶ 24, citing *Irvine v. State Unemployment Comp. Bd. of Rev.* (1985), 19 Ohio St.3d 15.

¹⁴ *Irvine* at 18.

¹⁵ *Id.*

¹⁶ *Fisher* at ¶ 24.

¹⁷ *Tzangas* at p. 696.

competent, credible evidence as to the main elements of the complaint, the court must affirm the board.¹⁸

“Under R.C. 4141.29, a party is entitled to unemployment compensation benefits if he or she quits with just cause or is discharged without just cause.”¹⁹ The burden of proving entitlement to unemployment benefits lies with the claimant, “including the existence of just cause for quitting work.”²⁰ Determination of just cause depends upon the facts in each case and also an analysis of the legislative purpose of the Unemployment Compensation Act, R.C. 4141.01 – 4141.47, and 4141.99.²¹ “It has long been recognized that the purpose of the Act is ‘to provide financial assistance to an individual who has worked, was able and willing to work, but was temporarily without employment through *no fault of his own*.”²²

In the statutory sense, just cause means “that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.”²³ Just cause for quitting a job “amounts to what ‘an ordinarily intelligent person would find to be a justifiable reason for quitting, where that cause is related in a substantial way with a person’s ability to perform in his employment.”²⁴

Based on the above analysis of the law, the court’s responsibility is to review the certified record to determine if the UCRC’s decision is supported by some reliable and probative evidence. If it is, the court cannot substitute its own opinion for that of the commission, but must, rather, affirm that decision.²⁵

Here, the appellant argues that the hearing officer applied the wrong standard of law in her decision, and ignored the weight of the evidence. It states that under the holding in *Tzangas*, it had cause to let Garesek go, for several reasons. First, he lied to management in 2009 when he said Credico took his keys as a prank but later returned them. It claims this exposed it to serious liability, as those keys could have been used to open any apartment in the complex. It also claims that testimony from Credico, and the affidavits of both Landau and Garisek support this version of events. Secondly, it claims that Garisek’s testimony was inconsistent and full of lies. For example, Garisek testified that the affidavit the appellant

¹⁸ *Fisher* at ¶ 24, citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

¹⁹ *Upton v. Rapid Mailing Services, Inc.* (Mar. 3, 2004), Summit App. No. 21714, 2004-Ohio-966, at ¶ 13.

²⁰ *Irvine* at 17, citations omitted.

²¹ *Upton* at ¶ 13.

²² *Id.*, quoting *Salzl v. Gibson Greeting Cards, Inc.* (1980), 61 Ohio St.2d 35, 39, 399 N.E.2d 76.

²³ *Id.* at ¶ 14, citing *Irvine*.

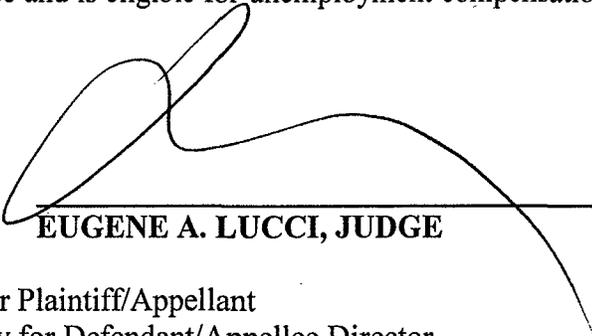
²⁴ *Id.* citing *Bacula v. Lorantffy Care Ctr.* (Feb. 11, 1998), Summit App. No. 18427, not reported.

introduced into the record had been falsified because it was dated March 2nd and the document he signed was actually dated February 22nd. The appellant urges the court to believe this is patently impossible, as its attorney did not even contact Garisek until March 1st. Finally, the appellant argues that the testimony of Murray, Credico and, again, Landau's affidavit, all prove that Garisek knew that the appellant had a policy against self-dealing, and that he broke that policy by awarding contracts to his painting company. Thus, the hearing officer failed to consider all the evidence, she omitted or misinterpreted key facts, and she failed to accurately recognize the quantity and quality of the evidence submitted. As a result, she failed to find that Garisek did not operate in Tamarac's best interest, and, therefore, resigned without just cause.

Unfortunately, this argument requires that the court make factual findings and determine the credibility of witnesses. As noted above, the court is not permitted to make such findings. It must merely decide whether the UCRC's decision is supported by some reliable testimony in the record. Based on the testimony taken at the October 19, 2010 hearing, the court finds that it is. Garisek testified at length both as to the two master key incidents and as to his painting company. The hearing officer specifically noted that she found his testimony to be credible, and that the witnesses against him were not. Because that finding is supported by evidence in the record, the court will not take issue with it.

Wherefore, the court finds that the UCRC's decision was lawful, reasonable, and not against the manifest weight of the evidence. Therefore, the UCRC's finding that Appellee Garisek resigned his position with just cause and is eligible for unemployment compensation benefits is hereby affirmed.

IT IS SO ORDERED.



EUGENE A. LUCCI, JUDGE

c: Fred N. Carmen, Esq., Attorney for Plaintiff/Appellant
Laurel D. Mazorow, Esq., Attorney for Defendant/Appellee Director,
Ohio Department Job and Family Services
John Garisek

FINAL APPEALABLE ORDER
Clerk to serve pursuant
to Civ.R. 58 (B)

²⁵ *Harrison v. Penn Traffic Co.* (Feb. 17, 2005), Franklin App. No. 04AP-728, 2005-Ohio-638 at ¶¶ 15 & 16.