

NANCY S. REINHOLD
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IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

D.A. PETERSON, INC.)	Case No. 2012CV01941
)	
)	
)	Judge Taryn L. Heath
)	
Appellant,)	
)	JUDGMENT ENTRY
vs.)	(Affirming Order of the State of
)	Ohio Unemployment
)	Compensation Review
)	Commission)
)	
DIRECTOR, OHIO DEPARTMENT)	
OF JOB & FAMILY SERVICES, et.)	
al.)	
)	
Appellees.)	

This matter is before the Court on Appellant, D.A. Peterson, Inc.'s ("Q92") administrative appeal of the State of Ohio Unemployment Compensation Review Commission's ("Review Commission") decision granting unemDeployment compensation benefits to Appellees, Patrick DeLuca ("DeLuca") and Charlotte DiFranco ("DiFranco")(jointly "Claimants"). The Claimants and Appellee, Director, Ohio Department of Job and Family Services ("ODJFS") have each filed a Response Brief and Appellant, Q92, has filed a Reply Brief.

I. Factual Background

DeLuca was employed by Q92 for nearly ten years as the host of the radio station's morning show. DeLuca Director File, *Request to Employer for Separation Information* (Feb. 21, 2012). DiFranco was employed by Q92 for nearly eight years, the last six of which were spent as DeLuca's co-host for the morning show. DiFranco Director File, *Request to Employer for Separation Information*, (Feb. 21, 2012).

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2006, the Claimants' employment at Q92 had been subject to written three-year employment contracts. DeLuca, *Request*; DiFranco, *Request*. The Claimants executed two contracts of employment through their tenure with Q92, the latest of which was scheduled to expire on February 2, 2012. Appellant's Exbs. 1 & 2; Appellee's Exbs. E & F.

Don A. Peterson, III ("Peterson") is the vice president of operations and general manager for Q92. Peterson engaged in contract negotiations on behalf of Q92. The Claimants both retained Attorney Steven Okey to represent them in contract negotiations with Q92. Renewal contract negotiations between the Claimants and Q92 began in early January, 2012. DeLuca, *Request*; DiFranco, *Request*. During negotiations, Claimants offered to continue working under the current contract until mutually agreeable new employment contracts could be executed. DeLuca Review Commission File, *Transcript of Hearing* (April 12, 2012) 7-9; DiFranco Review Commission File, *Transcript of Hearing* (May 29, 2012) 7-9. Claimants also offered to work without contracts during the continuing contract negotiations after expiration of the current contract. DeLuca Tr., at 7-9. Both offers were declined by Q92. DeLuca Tr., at 7-9; DiFranco Tr., at 7-9, 24. The current contract did not contain a provision that would permit its extension during continued negotiations. Appellant's Exbs. 1 & 2; Appellee's Exbs. E & F. The Claimants' employment contract with Q92 expired on February 2, 2012 without Claimants and Q92 reaching a new employment agreement. DeLuca Tr., at 7; DiFranco Tr., at 7-8.

Claimants last day of work at Q92 was February 1, 2012. DeLuca Tr., at 7; DiFranco Tr., at 7. On February 1, 2012 Claimants received an email from their supervisor, John Stewart ("Stewart") which stated

So we are all on the same page. After speaking with Don Peterson, III, it was decided that you all should meet tomorrow and that no one is expected to work the 5:30-10AM shift at Q92. I've already put in music. Please get together and knock this out so everyone is satisfied.

Review Commission File, *Claimants' Exhibit A* (Feb. 1, 2012 at 6:32 a.m.). Based upon Stewart's email Claimants did not work on February 2, 2012. Thereafter, Claimants and Q92 continued to negotiate a new employment agreement. DiFranco Tr., at 24. On February 6, 2012, the negotiations between Claimants and Q92 ended without the parties reaching a new employment agreement. DiFranco Tr., at 20-21.

With regard to DeLuca's claim, on March 1, 2012, ODJFS issued an initial determination, holding that DeLuca quit his employment without just cause and disallowed DeLuca's application for benefits. This decision was timely appealed and later affirmed. DeLuca filed a timely appeal of ODJFS' redetermination decision and on March 26, 2012, ODJFS transferred jurisdiction to the Review Commission pursuant to R.C. § 4141.281(B)(Anderson 2012). On April 12, 2012, Hearing Officer Spencer conducted a telephonic evidentiary hearing. In a decision mailed April 16, 2012, Hearing Officer Spencer modified ODJFS' redetermination decision and held that DeLuca had been separated from employment due to lack of work and was therefore eligible for unemployment compensation benefits. Appellees' Exb. A. On May 4, 2012, Q92 timely requested further review by the Review Commission. On May 12, 2012, the Review Commission disallowed the Employer's request. Appellees' Exb. B. Q92 thereafter appealed to this Court seeking reversal of the approval of DeLuca's unemployment compensation benefits.

With regard to DiFranco's claim, on February 27, 2012, ODJFS issued an initial determination holding that DiFranco became separated from employment due to a mutual

agreement and allowed DiFranco's application for benefits. On March 2, 2012, ODJFS vacated the initial determination and indicated that a new determination would follow. On March 12, 2012, ODJFS issued a revised determination, holding that DiFranco quit her employment without just cause and refused an offer of suitable work, and disallowed DiFranco's application for benefits. This decision was timely appealed and later affirmed. DiFranco filed a timely appeal of ODJFS' redetermination decision and on May 1, 2012 ODJFS transferred jurisdiction to the Review Commission pursuant to R.C. § 4141.281(B)(Anderson 2012). On May 29, 2012, Hearing Officer Meas conducted a telephonic evidentiary hearing. In a decision mailed June 6, 2012, Hearing Officer Meas reversed ODJFS' redetermination decision and held that DiFranco had been separated from employment due to lack of work, did not refuse an offer of work, and was therefore eligible for unemployment compensation benefits. Appellees' Exb. C. On June 22, 2012, Q92 timely requested further review by the Review Commission. On July 19, 2012, the Review Commission disallowed the Employer's request. Appellees' Exb. D. Q92 thereafter appealed to this Court seeking reversal of the approval of DiFranco's unemployment compensation benefits.

Upon Q92's Motion to Consolidate, the Court consolidated the two cases for purposes of judicial economy and joint determination of these two cases with essentially interwoven facts.

II. Law and Analysis

A. Standard of Review

In considering this appeal, this Court applies Ohio Revised Code § 4141.282(H) which requires this Court to affirm the decisions of the Review Commission allowing Claimants' claims for unemployment compensation benefits unless one or both of those

decisions are “unlawful, unreasonable, or against the manifest weight of the evidence.” *Tzangas, Plakas & Mannos v. Ohio Bur. Of Emp. Serv.*, 73 Ohio St. 3d 694 (1995). If “some evidence in the record” supports a Review Commission’s decision it must be affirmed. *See Binger v. Whirlpool Corp.*, 110 Ohio App. 3d 583, 589(1996); *Durgan v. Ohio Bur. Of Emp. Serv.*, 110 Ohio App. 3d 545, 551. “The fact that reasonable minds might reach different conclusions is not a basis for the reversal of the [Review Commission’s] decision.” *Irvine v. State Unemployment Comp. Bd.*, 19 Ohio St. 3d 15, 17 (1985). A reviewing court cannot usurp the function of the trier of fact by substituting its judgment for theirs. *Simon v. Lake Geauga Printing Co.*, 69 Ohio St.2d 41, 45 (1982). The reviewing court must give deference to the Review Commission’s credibility determination regarding witness testimony. *Durgan v. Ohio Bur. Of Emp. Serv.*, 110 Ohio App. 3d at 552.

B. Findings

Ohio Revised Code § 4141.29 establishes the criteria for unemployment compensation benefits. Pursuant to Ohio Revised Code § 4141.29:

Each eligible individual shall receive benefits as compensation for loss of remuneration due to involuntary total or partial unemployment in the amounts and subject to the conditions stipulated in this chapter.

An employee may not be eligible for unemployment compensation benefits under certain circumstances, including: 1) if the employee “quit work without just cause” pursuant to R.C. § 4141.29(D)(2)(a) and/or; 2) if the employee “refused without good cause to accept an offer of suitable work when made by an employer either in person or to the individual’s last known address” pursuant to R.C. 4141.29(D)(2)(b).

In each Claimant’s respective Review Commission decision it was determined that the Claimant was separated from Q92 “due to lack of work”. Unemployment Review

Commission Decision, *In re claim of: Patrick Deluca* (April 16, 2012) 4; Unemployment Review Commission Decision, *In re claim of: Charlotte DiFranco* (June 6, 2012) 6. In DiFranco's Review Commission decision it was additionally determined that: 1) she "did not refuse to accept an offer of work"; 2) no disqualification of benefit rights were imposed; and 3) she was not overpaid benefits. *DiFranco* Decision at 6. The issue for this Court to determine is whether the aforementioned Review Commission decisions were unlawful, unreasonable, or against the manifest weight of the evidence.

1. Separation From Employment Due To Lack Of Work

Q92 has asserted that the Claimants separation from employment was not due to the expiration of the current contracts but rather it was due to the termination of contract negotiations by the Claimants.

The Ohio Supreme Court has held:

An employee who accepts employment and agrees to a termination date does not waive her right to unemployment benefits. More specifically, the employee has not agreed to become voluntarily unemployed or to be discharged with just cause, unless an explicit exception is applicable.

Lorain County Auditor, et. al. v. Ohio Unemployment Compensation Review

Commission, et. al., 113 Ohio St. 3d 124, at ¶ 30 (2007). The Ohio Supreme Court went on to state: "The protections of an employee under R.C. 4141.29 are to be liberally construed. Thus, the exceptions to R.C. 4141.29 should be narrowly construed." *Id.* at ¶ 31.

In Case Western Reserve University v. Ohio Unemployment Comp. Review Commission, the Court held,

* * * 'the fact that the unemployment is the result of the expiration of a contract for employment is irrelevant.' The rationale for this position is that eligibility for unemployment benefits depends upon the establishment of an employment relationship followed by involuntary unemployment.

Consequently, in Ohio a presumption exists that the employee separated for lack of work; this presumption may be rebutted by the employer testifying that it indeed had work but the employee left voluntarily.

Case Western Reserve University v. Ohio Unemployment Comp. Review Commission, 2003-Ohio-2047, ¶5 (Ohio Ct. App. 8th Dist., April 24, 2003); quoting *Lexington Township Trustees v. Stewart*, 1986 WL 3925, *2 (Ohio Ct. App. 5th Dist., March 17, 1986).

a. DeLuca's Separation From Employment

Based upon the testimony provided at the hearing on April 12, 2012, and upon the exhibits that have been made a part of the official record, the Review Commission arrived at its findings of fact and its decision that DeLuca was separated by Q92 due to lack of work. Specifically, the Review Commission found that:

The contract did not provide a provision that would allow the claimant to continue working beyond the expiration of the contract and the prior contract was not extended beyond February 2, 2012.

DeLuca Decision at 3. The Review Commission further found that:

The claimant's employment contract ended, the contract did not contemplate employment beyond expiration of the contract, and the contract was not extended. Consequently, the Hearing Officer finds that under these circumstances the claimant was separated by D.A. Peterson, Inc. due to lack of work.

DeLuca Decision at 4. Further, upon review of the transcript of the April 12 hearing, it is clear that Claimants offered to maintain the existing contract terms after their expiration date while the parties continued to negotiate new terms but Q92 refused. *DeLuca Tr.*, at 7, 10-11. DeLuca testified that, "my partner and I had offered to continue our employment without a contractual agreement. We were told that without a new contract, we were no longer employed by the radio station." *DeLuca Tr.*, at 7.

This Court has reviewed the pleadings in the present action, attachments thereto and the transcript of the April 12, 2012 Review Commission Hearing held in this matter. The Court finds that the decision of the Review Commission was not unlawful, unreasonable, or against the manifest weight of the evidence. Based upon the testimony provided at the hearing on April 12, 2012, and upon all the exhibits that have been made a part of the official record, the Review Commission arrived at its findings of fact and its decision that DeLuca was separated by D.A. Peterson, Inc. due to lack of work.

b. DiFranco's Separation From Employment

Based upon the testimony provided at the hearing on May 29, 2012, and upon the exhibits that have been made a part of the official record, the Review Commission arrived at its findings of fact and its decision that DiFranco was separated by Q92 due to lack of work. Specifically, the Review Commission found that:

The testimony and evidence presented establishes that the contract was not renewed or extended and no work was immediately available to claimant. As no further work was immediately available to claimant, claimant was separated from D.A. Peterson, Inc. on February 2, 2012 due to a lack of work.

DiFranco Decision at 4. Further, upon review of the transcript of the May 29, 2012 hearing, it is clear that Claimants offered to maintain the existing contract terms after their expiration date while the parties continued to negotiate new terms but Q92 refused. *DiFranco Tr.*, at 7-9, 24. DiFranco testified that, "we offered to extend, um, the current contract to continue negotiations. Unfortunately, that was declined, uh, on behalf of D.A. Peterson...D.A. Peterson, Inc." *DiFranco Tr.*, at 7. Peterson testified that when DiFranco offered to extend the existing contract during continued negotiations he declined her offer. *Id.* at 24.

This Court has reviewed the pleadings in the present action, attachments thereto and the transcript of the May 29, 2012 Review Commission Hearing held in this matter. The Court finds that the decision of the Review Commission was not unlawful, unreasonable, or against the manifest weight of the evidence. Based upon the testimony provided at the hearing on May 29, 2012, and upon all the exhibits that have been made a part of the official record, the Review Commission arrived at its findings of fact and its decision that DiFranco was separated by D.A. Peterson, Inc. due to lack of work.

2. Offer For Suitable Work

Q92 has asserted that the Review Commission's decisions should be reversed due to an offer of suitable employment existing at the time the Claimants terminated contract negotiations. As stated herein, an individual may not receive unemployment compensation benefits if it is determined that they "refused without good cause to accept an offer of suitable work when made by an employer..." R.C. § 4141.29(D)(2)(b) (Anderson 2012).

In Ohio, it has long been held that whether work is "suitable" is a question of fact. *Feldman v. Loeb*, 37 Ohio App. 3d 188 (Ohio Ct. App. 8th Dist., April 6, 1987); *citing Pennington v. Dudley*, 10 Ohio St. 2d 90, paragraph two of syllabus (1967). The determination of this factual issue is left to the Review Commission. *Dudley, supra*.

In the present action the Review Commission only made a determination regarding the issue of refusal, without good cause, to accept an offer of work in the DiFranco claim. In the DiFranco decision, the Hearing Officer specifically made the following determination:

The testimony and evidence presented establishes that the negotiations ended on February 6, 2012 and no new agreement was reached between the parties. Under these circumstances, the Hearing Officer finds that

claimant did not refuse an offer of work as *no formal offer of work had been presented*. The facts indicate that the negotiations simply ended prior to the parties agreeing to the final terms and conditions of employment.

(Emphasis added) *DiFranco* Decision at 5. Peterson testified,

I said we need to figure out how to make the station (inaudible) for the overpayment, I'm sure we can come up with some solution (inaudible) her co-worker was also overpaid. We'll work that out. All that stuff could, could have been worked out somewhere along the way had negotiations continued. But, the negotiations ended.

DiFranco Tr., at 23. Upon review of the *DiFranco* Review Commission decision, the Review Commission file and the transcript of the May 29, 2012 hearing, the Court finds that the Hearing Officer made a factual finding based upon the record that no formal offer of employment was made to Claimants and therefore there was no offer of suitable work to refuse.

This Court has reviewed the pleadings in the present action, attachments thereto and the transcript of the May 29, 2012 Review Commission Hearing held in this matter. The Court finds that the decision of the Review Commission was not unlawful, unreasonable, or against the manifest weight of the evidence. Based upon the testimony provided at the hearing on May 29, 2012, and upon all the exhibits that have been made a part of the official record, the Review Commission arrived at its findings of fact and its decision that *DiFranco* did not refuse to accept an offer of work.

III. Conclusion

In the present action, even if this Court would have reached a different conclusion than the Review Commission based upon its interpretation of the evidence, it is not a basis for reversal. *Irvine v. State Unemployment Comp. Bd.*, 19 Ohio St. 3d 15, 17 (1985). If credible evidence supports the Review Commission's conclusion, the law prohibits a

reviewing court from substituting its judgment for that of the Review Commission. *Simon v. Lake Geauga Printing Co.*, 69 Ohio St. 2d 41 (1982).

Based upon a review of the entire record and pursuant to current and binding case law, this Court finds the Review Commission's determination that Claimants were involuntarily unemployed and that DiFranco did not refuse an offer of suitable work is supported by sufficient and credible evidence. Therefore, this Court must defer to the Review Commission's decisions.

The Court finds that the decisions of the Review Commission were not unlawful, unreasonable, or against the manifest weight of the evidence and therefore, **AFFIRMS** the decisions of the Review Commission.

IT IS SO ORDERED.



HON. TARYN L. HEATH

- c: Atty. Susan M. Sheffield- via facsimile (330) 884-7551
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- Atty. Steven P. Okey- via facsimile (330) 453-2715

NOTICE TO CLERK
FINAL APPEAL
IT IS ORDERED
