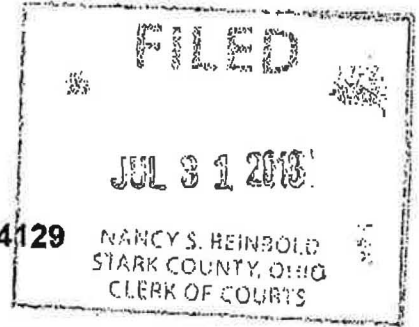


IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO



ERMA QUALLS,

Case No. 2011CV04129

Judge Taryn L. Heath

Appellant,

JUDGMENT ENTRY
(Affirming Order of the State of
Ohio Unemployment
Compensation Review
Commission)

vs.

J.C. PENNY CORPORATION, INC.,
et. al.

Appellees.

This matter is before the Court on Appellant, Erma Qualls' ("Claimant") administrative appeal of the State of Ohio Unemployment Compensation Review Commission's ("Review Commission") decision denying unemployment compensation benefits to Claimant, a former employee of Appellee, J.C. Penney Co., Inc. ("Employer"). The appellee, Director, Ohio Department of Job and Family Services ("ODJFS") has filed a Response Brief and Appellant, Claimant, has filed a Reply Brief.

I. Factual Background

Claimant worked as a catalog supervisor for Employer, from August 1997 until her last day of employment on April 14, 2011. *Transcript of October 3, 2011 Hearing*, at 5 ("Tr. 1"), appended to ODJFS' Brief as Exb. C¹. Claimant previously sustained a stroke in 2009. *Tr. 1*, at 6. In March 2011 and again in early April 2011, Claimant had

¹ The Transcript of the October 3, 2011 hearing contained within the Certified Record was, unfortunately, not paginated. Therefore, it is included as Exhibit C to ODJFS' Brief with pagination.

similar symptoms and went to the emergency room, where her medications were adjusted. *Tr. 1*, at 6-7.

On April 14, 2011, Claimant noticed symptoms that indicated her blood pressure was increasing, possibly leading to another stroke. *Tr. 1*, at 7. Claimant called for the manager of the day, Kim Carillon ("Carillon"). *Tr. 1*, at 8-9, 48. Claimant told Carillon that she felt bad, that she could possibly be having a stroke, and that she had to leave. *Tr. 1*, at 9. Claimant handed Carillon the keys for the register. *Id.* Carillon told Claimant that she couldn't leave because there was no one to cover her department. *Tr. 1*, at 48-49. Claimant called Barbara Pearles ("Pearles") and told her that she was not feeling well and needed to go home. *Tr. 1*, at 18. Claimant testified that Pearles told her that was okay. *Id.* Carillon testified that she heard Claimant speaking with someone on the phone and the Claimant yelled that Carillon didn't care if she was having a stroke. *Tr. 1*, at 49. Claimant stated that she had to leave and go to the hospital. *Transcript of October 26, 2011 Hearing*, at 10 ("Tr. 2"). Claimant then left work when her husband picked her up. *Tr. 2*, at 12. Claimant did not go to the hospital after being picked up by her husband, but went home and spoke with her doctor. *Tr. 2*, at 12.

On April 15, 2011, Claimant attempted to check her scheduled work times. This is done by going online and entering a program generally referred to as the employee kiosk ("kiosk"). Each time Claimant attempted to login to the kiosk she testified that she was unsuccessful and determined that she was locked out. *Tr. 1*, at 11, 15-16. Claimant testified that this indicated to her that she was terminated. *Id.*

On April 16, 2011, Claimant did not report for work and did not call in sick. *Tr. 1*, at 21. On the following days, Claimant also did not report for work or call in sick: April 17, 2011, April 18, 2011, April 20, 2011, and April 22, 2011. *Tr. 1*, at 21. Claimant

testified that it is a general procedure, that employees not present for the start of their shift are called by a supervisor or manager. *Tr.* 1, at 15. Claimant further testified that she was not called regarding a scheduled shift. *Id.*

On April 22, 2011, Barbara Pearles (“Pearles”), the Store Manager, received a call from a personnel specialist, who indicated that Claimant was in the office, and asked whether Pearles wanted to speak with Claimant. *Tr.* 1, at 21. Upon meeting with Claimant, Pearles asked Claimant why she hadn’t been to work. *Tr.* 1, at 21-22. Pearles testified that Claimant told her that Carillon had fired her. *Tr.* 1, at 22. When further questioned, Claimant stated that Carillon had told her that if she left, she “was finished”. *Tr.* 1, at 22.

Pearles called Carillon to the office. *Tr.* 1, at 22, 50. When Pearles relayed Claimant’s statement that Carillon had fired her, Carillon denied the accusation. *Tr.* 1, at 22, 40, 50. Carillon was then dismissed and Pearles told Claimant that she was not fired and that Claimant knew that only two people in the store could terminate employees, those people being, Pearle herself and the Assistant Store Manager. *Tr.* 1, at 23, 39. Pearles further told Claimant that she was still employed, on the schedule and that she could come back to work. *Tr.* 1, at 23, 39-41. Pearles then told Claimant that she could use paid time off for the prior week, or if she needed medical leave, she could call the company’s third party administrator. *Tr.* 1, at 23. However, Pearles informed Claimant, if she continued to not show up for work and not call in; she would be considered for job abandonment. *Tr.* 1, at 23. Claimant walked out of Pearles’ office without response. *Tr.* 1, at 23, 40.

On May 6, 2011, Claimant came to the store to pick up a paycheck. Pearles testified that at that time:

And I asked her, um, if she was returning to work. And she responded, I want my paycheck. I asked her if she had made the decision. Her answer was I want my paycheck...I told her that she had run out of paid time off...Um, she said I want my paycheck. I said, could we, when um, someone leaves the company, we ask for their associate discount card back. She said I don't have it with me. I said well could you drop it off. She said I cut it up. I said OK, and I handed her, her paycheck.

Tr. 1, at 24-25.

On May 13, 2011, Appellee ODJFS issued an initial determination regarding Claimant's application for unemployment benefits, holding that the Claimant had quit her employment without just cause, and disallowed Claimant's application for benefits. Claimant timely filed an appeal. In a redetermination decision issued on June 9, 2011, ODJFS affirmed the decision, holding that Claimant had quit her employment without just cause, and disallowed Claimant's application for benefits. The Claimant filed a timely appeal of the ODJFS redetermination decision. On July 6, 2011, ODJFS transferred jurisdiction to the Review Commission pursuant to R.C. 4141.281(B).

On October 3, 2011 and October 26, 2011, Review Commission Hearing Officer, Kevin Thornton ("Hearing Officer Thornton") conducted in-person evidentiary hearings. In a decision mailed November 7, 2011, Hearing Officer Thornton affirmed ODJFS' redetermination decision. HEARING OFFICER ADMINISTRATIVE DECISION, November 7, 2011. On November 23, 2011, the Claimant timely requested further review by the Review Commission. On December 1, 2011, the Review Commission disallowed the Claimant's request. DECISION DISALLOWING REQUEST FOR REVIEW, December 1, 2011. The Claimant thereafter appealed to this Court, seeking reversal of the denial of unemployment compensation benefits.

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 decision of the Review Commission disallowing Claimant's claim for unemployment compensation benefits unless that decision is "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 the 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.

The burden of proof is on the employee to prove his entitlement to unemployment benefits. *Id.* at 550; *citing Irvine*, 19 Ohio St. 3d at 18, 19. R.C. § 4141.29(D)(2)(a) provides that an individual is not eligible for unemployment compensation benefits for the duration of the individual's unemployment if the individual quit work without just cause or was discharged by his employer for just cause. OHIO REV. CODE §4141.29(D)(2)(a) (Anderson 2012). In the unemployment context, just cause is defined as "that which, to an ordinarily intelligent person, is a justifiable reason for doing or not

doing a particular act.” *Irvine*, 19 Ohio St. 3d at 15, quoting *Peyton v. Sun T.V.*, 44 Ohio App. 2d 10, 12 (Ohio Ct. App. 1975). Further, the applicant for unemployment compensation benefits must be unemployed involuntarily, and the act of resignation from employment is essentially an involuntary one only when the individual has just cause to quit. *Henize v. Giles*, 69 Ohio App. 3d 104, 110-111 (Ohio Ct. App. 4th Dist., 1990); see also *Baker v. ODJFS*, 2007-Ohio-743, at ¶11 (Ohio Ct. App. 6th Dist., 2007).

B. Finding

Claimant testified that she was fired by Carillon, a Sales Manager for leaving her post. *Tr. 1*, at 9. However, Carillon testified that she did not fire Claimant and had told her that if she left her position, that she was job abandoning. *Tr. 1*, at 50. Further, Ashley Thatcher (“Thatcher”), an optician who was called as a witness by Claimant, testified that she did not recall Carillon telling Claimant not to come back if she left. *Tr. 2*, at 10. Therefore, it is clear that the testimony heard by Hearing Officer Thornton was conflicting in regards to Claimant’s testimony contradicting Carillon and her own witness, Thatcher’s testimony.

Additionally, Claimant has asserted that the determination of whether Carillon had terminated her could have been resolved by the submission of a subpoenaed video surveillance tape of April 14, 2011. Claimant asserts that the Employer failed to provide it prior to the first hearing, but brought it to the continued hearing on October 26, 2011. She further asserts that there was a discussion off the record prior to the beginning of the second hearing. She has asserted that the Employer’s failure to provide the tape early enough to use it reduces Carillon’s credibility and that of other assertions made on behalf of the Employer.

Pursuant to R.C. 4141.282(H), “[t]he court shall hear the appeal on the certified record provided by the commission.” OHIO REV. CODE § 4141.282(H) (Anderson 2012). Therefore, any discussion held off the record or prior to the beginning of the hearing is not contained in the certified record and thus may not be considered by this Court. Additionally, the Hearing Officer is not bound by common law or statutory rules of evidence in the administrative hearing process. Ohio Rev. Code § 4141.281(C)(2); OAC § 4146-7-02 (B). The Review Commission has broad discretion in accepting and rejecting evidence and in the conduct of the hearing in general. *Bulatko v. Director, ODJFS*, 2008-Ohio-1061, at ¶¶11-12 (Ohio Ct. App. 7th Dist., 2008). When faced with conflicting testimony, as occurred in the present action, “the commission, not the court resolves the conflicts and determines the credibility of the witnesses.” *Cottrell v. ODJFS*, 2006-Ohio-793, at ¶ 15. (Ohio Ct. App. 10th Dist., 2006). As a reviewing Court, deference must be made to the Review Commission’s credibility determination of witness testimony. *Autozone, Inc. v. Herring*, 2006-Ohio-1039 (Ohio Ct. App. 9th Dist., March 8, 2006); citing *Lorain Cty. Auditor v. Unemployment Comp. Rev. Comm.*, 2004-Ohio-5175, at ¶ 8, citing *Tzangas*, 73 Ohio St. 3d at 696.

Hearing Officer Thornton specifically acknowledged the conflict in the testimony of Claimant, Carillon and Thatcher and found that,

Claimant contends that Ms. Carillon did, in fact, tell her that if she left, not to bother coming back. The weight of the evidence does not support this contention. Claimant’s own witness, Ashley Thatcher, Optician, who overheard the conversation between Ms. Carillon and claimant, indicated that she did not hear Ms. Carillon say that.

HEARING OFFICER ADMINISTRATIVE DECISION, November 7, 2011, at P. 4. Hearing Officer Thornton properly determined credibility in the present action, and this Court is without jurisdiction to reweigh evidence or determine credibility. *Brown-Brockmeyer Co.*

v. Roach, 148 Ohio St. 511 (1947); *Martin v. ODJFS, et. al.*, 2010-Ohio-57, at ¶¶18-20 (Ohio Ct. App. 5th Dist., 2010).

Based upon the testimony provided at the hearing on October 3, 2011 and October 26, 2011, 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 Claimant quit her employment without just cause and was therefore ineligible for unemployment compensation benefits. *See* ODJFS Brief, Exb. A. Specifically, the Review Commission found that

Claimant experienced symptoms similar to those she had experienced when suffering a stroke two years before. When claimant called the manager on duty and told her that she had to leave, because she might be having a stroke, the manager on duty was less than sympathetic and told claimant that she could not leave because there was no coverage. The weight of the evidence indicates that the manager on duty did not tell claimant that she was terminated if she left. Even if there was some misunderstanding on claimant's part as to what the manager on duty had said, the store Manager made it clear to claimant when she came in to pick up her paycheck eight days later that she was not terminated and still had a job. When claimant failed to return to work after that conversation she abandoned her job.

Claimant, therefore, quit employment without just cause.

HEARING OFFICER ADMINISTRATIVE DECISION, November 7, 2011, P. 5.

Upon review of the transcripts of the testimony it is clear that Pearles and Sheila Hoffman ("Hoffman") both testified that Pearles told Claimant she still had her job, and that she was on the schedule. *Tr.* 1, at 23, 40. Both testified that Claimant merely walked out without a reply. *Id.* Even if Claimant had misinterpreted Carillon's statements on the day that she left the workplace, as stated in Hearing Officer Thornton's decision, "the store Manager made it clear to claimant when she came in to pick up her paycheck eight

days later that she was not terminated and still had a job.” HEARING OFFICER ADMINISTRATIVE DECISION, November 7, 2011, P. 5.

This Court has reviewed the pleadings in the present action, attachments thereto, the transcript of the Review Commission’s Hearings held in this matter, and 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 hearings on October 3, 2011 and October 26, 2011, 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 Claimant quit her job without just cause in connection with work.

III. Conclusion

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

IT IS SO ORDERED.



HON. TARYN L. HEATH

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NOTICE TO CLERK
FINAL APPEALABLE ORDER
 IT IS HEREBY ORDERED that notice shall be served on all parties of record within three (3) days after docketing of this Entry and the service shall be noted on the docket.

