

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

KENNETH D MUKES,

CASE NO.: 2013 CV 01780

Appellant,

JUDGE DENNIS J. ADKINS

-vs-

OHIO DEPARTMENT OF JOB AND FAMILY
SERVICES et al,

**DECISION, ORDER, AND ENTRY
SUSTAINING THE MOTION TO STRIKE
AND AFFIRMING THE DECISION OF
UNEMPLOYMENT COMPENSATION
REVIEW COMMISSION**

Appellees.

This matter is before the Court on a *Notice of Administrative Appeal* filed by Kenneth Mukes (“Mukes”) on March 20, 2013. On June 21, 2013, Mukes filed his *Appellant Brief*. On July 23, 2013, the Ohio Department of Job and Family Services (“ODJFS”) filed *Brief of Appellee, Director, Ohio Department of Job and Family Services*. On August 6, 2013, Mukes filed a *Reply to Appellee Brief*.

On August 12, 2013, ODJFS filed a *Motion to Strike and Memorandum in Support*. On August 14, 2013, Mukes filed a *Reply to the Motion to Strike and Memorandum*.

This matter is now properly before the Court and for the reasons contained herein the Court SUSTAINS the motion to strike and AFFIRMS the decision of the Unemployment Compensation Review Commission.

I. Facts and Procedural History

The facts are those for the purposes of the instant administrative appeal and motion to strike. Mukes was employed by Economy Linen and Towel Service, Inc. (“Economy”) from June 13, 2012 to November 16, 2012. *Transcript of Testimony* at 5:12, 6:3-4. Economy Work and Conduct Rules contains an Absenteeism and Tardiness policy. *Certified Record* at 89. The policy provides that “[a]n employee is

expected to report his or her absence to the employer sixty (60) minutes before or after the scheduled starting time, each day of the absence. Employees must report their absences to their immediate supervisor or designate, including voice mail [sic], if appropriate.” *Id.* at 91. Further, the policy provides that a “No call/no show shall be considered a voluntary quit, unless the employee is physically unable to do so.” *Id.*

On November 12, 2012, Mukes did not come to work because he was depressed and having a difficult time dealing with a family death. *Id.* at 6:23-24, 7:1-4. Mukes called Economy’s general number at 10:00 a.m. that day and left a voicemail indicating that he was not feeling well and that he would not be in for his shift at 1:00 p.m. *Id.* 7:6-9. Kim Keith (“Keith”) works in Human Resources at Economy and testified that she received a message from the receptionist that Mukes had called and indicated that he was going to quit because he was having a difficult time mentally. *Id.* at 21:12-16. Neither Keith nor Mukes’ direct supervisor received a call or voicemail from Mukes. *Id.* at 27:1-4. Keith testified that she attempted to call Mukes three times that day without success. *Id.* at 21:8-10.

On November 13, 2012 and November 14, 2012, Mukes still did not show up for work. Mukes testified that he called Economy both days and left a voicemail stating that he was sick and would not be at work. *Id.* at 8:12, 8:18, 9:1-4. Keith testified that she still did not receive a voicemail from Mukes. *Id.* at 27:25-26, 28:1-4. Mukes testified that he left voicemails indicating his illness every day until November 16, 2012. *Id.* at 9:20-22. Keith testified that she attempted to reach Mukes on November 12, 2013, November 13, 2013, and November 14, 2013. *Id.* at 27:19:22. Keith spoke with Mukes on November 15, 2012 and told him to come in the next day to pick up his last check and to return his uniform and keys. *Id.* at 22:1-4. Mukes was terminated under the Absenteeism and Tardiness policy for being a “no call/no show.” *Id.* at 25:19, 25:26, 26:1.

On November 17, 2012, Mukes filed an Application for Determination of Benefit Rights. *Certified Record* at 6. On November, 30, 2012, ODJFS disallowed Mukes’ application for unemployment compensation benefits. *Id.* at 11. On December 7, 2012, Mukes appealed. *Id.* at 12-14. On December 20, 2012, the Director issued a Redetermination and affirmed the original Determination and disallowed Mukes’ application for unemployment compensation based upon the finding that Mukes quit his job with Economy without just cause. *Id.* at 19. On December 20, 2012, Mukes appealed the Redetermination. *Id.* at 29. That same day, ODJFS transferred jurisdiction to the Unemployment Compensation Review Commission. *Id.* at

27. On January 17, 2013, a telephone hearing was held before an Unemployment Compensation Review Commission Hearing Officer at which Mukes and Keith both appeared. *Id.* at 133. The Hearing Officer affirmed the Director's Redetermination and found that Mukes quit work without just cause. *Id.* at 134. Mukes appealed. *Id.* at 149-150. The Unemployment Compensation Review Commission denied Mukes' request for review. *Id.* at 169. Mukes now appeals to this Court.

II. Law and Analysis

1. Standard of Review

Pursuant to R.C. 4141.281(A), a party may appeal a determination of unemployment benefit rights or a claim for benefits determination. "Within twenty-one days after receipt of the appeal, the director of job and family services shall issue a redetermination or transfer the appeal to the unemployment compensation review commission. A redetermination under this section is appealable in the same manner as an initial determination by the director." R.C. 4141.281(B).

Once the Review Commission has sent a final decision to all interested parties, any party may appeal the decision to the Court of Common Pleas within thirty days. R.C. 4141.282(A). Ohio's Revised Code mandates that the Court of Common Pleas shall hear appeals from administrative decisions on the certified record of the Commission. The court shall reverse, vacate, modify or remand the decision of the Commission only if that court "finds that the decision of the commission was unlawful, unreasonable, or against the manifest weight of the evidence." R.C. 4141.282(H). This strict standard of review was emphasized in *Tzangas, Plakas & Mannos, Attorneys v. Ohio Bureau Of Employment Services*, 73 Ohio St.3d 694, 653 N.E.2d 1207 (1995).

The Court may not reverse the decision of the Review Commission just because reasonable minds may have reached a different conclusion. *Ro-Mai Industries, Inc. v. Weinberg*, 176 Ohio App. 3d 151, 2008-Ohio-301, 891 N.E.2d 348 (2008). As the trier of fact, the Review Commission is vested with the power to access the evidence and determine the believability of the witnesses. Therefore, the Court should give deference to the Review Commission's determination of factual issues that relate to the weight of conflicting evidence and credibility of witnesses. *Angelkovski v. Buckeye Potato Chips* (1983), 11 Ohio App.3d 159, 162; *Budd Co. v. Mercer* (1984), 14 Ohio App.3d 269.

2. Motion to Strike

ODJFS moves the Court to strike the exhibits attached to the *Reply to Appellee Brief* filed by Mukes. *Motion to Strike* at 2. ODJFS asserts that the exhibits were not included in the record filed with the Court and that Mukes now wants the opportunity to introduce additional evidence. *Id.* at 2.

R.C. 4141.282 governs appeals to the court regarding unemployment compensation benefits. R.C. 4141.282(H) provides, in relevant part, that “[t]he court shall hear the appeal on the certified record provided by the commission.” The “trial court is limited to reviewing only what was before the review board when it came to its decision.” *Abrams-Rodkey v. Summit County Children Services*, 9th Dist. No. 22358, 2005-Ohio-4359 ¶ 32.

Here, Mukes has submitted several exhibits that were not presented as evidence to the Hearing Officer at the time of the January 17, 2013 hearing. The exhibits appear in the certified record filed with the Court by ODJFS, however, the exhibits were submitted by Mukes in the appeal to the Hearing Officer’s decision. The Court may only take into consideration the evidence presented to the Unemployment Compensation Review Commission at the time it came to its decision. Therefore, the motion to strike filed by ODJFS is granted and this Court will not review or consider the exhibits attached to the *Reply to Appellee Brief*, and any references to their content will be stricken from this case.

3. Administrative Appeal

Mukes does not state any assignments of error but, essentially, makes credibility arguments. *See Appellant’s Brief*. He either disputes or discredits Keith’s testimony. *Id.* In response, ODJFS argues that credibility of the witnesses should not be disturbed on appeal. *Appellees’ Brief* at 8. ODJFS further argues that Mukes never called in to report his illness his direct supervisor, did not provide Economy with medical documentation for his illness, and did not provide Economy the opportunity to work with him due to his illness. *Id.* at 7-8.

R.C. 4141.29 governs unemployment compensation benefits and the eligibility and qualification for those benefits and provides, in relevant part, that:

(D) ... no individual may ... be paid benefits under the following conditions:

(2) For the duration of the individual’s unemployment if the director finds that:

(a) The individual quit work without just cause[.]

R.C. 4141.29(D)(2)(a). The Ohio Supreme Court has noted the following on the “just cause” determination:

In *Irvine, supra*, this court stated that “[t]raditionally, 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* at 17, 19 OBR at 14, 482 N.E.2d at 589, citing *Peyton v. Sun T.V.* (1975), 44 Ohio App.2d 10, 12, 73 O.O.2d 8, 9, 335 N.E.2d 751, 752. Just cause determinations in the unemployment compensation context, however, also must be consistent with the legislative purpose underlying the Unemployment Compensation Act. The Act exists “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.” (Internal citation omitted.) “The [A]ct was intended to provide financial assistance to an individual who had worked, was able and willing to work, but was temporarily without employment through no fault or agreement of his own.” (Internal citation omitted.) Thus, while a termination based upon an employer’s economic necessity may be *justifiable*, it is not a *just cause* termination when viewed through the lens of the legislative purpose of the Act.

The Act does not exist to protect employees from themselves, but to protect them from economic forces over which they have no control. When an employee is at fault, he is no longer the victim of fortune’s whims, but is instead directly responsible for his own predicament. Fault on the employee’s part separates him from the Act’s intent and the Act’s protection. Thus, fault is essential to the unique chemistry of a just cause termination.

While this court did hold in *Irvine* that “the determination of whether just cause exists necessarily depends upon the unique factual considerations of the particular case,” *Irvine* at 17, 19 OBR at 15, 482 N.E.2d at 590, that does not compel the appellate court’s abandonment of fault-based just cause analysis in favor of a “totality of the circumstances” examination. Instead, *Irvine* recognizes that the question of fault cannot be rigidly defined, but, rather, can only be evaluated upon consideration of the particular facts of each case. If an employer has been reasonable in finding fault on behalf of an employee, then the employer may terminate the employee with just cause. Fault on behalf of the employee remains an essential component of a just cause termination.

Tzangas, Plakas & Mannos, 73 Ohio St.3d at 697-698.

The Court finds that the decision of the Unemployment Compensation Review Commission is not unlawful, unreasonable, or against the manifest weight of the evidence. It is clear from the transcript of the hearing that Mukes and Keith disagree on the events surrounding November 12, 2012 through to November 16, 2012. Mukes asserts that he called in each day at 10:00 a.m., or shortly thereafter, to inform Economy that he would not be in to work because he was sick. Mukes testified that he left a voicemail on Keith’s personal voicemail regarding the same. However, Keith asserts that she only received a message from her receptionist on November 12, 2012 from Mukes indicating that he was sick and that he was going to quit.

Keith testified that she did not receive and any voicemails from Mukes on her personal voicemail and that his direct supervisor did not receive and communication from Mukes either. Keith further testified that she attempted to contact Mukes on November 12, 2012, November 13, 2012, and November 14, 2012 without success. Mukes and Keith did agree that they spoke on the telephone after November 14, 2012, but at that point Keith had considered Mukes' lack of communication a "voluntary quit" under Economy's Work and Conduct Rules policy. The Hearing Officer found Keith's testimony to be credible and this Court will not disturb that finding on appeal.

The Court finds that Mukes could have contacted his direct supervisor or returned Keith's call regarding his absence. But, he failed to do so. As noted by the Ohio Supreme Court, the Act is for employee's who lose their job through no fault of their own. The Court finds that Mukes could have prevented losing his job at Economy by merely calling his direct supervisor or returning Keith's calls. These actions do not fall under the purpose of the Act. Therefore, the Court finds that the decision was not unlawful, unreasonable, or against the manifest weight of the evidence and **AFFIRMS** the decision of the Unemployment Compensation Review Commission.

III. Conclusion

Based on the foregoing, the Court **SUSTAINS** the motion to strike and **AFFIRMS** the decision of the Unemployment Compensation Review Commission.

THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NO JUST CAUSE FOR DELAY FOR PURPOSES OF CIV. R. 54. PURSUANT TO APP. R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED:

JUDGE DENNIS J. ADKINS

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General Division
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FAMILY SERVICES

So Ordered