

STATE OF OHIO, COUNTY OF BELMONT
COURT OF COMMON PLEAS

FILED
COMMON PLEAS COURT
BELMONT CO., OHIO

David L. Fiutem

2012 NOV 14 AM 8 38

Claimant/Appellant

Case No.: 12 CV 106

Vs.

JUDGMENT ENTRY

CYNTHIA K. M. GEE
CLERK OF COURT

State of Ohio Unemployment
Compensation Review Commission,
and
Director Ohio Department of
Job & Family Services
and
Cadiz CountryClub, Inc.,

Appellees

This matter comes before this Court on Appeal on questions of law from an **Administrative Decision** of the **Unemployment Compensation Review Commission**, mailed January 12, 2012, which decision found claimant, David L. Fiutem, quit his job at Cadiz Country Club, Inc., without just cause, and which found that Claimant had been overpaid benefits to which he is not entitled.

Appellant has exhausted his Administrative remedies and this Court has jurisdiction to entertain the Appeal.

The Appeal filed by Appellant, David L. Fiutem, on February 29, 2012, is Sustained and the Decision of the Unemployment Compensation Review Commission is Reversed and this case is Remanded for Rehearing before a different Hearing Officer. In addition, while this matter is pending, the decision pertaining to overpayment is also reversed and vacated. Appellant's benefits shall be reinstated and continued in accord with law.

The Court specifically finds that the decision of the Hearing Officer was unlawful and unreasonable because the Hearing Officer failed to allow Claimant/Appellant to present a witness to relevant and material issues pertaining to his alleged "quit without just cause" and otherwise to otherwise develop his case to demonstrate his entitlement to Unemployment Benefits. Bulatko v. ODJFS, 2008 WL 650776, (Ohio App. 7th Dist.), citing Owens v. Admr., OBES, 135 Ohio App. 3d 217, 220 (1999).

This is a Final Appealable Order.

FINDINGS OF COURT

The Ohio Unemployment Act defines and limits the scope of review to be utilized by the Court of Common Pleas in Appeals from the Commission and specifies the standard of review to be applied in reviewing the record. **R.C. §4141.28 (0)(1)** provides in part:

If the Court finds that the decision was unlawful, unreasonable or against the manifest weight of the evidence, it shall reverse and vacate such decision or it may modify such decision and enter final judgment in accordance with such modification; otherwise, the Court shall affirm such decision.

Accordingly, proceedings in the Court of Common Pleas arising under R.C. §4141.28 (0)(1) are error proceedings, not proceedings de novo. **Tzangas Plaskas & Munnos v. Ohio Bur. Of Emp. Serv. (1995), 73 Ohio St. 3d 694** The Commission is the trier of fact and reviewing courts cannot infringe on that primary jurisdiction by weighing evidence or assessing credibility from afar. **Simon v. Lake Geauga Printing Co. (1982), 69 Ohio St. 2d 41** Therefore, reviewing courts are without jurisdiction to overturn a decision of the Commission merely on the basis that reasonable minds might differ as to factual conclusions. **Charles Livingston & Sons v. Constance (1965) 115 Ohio App. 437**

In light of the above-mentioned precedent, this Court has carefully reviewed the entire transcript of proceedings, including testimony and exhibits submitted by Claimant, David L. Fiutem and Charles Bizzari, Board Member of Cadiz Country Club, Inc., at the Hearing on January 11, 2012 and **finds that the decision of the Hearing Officer**, which decision was affirmed by the Unemployment Compensation Review Commission, **was unlawful and unreasonable because the Hearing Officer deprived Claimant of a fair hearing by wrongfully refusing to permit a witness, Mr. Zitko, a member and equity holder of the Country Club, to testify regarding issues that were otherwise relevant and material to the determination of whether Claimant "quit" Cadiz Country Club, Inc. "without just cause." **Bulatko v. ODJFS, 2008 WL 650776, (Ohio App. 7th Dist.), citing Owens v. Admr., OBES, 135 Ohio App. 3d 217, 220 (1999).****

A Claimant is ineligible for unemployment benefits if he or she quits the job without "just cause." **R.C. §4141.29(D)(2)(a)** "Traditionally just cause, in the statutory sense, is that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act." **Irvine v. Unemp. Comp. Bd. of Review, 19 Ohio St. 3d 15, 17 (1985)** Just cause is decided on a case by case basis. **Irvine, cited in Tzangas, Plakas & Mannos v. Admr., Ohio Bur. of Emp. Servs., 73 Ohio St. 3d 694, 696.**

In this case, the Court specifically finds that the Hearing Officer deprived the Claimant of a fair hearing when he wrongly refused to permit Fiutem's witness, Mr. Zitko, a member and equity owner of the Country Club, to testify. The Unemployment Compensation Act mandates that the "referee" afford all parties a reasonable opportunity for a fair hearing. "The board and the referee shall take any steps in such hearings, consistent with the impartial discharge of their duties, which appear reasonable and necessary to ascertain the facts and determine whether the claimant is entitled to benefits under the law...." **R.C. §4141.28(J)**

In this case, the Hearing Officer, who was unexpectedly substituting for the regularly assigned Hearing Officer, over the objection of Fiutem's counsel, refused to permit Mr. Zitko to testify, even though the Hearing Officer had indicated that the proffered testimony would be otherwise admitted if Appellee's witness, Mr. Bizzari, had agreed (Mr. Bizzari, in fact, did not agree and Fiutem's witness was not permitted to testify). (**See, Transcript p. 13.**) The Hearing Officer, upon receiving the proffer as to Zitko's testimony, i.e., (1) that Kirkland (Fiutem's supervisor) plotted one worker against another; (2) that he would not follow the "flow charts", or chain of command; and (3) that he told Bizzari there was a lot friction caused by Kirkland, proceeded to pose his own questions concerning these issues, but subsequently failed to permit Zitko to testify, despite the failure of Bizzari to agree to the proffer. (**See, Transcript, p. 20, ¶10-23.**) It is interesting to note, at this juncture, that the Hearing Officer had just picked up the file for the Hearing immediately prior thereto because the regularly assigned Hearing Officer was ill and he had no knowledge of the case prior to the Hearing. (**See, Transcript, p. 3.**)

A key factor in deciding whether a hearing satisfies procedural due process is whether the claimant had the opportunity to present the facts which demonstrate that he was entitled to unemployment benefits. **Gregg v. SBC Ameritech, 10th Dist. No. 03-AP-429, 2004 Ohio 1061.** This is because the object of the hearing is to ascertain the facts which may or may not entitle the claimant to the unemployment benefits. **Bulatko v. Ohio Dept. of Job & Family Servs., 7th Dist. No. 07-MA-124, 2008-Ohio-1061.**

This Court specifically finds that Fiutem's proffer establishes that Mr. Zitko would have offered evidence pertaining to the issue of whether Fiutem gave his employer an opportunity to fix the employment problems prior to his decision to resign. Since the severance of the employment relationship can entail more than one step (**Coleman v. Cleveland School Dist., 142 Ohio App. 3d 690 (8th Dist.)**), or constitute a process, containing several steps, Mr. Zitko would have provided evidence as to whether the Board gave Fiutem an opportunity to accommodate his complaints over a period of time prior to the submittal of his resignation. Further, the Court finds that, based upon the proffer, that Zitko was a witness who had personal knowledge of how Kirkland and the employer operated and how the Board made decisions and would have provided insight as to the issue pertaining to the chain of command at the Country Club, as well as whether the apparent conflict between Fiutem and his supervisor (Kirkland) was an issue of "managerial style" or, as alleged by Fiutem, an attempt by Kirkland to make his job "practically impossible." (See, Transcript p. 7, line 19.) Finally, Zitko's testimony may have also impacted upon the question of Fiutem's "continued stress" and whether Kirkland deliberately caused the problem of such stress.

It is apparent, from the record, that the testimony of Zitko would have provided insight into the very subject of the dispute. It is apparent that Fiutem was not seeking to provide cumulative testimony, but simply one (1) witness, in addition to himself, with a perspective different from the Claimant. Nor was this a case where there appeared to be an inconvenience to, or concerns about the unavailability of the witness. In fact, Zitko had been present for two (2) previous hearings. It appears reasonable, based upon the proffer, that Zitko, without undue delay or presentation of cumulative evidence, would have provided evidence from which inferences could be drawn, as to how Kirkland and the Board operated as an employer and as to how the Board may have arrived at its decision to accept Claimants resignation. (See, **Astro Shapes, Inc. v. Sevi, 2010-Ohio-750, 2010 WL 708997, 3 (Ohio App. 7th Dist.)**)

While the Hearing Officer has some discretion to deny the testimony of a perspective witness, the Hearing Officer's failure to allow a party to present witnesses or otherwise develop their case is grounds for reversing the decision of the Review Commission. **Bulatko v. ODJFS, 2008 WL 650776, 2 Ohio App 7th Dist.** This Court finds that the Hearing Officer's failure to allow Fiutem to present his witness (Zitko) and to otherwise develop his case is grounds for reversing the decision of the Review Commission.

For all of the above-stated reasons, the Court finds that this matter should be remanded for a Hearing before a different Hearing Officer and that Fiutem should receive all other further relief to which he is entitled, that the overpayment should be reversed and vacated and benefits reinstated and continued in accord with law, until such further Hearing of this matter.

This is Final, Appealable Order.

Dated: November 13, 2012


JOHN M. SOLOVAN, II - JUDGE

pc:  **Timothy F. Cogan, Atty./Claimant**
Patria V. Hoskins, Atty./Appellee