IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

Valerie Murphy,	*	Case No.: CI13-2141
Plaintiff-Appellant,	*	Honorable Gene A. Zmuda
vs.	*	**OPINION AND JUDGMENT ENTRY**
OH ASR EMP, LLC, et al.,	*	
Defendants-Appellees.	*	

* *

This case comes before the Court on an administrative appeal filed by Plaintiff-Appellant Valerie Murphy ("plaintiff") on March 20, 2013 from a decision of the Ohio Unemployment Compensation Review Commission dated February 20, 2013 which held that plaintiff was discharged for just cause in connection with work and therefore was not entitled to unemployment compensation benefits.

Plaintiff filed her merit brief on July 15, 2013. Defendant-appellee Director, Ohio Department of Job and Family Services ("ODJFS") filed its merit brief on August 27, 2013. Defendant- Appellee OH ASR EMP, LLC ("OH ASR") failed to file a merit brief in this matter. Plaintiff filed a reply brief on September 6, 2013. The matter having been fully briefed is now decisional.

A brief summary of the proceedings in this matter are as follows.

On July 19, 2012, plaintiff submitted her Application for Determination of Benefit Rights to the Director of ODJFS. On August 8, 2012, the Director of ODJFS allowed plaintiff's initial application for unemployment benefits. OH ASR was notified of the allowance of plaintiff's initial application and filed an appeal of the Director's decision on August 28, 2012. On September 19, 2012, the Director of ODJFS issued a Redetermination Decision finding that plaintiff was discharged by OH ASR with just cause in connection with her work. On September 28, 2012, plaintiff filed an appeal of the Director's Redetermination Decision to the Unemployment Compensation Review Commission ("UCRC").

On October 25, 2012, a telephone hearing was held before Hearing Officer Donald McElwee with plaintiff and her counsel. No one from OH ASR appeared for the hearing. On October 26, 2012, the Hearing Officer issued a Decision reversing the Director's Redetermination Decision which found that plaintiff was discharged by OH ASR without just cause in connection with work. On November 7, 2012, OH ASR filed a Request for Review from the Hearing Officer's October 26, 2012 Decision, stating that they did not receive notice of the hearing. UCRC allowed OH ASR's Request for Review.

On February 13, 2013, a further hearing was held before Hearing Officer Leanne Colton. Present at the hearing was plaintiff and her counsel, Tina Hacker, human resources manager for OH ASR, and Kimberly Burkholder-McNutt, chief clinical officer for OH ASR. Hearing Officer Leanne Colton rendered her decision on February 20, 2013 again denying plaintiff's unemployment compensation finding that plaintiff was discharged by OH ASR for just cause.

Hearing Officer Leanne Colton made the following findings of fact in her February 20, 2013 Decision:

"Claimant was employed by Oh Asr Emp LLC from February 25, 2009 until July 18, 2012. At the time of her separation she was employed as a respiratory therapist.

On February 21, 2012, claimant was placed on a final warning after she became hostile towards another respiratory therapist who was training nurses and a new respiratory therapist because claimant felt that she should be the one doing the training. Following this incident, claimant left the facility without permission. She was told that any additional incidents would result in her discharge. Claimant refused to sign this warning. Following this incident, Ms. Burkholder-McNutt recommended that claimant no longer be permitted to transport patients or teach new employees due to her behavior.

On July 14, 2012, a patient claimant had been treating was being transferred out of the hospital. Another employee was told to transport the patient. The employer's operational policy is to assess who would be the best person to transport the patient and who would be best to stay at the hospital. When claimant learned that she would not be transporting the patient, she began yelling about how she was going to sue the company for discrimination and that they were sending the white boy instead of the black girl. This occurred at the nurse's station, where claimant could be heard by other employees and patients. The nurse in charge eventually decided that the only way to stop claimant's behavior was to send her to transport the patient. She then called Ms. Hacker to report what had happened.

During claimant's employment with the company, she had complained about being discriminated against several times. Although the employer investigated these complaints, they were never able to substantiate that claimant had been discriminated against for any reason.

Based on this incident, and claimant's final warning, she was discharged on July 18, 2012." (February 20, 2013 Decision by Hearing Officer Leanne Colton, p.4).

On March 20, 2013, plaintiff filed a timely appeal with the Lucas County Common Pleas Court from the February 20, 2013 Decision of the UCRC.

This is an unemployment compensation appeal under Ohio Revised Code §4141.282. R.C. §4141.282 sets forth the rights an interested party may have to appeal a final decision of the UCRC

to a court of common pleas. Specifically, R.C. §4141.282(H) states that:

> "The court shall hear the appeal on the certified record provided by the commission. 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." *Id.*

In dealing with a claim that the judgment is against the manifest weight of the evidence, a reviewing court can reverse only if the verdict is so manifestly contrary to the natural and reasonable inferences to be drawn from the evidence as to produce a result in complete violation of substantial justice. *Sambunjak v. Board of Review* (1984), 14 Ohio App.3d 432, paragraph 2 of the syllabus by the Court.

The duty or authority of the courts is to determine whether the decision of the board is supported by the evidence in the record. *Kilgore v. Bd. of Review* (1965), 2 Ohio App. 2d 69, 71. The fact that reasonable minds might reach different conclusions is not a basis for the reversal of the board's decision. *Craig v.. Bur. of Unemp. Comp.* (1948), 83 Ohio App. 247, 260. The Common Pleas Court in such an appeal is not authorized to make a finding of facts or to substitute its judgment for that of the Board of Review; the parties thereto are not entitled to a trial *de novo*. *Kilgore v. Board of Review* (1965), 2 Ohio App.2d 69, paragraph two of the syllabus by the Court.

To be eligible for unemployment compensation benefits in Ohio, claimants must satisfy the criteria established pursuant to R.C. 4141.29(D)(2)(a), which provides, in pertinent part, that:

> "(D) * * * No individual may * * * be paid benefits * * *:
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> * * *
>
> (2) For the duration of his unemployment if the administrator finds that:

> (a) He quit his work without just cause or has been discharged for just cause in connection with his work * * *." R.C. §4141.29(D)(2)(a).

"The claimant has the burden of proving her entitlement to unemployment compensation benefits under this statutory provision. *Shannon v. Bur. of Unemp. Comp.* (1951), 155 Ohio St. 53; *Canton Malleable Iron Co. v. Green* (1944), 75 Ohio App. 526; 54 Ohio Jurisprudence 2d (1962), Unemployment Compensation, Section 35." *Irvine v. State, Unemployment Compensation Bd. of Review* (1985), 19 Ohio St.3d 15, 17.

The Unemployment Compensation Act "'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.'" *Irvine* at 17; citing *Salzl v. Gibson Greeting Cards* (1980), 61 Ohio St.2d 35, 39. The Ohio Supreme Court in *Tzangas, Plakas & Mannos v. Administrator, Ohio Bureau of Employment Servs.*, 73 Ohio St. 3d 694 (Ohio 1995), found that:

> "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.
>
> 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." *Id.* at 697-698.

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. *Peyton v. Sun T.V.* (1975), 44 Ohio App. 2d 10, 12. "The determination of what constitutes just cause must be analyzed in conjunction with the legislative purpose underlying the Unemployment Compensation Act,

essentially, the Act's purpose is '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.'" *Leach v. Republic Steel Corp.* (1964), 176 Ohio St. 221, 223; in accordance with *Nunamaker v. United States Steel Corp.* (1965), 2 Ohio St. 2d 55, 57. "Just cause for discharge may be established by proof that the employee violated a specific company rule or policy." *Jones v. Bd. of Review* (Sept. 28, 1993), 10th Dist. No. 93AP-430, 1993 Ohio App. LEXIS 4788.

Plaintiff raises only procedural grounds for her appeal by arguing that the UCRC erred: 1) in granting the February 20, 2013 rehearing; 2) in rejecting plaintiff's testimony in favor of hearsay evidence; 3) in failing to perform its affirmative duty to develop the record; 4) by insisting that the same hearing officer should have presided over both hearings; and 5) for the second hearing officer reviewing portions of the first hearing testimony that was inaudible. All of which plaintiff asserts denied her due process rights.

ODJFS argues that the record contains sufficient evidence that plaintiff continued to act in a hostile and disruptive manner and therefore was terminated with just cause. ODJFS also argues that plaintiff's grounds for her appeal fail both procedurally and on their merits and thus must be rejected.

I. The Commission Erred by Granting Rehearing, and Claimant was Thereby Denied Due Process:

Plaintiff contends that OH ASR had notice of the telephone hearing scheduled for October 25, 2012 as the previous notices were sent to the same address as the notice of hearing. Plaintiff argues that OH ASR did not show good cause as to why they were not at the hearing.

ODJFS argues that plaintiff has waived this argument by not raising it earlier and that under

R.C. §4141.281(D)(6) OH ASR may seek a new hearing within fourteen (14) days after the hearing date.

" 'A fundamental rule of appellate review is that an appellate court will not consider any error that could have been, but was not, brought to the trial court's attention.' *Little Forest Med. Ctr. v. Ohio Civ. Rights Comm.* (1993), 91 Ohio App.3d 76, 80, 631 N.E.2d 1068, citing *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 210, 24 O.O.3d 316, 436 N.E.2d 1001." *Atkins v. Dir., Ohio Dep't of Job & Family Servs.*, 2008-Ohio-4109, P19 (Ohio Ct. App., Franklin County Aug. 14, 2008).

R.C. §4141.281(D)(6) provides, in relevant part, that:

> "For hearings at either the hearing officer or review level, if the appellee fails to appear at the hearing, the hearing officer shall proceed with the hearing and shall issue a decision based on the evidence of record. The commission shall vacate the decision upon a showing that written notice of the hearing was not sent to the appellee's last known address, or good cause for the appellee's failure to appear is shown to the commission within fourteen days after the hearing date." *Id.*

Plaintiff raises this issue regarding the granting of a rehearing for the first time in this appeal. There is nothing in the transcript of proceedings which evidences that plaintiff has previously raised an issue with the second hearing on February 20, 2013. Consequently, plaintiff has waived her right to raise such an issue here. Even if plaintiff has not waived her objection to the second hearing, it is undisputed that the first UCRC hearing in this case was held on October 25, 2012 and that OH ASR submitted a Request for Review on November 7, 2012 which is within the fourteen days required under R.C. §4141.281(D)(6). Therefore, the Court finds that the UCRC decision to grant OH ASR a rehearing was not in error and did not deny plaintiff's due process rights.

II. The Commission Erred in Rejecting Plaintiff's Testimony in Favor of Hearsay Evidence:

Plaintiff further contends that the testimony offered by OH ASR at the second hearing was from two individuals that were not present during the incident in question and therefore, is hearsay. Plaintiff argues that in light of the preference for in person testimony, the clear lack of direct knowledge by the OH ASR witnesses and the generally suspect nature of the hearsay testimony that leads to its exclusion from court proceedings absent certain specified exceptions, it is submitted that this reliance of hearsay testimony constitutes error on the part of the UCRC.

ODJFS argues that plaintiff relies on thirty year old case law and has not been rejected and that it is now irrefragable that an UCRC hearing officer may find hearsay evidence more credible that even sworn, in-person testimony.

In *Barksdale v. State*, 2010-Ohio-267 (Ohio Ct. App., Cuyahoga County Jan. 28, 2010), the Eighth District Court of Appeals found that even when the employer failed to appear at an administrative hearing, as is the case here, a hearing officer may place greater weight on an employer's documentary evidence than on the claimant's testimony. The Eighth District in *Barksdale* held that:

> "The evidence in the record supports the Commission's decision that Barksdale was terminated for just cause and therefore ineligible for unemployment compensation. Documentation provided by MHS to ODJFS showed that Barksdale logged on to an MHS computer with his login and account number and accessed pornographic sites while on duty. Although Barksdale denied accessing the sites on the dates identified by MHS and insisted that other persons must have used the computer with his login ID, credibility determinations are solely for the trier of fact, in this case the hearing officer. *Simon v. Lake Geauga Printing Co.* (1982), 69 Ohio St.2d 41, 44, 430 N.E.2d 468; *Royster v. Bd. of Review* (Apr. 13, 1990), Scioto App. No. 89 CA 1826, 1990 Ohio App. LEXIS 1640. Thus, the hearing officer could accept or reject all or part of Barksdale's testimony. The Review Commission apparently gave little credibility to Barksdale's testimony, presumably because he admitted at the hearing that he had accessed pornographic

> websites at work previously, despite his awareness of MHS's Use of Technology policy.
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> The fact that MHS did not send a representative to the hearing did not, as Barksdale suggests, deprive him of any due process rights. Even where the employer does not send a representative to the hearing, the Review Commission may properly rely on any and all evidence incorporated in the certified record, including any disciplinary evidence (e.g., the IT record) submitted by the employer during the administrative claim process. *Simon*, supra. Further, the Review Commission is free to find the evidence in the record submitted on behalf of the employer more credible than the sworn testimony of the claimant. *Id.*; *Fisher v. Bill Lake Buick*, Cuyahoga App. No. 86338, 2006 Ohio 457, P20. Thus, it was within the province of the hearing officer to place greater weight on the documentary evidence submitted by MHS than on Barksdale's testimony." *Id.* at P2-P3 and P7-P8.

In light of the case law submitted by ODJFS, it is clear that a hearing officer may place greater weight on an employer's documentary evidence than on the claimant's testimony. As the Fourth District Court of Appeals found in *Todd v. Admr, Ohio Dep't of Job & Family Servs.*, 2004-Ohio-2185 (Ohio Ct. App., Scioto County Apr. 20, 2004):

> "We are required to give great deference to the hearing officer's findings of fact and it would be inappropriate to disregard his findings simply because they are partially based on admissible hearsay testimony." *Id.* at P26.

Therefore, the Court finds that Hearing Officer Leanne Colton did not err in finding hearsay evidence provided by OH ASR more credible than the sworn testimony of plaintiff.

III. The Commission Failed to Perform its Affirmative Duty to Develop the Record and Claimant was Denied Due Process by the Irregularity of the Proceedings:

Plaintiff asserts that during the first hearing, she was advised by the hearing officer that it was unnecessary for her to give testimony regarding the allegations of racial discrimination or to discuss the incidents of prior discipline that predated the one leading to her discharge. During the second

hearing, plaintiff asserts that the hearing officer did not elicit testimony from her concerning the past discipline, her complaints of discrimination prior to discharge, or her testimony as to whether there were individuals who were upset by her actions, or how exactly she, or anyone else behaved in the incident. Plaintiff contends that this is an error on both occasions, as testimony directly from her could have shed light on the accusations made against her and without this, she was denied due process. Plaintiff argues that it was irregular and a denial of due process for the first and second hearings to be heard by two different hearing officers. Plaintiff further contends that the hearing officer did not ask her questions during the second hearing and merely relied on a review of the transcripts from the first hearing where parts of the testimony were inaudible and thus could not be transcribed. Finally, plaintiff asserts that she was not provided a copy of the transcript or recording from the first hearing prior to the second hearing which placed her at a disadvantage in that she did not have fresh knowledge of the details that were covered at the first hearing.

ODJFS argues that plaintiff received a fair hearing on two separate occasions as both hearing officers questioned witnesses, permitted plaintiff's counsel to question each witness, and allowed plaintiff's counsel to make a closing statement. ODJFS contends that second hearings are not uncommon and there is no statutory or administrative requirement they be conducted by the same hearing officer as the only actual requirement is that all hearings be conducted as soon as possible pursuant to Ohio Admin. Code 4146-5-06(A). ODJFS argues that plaintiff has failed to show any prejudice resulting from her inability to review the transcript of the first hearing and failed to object to the lack of transcript at the second hearing or anywhere else which amounts to plaintiff's waiver of any error. Finally, ODJFS contends that the few inaudible portions of the testimony do not deprive this Court of the ability to meaningfully review the administrative record and plaintiff fails to show that she was prejudiced as a result of the inaudible portions of the hearing transcript.

In *Hord v. Dir., Ohio Dept. of Job & Family Servs.*, 2006-Ohio-4382 (Ohio Ct. App., Jefferson County Aug. 16, 2006), the Seventh District Court of Appeals addressed the success of an appeal based upon procedural due process grounds and found that:

> "The statutes and rules governing the procedure employed in reviewing an unemployment compensation claim are constitutional because they give an opportunity for a fair hearing before an impartial tribunal. *Henize v. Giles* (1986), 22 Ohio St.3d 213, 215, 22 Ohio B. 364, 490 N.E.2d 585. **In order to successfully appeal a judgment on a procedural due process grounds, Hord must show that they have been prejudiced by the allegedly inadequate process unless the procedure employed involves such a probability that prejudice will result that it is deemed inherently lacking in due process.** *Estes v. Texas* (1965), 381 U.S. 532, 542-543, 85 S. Ct. 1628, 14 L. Ed. 2d 543; see also *Smith v. Five Rivers MetroParks* (1999), 134 Ohio App.3d 754, 764, 732 N.E.2d 422 (Party could not get relief on procedural due process grounds because he could not point to any facts showing that he was unduly prejudiced by procedures employed.). In this case, Hord cannot show either that the procedure was not that mandated by statute or rule or that he was prejudiced by any alleged deficiency." **(Emphasis added).** *Id.* at P12.

Here, R.C. §4141.281(C)(1) states, in pertinent part, that:

> "The commission shall provide an opportunity for a fair hearing to the interested parties of appeals over which the commission has jurisdiction." *Id.*

R.C. §4141.281(C)(2) further provides, in relevant part, that:

> "In all hearings conducted at the review level, the commission shall designate the hearing officer or officers who are to conduct the hearing.
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> * * *
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> In conducting hearings, all hearing officers shall control the conduct of the hearing, exclude irrelevant or cumulative evidence, and give weight to the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of serious affairs. Hearing officers have an affirmative duty to question parties and witnesses in order to ascertain the relevant facts and to fully and fairly develop the record. Hearing officers are not bound by common law or statutory

rules of evidence or by technical or formal rules of procedure." *Id.*

Plaintiff has failed to establish that the UCRC deviated from the practice established by statute for hearings in unemployment compensation cases. Plaintiff has further failed to establish any prejudice that she suffered as a result of any alleged deficiency of the record argued above. More importantly, plaintiff has failed to even object at any stage of the proceedings to her concerns that a second hearing was held, that two different hearing officers presided over the two hearings, that she was not provided a copy of the transcript from the first hearing prior to the second hearing, or that the record of these proceedings were not developed to her satisfaction. This is tantamount to waiver as plaintiff had opportunities to raise her objections prior to the second hearing being held on February 20, 2013 and failed to do so.

The evidence in this case from the transcript of proceedings is that an incident occurred on February 21, 2012 where plaintiff displayed rude and/or discourteous behavior to co-workers and left the job without permission while putting patients unnecessarily at risk. From this incident, plaintiff was given her final written warning and notified that termination will result with continued episodes that create a hostile work environment. The evidence further provides that another incident occurred on July 18, 2012 where plaintiff became very hostile and loud at the nurse's station of Advanced Specialty Hospitals of Toledo which disrupted critical patient care involving the transport of a patient to a higher level of care. As a result of this incident, plaintiff was terminated.

ODJFS references the case captioned *Arnold v. Kingston Care Ctr.*, Fulton C.P. No. 10CV000362, where Judge James Barber correctly points out in his Judgment Entry that:

> "In other areas of human affairs and activity, allowances for mistakes, errors, and even outright misfeasances, can be countenanced and absorbed, but not so in the medical field. Appellant is an "L.P.N.". She is a professional. In that specialized area law and discipline demand there be a strict adherence to standards, rules, and

> regulations. Compliance is expected and required. That fact is hammered home in the extensive educational processes that all nurses must undergo, and be examined upon. "Licensure" and "certification" of status is symbolic of that person's acumen, and his/her ability to understand duty, to perform tasks at an acceptable level, and to comply with those standards learned in every school of nursing." *Id.* at p.3.

Consequently, after carefully reviewing the evidence submitted by the parties in this case, including, but not limited to, the Transcript of Testimony of the October 25, 2012 and February 13, 2013 hearings before Hearing Officers Donald McElwee and Leanne Colton, respectively, of the UCRC, briefs and arguments of counsel, Ohio Revised Code Section 4141.29(D)(2)(a), all relevant case law, and pursuant to R.C. §4141.282(H), the Court finds that OH ASR's decision to terminate plaintiff for just cause "was supported by some competent, credible evidence going to all the essential elements of the case." *C. E. Morris Co.*, supra. Therefore, UCRC's February 20, 2013 Decision to deny plaintiff's application for unemployment benefits is affirmed.

The ruling herein is a full and complete adjudication of all issues incipient in plaintiff's notice of appeal as they relate to OH ASR and a complete adjudication of all genuine issues, merits and matters in controversy between the parties. It appears there is no just cause for further delay, and that, pursuant to Civ. R. 54, Final Judgment should be entered for defendants OH ASR EMP, LLC and Director, Ohio Department of Job and Family Services.

2/10/13
Date

Judge Gene A. Zmuda