COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Foot and Ankle Specialists of Columbus, LLC,	:	
Appellant,	:	CASE NO. 11CVF03-2858
-vs-	:	**JUDGE DAVID W. FAIS**
Tina L. Barker, et al.,	:	
Appellees.	:	

DECISION AND ENTRY AFFIRMING THE ORDER OF THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION

FAIS, JUDGE

I. INTRODUCTION

The above-styled case is before the Court on appeal under R.C. 4141.282 from a granting of unemployment benefits by decision of the Ohio Department of Job and Family Services, Unemployment Compensation Review Commission (hereinafter "Commission"). That Decision, mailed February 3, 2011, disallowed further review of the assigned Hearing Officer's finding. The Hearing Officer previously concluded that Appellee/Claimant Tina L. Barker (hereinafter "Claimant" or "Barker") was entitled to unemployment compensation, finding that she had not quit her employment. Such a finding reversed a previous determination by the Director that Claimant had quit employment without just cause.

The record has been filed and arguments have been timely submitted by the parties. For the reasons identified below, the decision of the Commission must be affirmed.

II. FACTUAL AND PROCEDURAL HISTORY

Claimant was employed by Appellant Foot and Ankle Specialists of Columbus, LLC

(hereinafter "Appellant") as an Office Assistant, from February 2, 2009 until May 11, 2010. Appellant is a podiatry practice owned and operated by Dorothy Jones, DPM. Pursuant to approved maternity leave, Claimant worked her last day on March 17, 2010. *Hearing Exhibit A*. It was agreed by Appellant and Claimant that she would return to work on a full-time basis on May 17, 2010. To that effect, Claimant arranged for a neighbor to act as a sitter for her young children in anticipation of her return to work.

On April 27, 2010, Claimant came into Appellant's Office to discuss the particulars surrounding the return to work. At was at that time that Claimant broached the subject of working a reduced schedule to save in child care costs. Claimant indicated that she preferred to work a part-time schedule from 2:00 p.m. to 6:00 a.m., as her husband arrived home from work in the early afternoon. Dr. Jones conveyed that this would not be feasible, due to office needs and morning reception obligations, but it was permissible for Claimant to begin a part-time schedule if she could work from 8:00 a.m. to 12:00 p.m. At conclusion, it was agreed by the parties that Claimant would discuss the matter further with her husband and report back.

On May 10, 2010, Claimant and Dr. Jones engaged in an additional telephone conversation. There is no dispute that it was represented that the offered part-time hours of 8-12 were not beneficial to Claimant. Regarding the return to full-time employment, Claimant alleges that this was her preference, given the circumstances, but the phone call ended prematurely because of a crying baby. Dr. Jones recalls the conversation quite differently, denies hearing any baby crying, and insists that Claimant expressed that given the limitations governing part-time employment, Claimant preferred not to return to her previous position and formally resigned at that time.

According to Claimant, she attempted to call Dr. Jones repeatedly over the next several

days, but was unable to reach her. It was represented that initially this may have been attributed to Dr. Jones' travel, but ultimately, Claimant concluded her calls were not being returned.

On May 11, 2010, Dr. Jones sent a letter to Claimant referencing their earlier conversation and citing "[Claimant's] indication that you would not be returning to work", along with the fact that "your previous position was immediately filled." *Hearing Exhibit B*. After receiving this correspondence, Claimant retained counsel and pursued a sexual discrimination claim, as well as application for unemployment compensation benefits.

After Appellant's claim was heard by a Hearing Officer for the Commission, it was determined that Appellant had not quit her employment during the aforementioned verbal exchanges, and therefore, her claim for unemployment benefits remained viable and was restored. The Hearing Officer provided the following in the way of explanation "the [C]laimant offered sworn credible testimony that she had no intent to quit her employment and simply wanted to see if it was possible to work out a schedule that allowed her to work without securing childcare for economic reasons. The Claimant further testified and produced a witness was also testified, that she had secured a childcare provider to care for her children on a full time basis as it was her original intent to return to work full time if she was unable to return part-time." *Decision*, at 3.

As the employer, Appellant has appealed this finding that was adopted by the Commission to this Court, pursuant to R.C. 4141.282.

III. STANDARD OF REVIEW

Section 4141.282(H) of the Ohio Revised Code provides the following in relevant part:

> 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.

The Ohio Supreme Court has confirmed that in reviewing decisions rendered by the Commission, courts are not permitted to make factual findings or to determine the credibility of witnesses, but merely have the duty to determine whether the Commission's decision is supported by the evidence in the record. *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Ser.* (1995), 73 Ohio St.3d 694, 696. Moreover, the fact that reasonable minds might reach different conclusions is not a basis for the reversal of the Commission's decision. *Irvine v. Unemployment Compensation Review Commission* (1985), 19 Ohio St.3d 15, 18.

Where the Commission might reasonably decide either way, the courts have no authority to disturb the Commission's decision. *Id*. at 17. Accordingly, the Commission's role as factfinder remains intact and a reviewing court may reverse the Commission's determination only if it is unlawful, unreasonable, or against the manifest weight of the evidence. *Tzangas* at 697.

IV. ANALYSIS AND FINDINGS OF THE COURT

Appellant argues that the Commission's decision was in error. It is asserted that the Commission committed error by finding the Appellant did not quit without just cause. It is Appellant's position that the record establishes that Claimant voluntarily quit her employment after the employer was unable to convert her schedule to the particular part-time accommodation she demanded. According to Appellant, after receiving the letter from Dr. Jones on May 13, 2010, Claimant did not correspond in writing and failed to call the office to clarify claimant's position. Appellant argues that it wasn't until more than five weeks subsequent that Dr. Jones received a letter, but from Claimant's attorney alleging discrimination.

Appellant insists that Claimant's employment was ended due to her own fault or actions,

and therefore, unemployment compensation benefits are not appropriate. It is Appellant's contention that the Hearing Officer based her Decision on irrelevant facts and inconsequential circumstances. Next, it is said that it is mischaracterized that Appellant immediately hired someone as a replacement, as the facts demonstrate that the temporary employee that assisted Dr. Jones while Claimant was on maternity leave merely remained in that capacity until a permanent replacement was hired.

Lastly, Appellant states that the record reveals a bias in favor of Claimant and a direct animus toward Appellant. It is suggested that only a biased hearing officer could interpret the facts as presented in the manner contained in the Commission's Decision. Lastly, Appellant submits that the relied-upon credibility determinations are equally difficult to justify, because in a telephonic hearing it is impossible to judge demeanor.

In response, Appellee insists that the Commission properly found that Claimant was entitled to receive unemployment compensation benefits, as there is no fault to be attributed to her as the employee. According to Appellee, Claimant gave every indication of her intention to return to her previous full-time work schedule after maternity leave. She had arranged childcare with a neighbor, who verified at the hearing of an understanding that she was secured to provide full-time care for Claimant's children starting on May 17, 2010.

Appellee states that after several discussions between Dr. Jones and Claimant, it became apparent that Claimant would not be able to have the part-time work schedule she desired. In response, it is contended that Claimant abandoned that idea and decided to continue her previous full-time work schedule. Appellee maintains that Claimant repeatedly attempted to phone Dr. Jones to convey this preference, without success, and at no point in time did she ever express a

desire to quit her job. Once receiving the May 11, 2010 letter, Appellee indicates that Claimant was left without a purpose to further contact Appellant, as her previous calls were unreturned, she was already fired and the position had been "immediately filled."

It is with these assertions, arguments and assignments of error that the Court reviews the record in this proceeding.

Upon review, the Court observes that this matter does not present an instance that turns on just cause for termination per se, but rather, whether verbal notice of a voluntarily resignation ever occurred or was verbally conveyed to Dr. Jones by Claimant. As fully articulated by the Hearing Officer, the evidence on this issue requires reconciling Claimant's and Dr. Jones' versions of the multiple conversations between the parties regarding return to employment. The transcript contains these contrasting witness recollections on pages 11-13 and 31-24. *Id*.

Given this opposing testimony, the Court determines that it could reasonably be inferred from Claimant's testimony that she believed the discussion regarding her return to work had not concluded, but was delayed based on her child crying in the background. More importantly, if found credible, the Hearing Officer could believe Claimant's denial that she ever represented or suggested she was resigning her position or was unwilling to return to the office on a full-time basis. Although Appellant is critical that Claimant never uttered the magic words "I'll be coming back full-time as scheduled", the Court finds the statement "okay well I can work out the babysitting issues" is tantamount to the very outcome. (Transcript, at 13). Conversely, Dr. Jones attested to specifically hearing from Claimant that she would not be able to return to the position, as previously arranged, and that she was resigning her employment. Once again, the Hearing Officer was free to find that opposing testimony less credible in light of all the evidence and circumstances,

as well as the usual rules for assessing credibility. In reaching these factual findings, the Hearing Officer was also permitted to find the testimony of neighbor Underwood more persuasive or complementary than that of Appellant staff member Johnson.

Based on this evidence, the Court observes that this appeal does not concern a complicated set of facts, but clearly focuses on divergent testimony in the record based upon two distinct recitations of what was verbally discussed between the parties in advance of Claimant's return to work.

When there is probative evidence in conflict contained in the record, the Court is not in a superior position to alter the factual conclusions reached at the hearing and Commission level. *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Ser.* (1995), 73 Ohio St.3d 694, 696; *Brown-Brockmeyer Co. v. Roach*, 148 Ohio St. 511 (Ohio 1947); *Angelkovski v. Buckeye Potato Chips Co*., 11 Ohio App. 3d 159 (Ohio Ct. App., Franklin County 1983). Consequently, reviewing courts are traditionally unwilling to interfere with this fundamental role of factual development bestowed at the administrative level. *Id*.

In light of this authority, this Court views this dispute of material fact was appropriately assessed by the Hearing Officer, which is the precise role of her function. Clearly, in reconciling the existing conflicts, the Hearing Officer duly determined that Claimant and her witness were more credible than that of Jones, along with Appellant's staff member. The Court declines any invitation to second-guess or disturb the Hearing Officer's role as fact-finder and trier of witness credibility. The Court further rejects Appellant's proposition that the facts present in the record are so one-sided that credibility determinations are rendered unnecessary, and the result can only explained via an exhibition of personal animus against Appellant and/or counsel.

In the determination of the Court, the Hearing Officer resolved the competing evidence and versions of telephones conversations by assessing witness credibility. In conjunction with the provided reasoning, it is apparent that it was found believable that the parties had preliminary discussion about Claimant's options that were never finalized, and that Claimant attempted to reach Dr. Jones subsequently on several occasions, but was unsuccessful. Evidentiary support exists in the record for each of these factual findings.

Appellant attempts to place undue emphasis on written versus verbal communication, along with associated inferences that a reasonable person would challenge the contents of the May 11, 2010 letter in writing and at an earlier date. However, the crux of this case centers on which side's witnesses were perceived as more credible in their hearing testimony surrounding the events leading up to said letter. Moreover, the Court does not perceive the lack of a written resignation letter to be controlling or dispositive in the Hearing Officer's analysis. Furthermore, with respect to whether Claimant's position was filed by a third-party or an interim temporary employee is immaterial. The May 11, 2010 letter explicitly states that the position has been "immediately filled." The only significant consequence of that statement is that Claimant could reasonably conclude that she was no longer part of the office staff and is not expected back or welcome on May 17, 2010, as previously arranged.

Appellant offers the case of *Lorain County Auditor v. Ohio Unemployment Review Comm'n*, 185 Ohio App. 3d 822 (Ohio Ct. App., Lorain County 2010), in support of its argument that Claimant quit employment without just cause and the proposition that employees are protected by the Unemployment Compensation Act from economic forces that they have no control and not as victims of their own predicaments. Upon review, the Court agrees that the above-cited case

stands for those legal principles and addresses an instance where a claimant had allegedly unexcused absences leading to termination. However, the Commission in that case ultimately determined that the claimant's testimony was credible in that her absences derived from injuries sustained in a car accident that were medically excusable, thereby finding they were out of her control and not with fault, despite exceeding those allowed under the applicable employee attendance policy. *Id*. at syllabus. For the reasons stated above, this Court concludes that the Commission has performed a similar role in this appeal by failing to impute fault on the part of Claimant Barker.

As a secondary assignment of error, Appellant maintains that the proceeding at the administrative level was personally biased against Dr. Jones, along with counsel. The Court disagrees after examining the record, with emphasis on the hearing transcript identified in Appellant's brief. (Transcript, at 18-22, 38). Appellant's allegations that the Hearing Officer was bias against Appellant and counsel, is simply not reflected in the hearing transcript. It is accurate that the Hearing Officer cautioned counsel for talking over witnesses and mischaracterizing testimony. However, such admonitions are routine during contested evidentiary proceedings, and there is nothing included to suggest an existing impartiality. Instead, these appear to be examples of the individual presiding over the administrative hearing attempting to preserve order and accuracy of the record of the proceeding as it is being developed. Accordingly, the record fails to corroborate Appellant's accusation.

Appellant lastly intimates that the Hearing Officer's manner of conducting a telephonic hearing impaired her ability to fairly judge credibility. This argument must also fail. Courts and juries are routinely required to evaluate the weight of testimony from depositions which are in

recorded form. Evidence can often come from recordings where visual cues are lacking. While in person testimony is always preferable, the economic factors in having live testimony are considerations that require the Commission to utilize telephonic services.

Based on the foregoing, this Court finds that the Commission's Order is supported by the evidence and is in accordance with law. Accordingly, the Court hereby **AFFIRMS** the Order of the Commission.

Rule 58(B) of the Ohio Rules of Civil Procedure provides the following:

> **(B) Notice of filing.** When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment on the journal, the clerk shall serve the parties in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App. R. 4(A).

The Court finds that there is no just reason for delay. This is a final appealable order.

The Clerk is instructed to serve the parties in accordance with Civ. R. 58(B) as set forth above.

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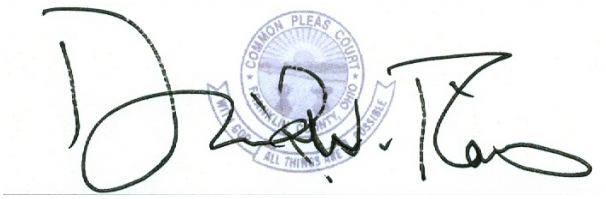
Franklin County Court of Common Pleas

Date:	06-25-2012
Case Title:	FOOT & ANKLE SPECIALISTS COLUMBUS -VS- TINA L BARKER
Case Number:	11CV002858
Type:	DECISION/ENTRY

It Is So Ordered.



/s/ Judge David W. Fais

Court Disposition

Case Number: 11CV002858

Case Style: FOOT & ANKLE SPECIALISTS COLUMBUS -VS- TINA L BARKER

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes