

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

HOUNG N. LAM, :
 :
 Appellant, :
 : Case No. 11CVF-05-6347
 vs. : (JUDGE FRYE)
 STATE OF OHIO UNEMPLOYMENT :
 COMPENSATION REVIEW :
 COMMISSION, *et al.*, :
 Appellee. :

DECISION AND FINAL JUDGMENT
**AFFIRMING DECISION OF THE OHIO UNEMPLOYMENT COMPENSATION
REVIEW COMMISSION IN DOCKET NO. H2010-01-2857**

Introduction

Houng N. Lam appeals the Order of the Ohio Unemployment Review Commission which disallowed further review of a hearing officer's decision denying her unemployment benefits. Hearing Officer DiPasquale affirmed the Director's Redetermination that Ms. Lam had been terminated from employment at a Kroger store for just cause. The Hearing Officer did so following a hearing in which oral testimony was given and documentary evidence was admitted.

The Hearing Officer concluded that Ms. Lam took merchandise (specifically fish) without paying for it from the Kroger store where she had been a long term employee. This was found to be a clear violation of Kroger's policies and contrary to her employer's legitimate business interests. Thus, she was found to have been discharged by Kroger

with just cause, rendering her ineligible to receive unemployment benefits under R. C. Sections 4141.29(D)(2) and 4141.29(G).

The Hearing Officer's findings are supported by the record and are in accordance with case law. Hence, the decision is lawful, reasonable, and not against the manifest weight of the evidence. Accordingly, this court **AFFIRMS** the decision of the Ohio Unemployment Review Commission.

Standard of Review and Applicable Law

Williams v. Ohio Dept. of Job & Family Servs., 129 Ohio St.3d 332, 2011-Ohio-2897, ¶¶ 15 – 24, the Court set forth the law that applies to this case. To summarize, a determination whether an employee was discharged for “just cause” is the focus of proceedings at the Commission, and on appeal a court may not reverse the Commission merely because a different view of the evidence is arguable. “Just cause” is viewed from the standpoint of an ordinarily intelligent person, while having in mind that the law’s “purpose is ‘to enable unfortunate employees, who become and remain involuntarily unemployed by adverse business and industrial conditions, to subsist on a reasonably decent level and is in keeping with the humanitarian and enlightened concepts of this modern day.’” *Id.* ¶ 22. The unemployment laws do not exist to protect employees from themselves, but from economic forces over which they have no control. *Id.* ¶ 24.

Discussion

Following a January 2011 hearing, Hearing Officer DiPasquale issued her decision in Docket No. H-2010012857. That decision was mailed to Appellant on

February 25, 2011. Appellant requested that the decision be reviewed by the Unemployment Review Commission. That request was denied so this appeal followed.

The Hearing Officer received testimony from Appellant, who was represented by counsel. Additionally, testimony was received from Kroger employees Steve Sheperd, District Loss Prevention Manager, and Cindy James, the manager of the store at which Appellant had been employed. Additionally, Kroger provided documentary evidence.

The Hearing Officer concluded that when questioned about this matter, Ms. Lam admitted to Kroger employees that she took store merchandise without paying for it. Although Appellant denied she made such an admission, the evidence supports the finding made by the Hearing Officer that this had occurred. Specifically, the Hearing Officer found that Appellant, employed in the seafood department of a Kroger store since 2000, when questioned concerning whether she took fish without paying for it, provided non-credible explanations for the missing fish prior to admitting that she took the fish without paying Kroger for it. The Hearing Officer examined documentary evidence, consisting of records kept in the ordinary course of Kroger's business. Appellant, as head seafood clerk, was responsible for logging in all fish coming into the store. The documentary evidence showed that the fish which Appellant took had been logged in, but that the two logged in boxes of fish were crossed out on the record. (See COUNTRY OF ORIGIN RECORD, date received 6-10-10). Appellant offered three explanations for the cross-outs. She initially claimed the fish was a special order for a customer. However, Appellant's inability to remember even basic information about that assertion cast suspicion on it. Appellant next claimed that fish was thrown away because it was spoiled. Again, when pressed on details Appellant was unable to piece together a credible story. (See, Sheperd Testimony beginning P. 7, L. 6, esp. P. 8, L. 13,

“Uh Ms. Lam said that she family in front (sic) Vietnam, she wanted them to have a good meal and that was the reason she took the product.” And P. 10, L. 9-12 stating Ms. Lam resigned from Kroger on July 22, 2010) (See, also, Cindy James Testimony beginning at P. 18, L. 14 concerning the same interview Mr. Sheperd of Ms. Lam. Esp., P. 19, L. 5 “there were multiple stories at that point um and then finally at the end of the interview she did finally come out and say she had family visiting from Vietnam and she did leave the store without purchasing the product...”)

Kroger argued Ms. Lam’s explanations were inconsistent with seafood department records and Kroger policies. (See, **Store Rules**, signed by Appellant on 8-10-2000 & additional rules signed 01-04-08; Employee Acknowledgement of Handbook signed 4-26-09.) Unquestionably she was aware of the rules as head seafood clerk. She ultimately admitted she took a box of perch and a box of sea bass without paying her employer for them. She also signed a paper resigning from employment and agreeing to make restitution.

It is true that her signature appears at the bottom of the document titled **RESTITUTION**, and not directly below the resignation portion. The court does not view this a some flaw fatal in the evidence as Appellant affirmed the statement that “The above amount of moneys were taken by me without permission of any manager, employee or agent of the Kroger Company, with authority to give.” Appellant also signed her name below the line that reads, “All of the above statements have been made of my own free will and without any threats or promises.” (See, **RESTITUTION** form on Kroger letterhead, dated 7-22-10).

Although appellant argued at the hearing that her agreement to resign and repay Kroger was the product of coercion, the contemporaneous records belie that contention.

As fact finder, the Hearing Officer was entitled to credit the documents and the testimony concerning them from the Kroger employees who testified at the hearing.

Appellant also tried to explain at her hearing that she did not know she resigned and that she did not knowingly sign the papers. The Hearing Officer did not opine upon that contention. However, she found that Appellant's first two explanations for the missing fish were inadequate to explain the irregularities in the department records, and implicitly rejected Lam's other explanations for matters as contrived. In accepting Ms. Lam's admission that she took the fish without paying Kroger as fact, the Hearing Officer concluded she had not acted in her employer's interests. Thus, she found that "claimant was discharged by The Kroger Company, Inc., for just cause in connection with work." This court agrees.

Appellant's misconduct was reasonably proven and occasioned her discharge. It shows personal fault, not economic forces beyond Lam's control or some other benign explanation that does not justify denying her unemployment benefits.

The videotape.

There is one additional argument that merits mention. Appellant asks this court to remand this case to the Commission for a re-hearing contending it is necessary because Kroger did not produce a copy of a surveillance videotape allegedly showing Ms. Lam leaving the Kroger store on the date that she took the fish. At the hearing, Ms. Lam's counsel did not seek a continuance based on the lack of production of the tape (which he had subpoenaed.) The failure to seek a continuance for that additional, potential evidence waived the issue for appeal.

This argument is unavailing for several other reasons. First, testimony concerning the tape, and what it did or did not demonstrate, was considered. While ultimately it did not sway the Hearing Officer when considered against evidence provided by witnesses and other exhibits it is hard to find prejudice. Second, the videotape may well have been redundant or immaterial since even if it depicted the scene at all it would have disclosed nothing about whether Ms. Lam took the fish without paying for it. .

This court finds the administrative decision was not unlawful, unreasonable, or against the manifest weight of the evidence. The court sees no reason to remand this case to the commission for a re-opening of Lam's hearing.

FINAL JUDGMENT

The court **AFFIRMS** the Order of the Ohio State Unemployment Commission in Docket No: H-2010012857 in all respects, and denies Ms. Lam's appeal.

Costs taxed against Appellant.

IT IS SO ORDERED.

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Franklin County Court of Common Pleas

Date: 05-16-2012
Case Title: HOUNG N LAM -VS- OHIO STATE UNEMPLOYMENT
COMPATION REVIEW
Case Number: 11CV006347
Type: DECISION

It Is So Ordered.

The image shows a handwritten signature in black ink that reads "Richard A. Frye". The signature is written over a circular blue seal. The seal contains the text "FRANKLIN COUNTY OHIO" around the top and "COMMON PLEAS COURT" around the bottom. In the center of the seal, there is a smaller emblem with the text "ALL THINGS ARE" and "1803".

/s/ Judge Richard A. Frye

Court Disposition

Case Number: 11CV006347

Case Style: HOUNG N LAM -VS- OHIO STATE UNEMPLOYMENT COMPATION
REVIEW

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes