

SANDRA KURI IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

2016 MAR -2 PM 2: 28

SUMMIT COUNTY
CLERK OF COURTS
LEEANNE B. LAMBERT
Appellant,

vs.

MENORAH PARK, et al.

Appellees.

(CASE NO.: CV-2015-10-4884
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(JUDGE PAUL J. GALLAGHER
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(**JUDGMENT ENTRY**
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This matter involves an administrative appeal from the Ohio Unemployment Compensation Review Commission (“Review Commission”) pursuant to R.C. 4141.282. The Review Commission disallowed Plaintiff-Appellant Leanne Lambert (Lambert) request for unemployment benefits. Lambert’s request was disallowed because the Review Commission found that Lambert was discharged from her employment by Appellee, Menorah Park for just cause under R.C. 4141.29(D)(2)(a). In this action, Lambert appeals from the Review Commission’s final Decision denying her claim for unemployment benefits.

The Court has considered Lambert’s Brief, the Brief of Appellee, Director, Ohio Department of Job and Family Services (“Director” or “ODJFS”), the Brief of Appellee, Menorah Park, and the Response Brief of Appellant, the facts of this matter, R.C. 4141.282, and applicable law. Upon due consideration, and upon a finding that the Review Commission’s decision was not unlawful, unreasonable or against the manifest weight of the evidence, the Court AFFIRMS the Review Commission’s final Decision denying Lambert’s request for unemployment compensation.

PROCEDURAL HISTORY

After her employer terminated her employment on April 17, 2015, Lambert applied for unemployment benefits. On June 19, 2015, the Director of the Ohio Department of Job and Family Services (ODJFS) issued its initial decision approving Lambert for benefits. Menorah Park filed a request for redetermination with ODJFS within twenty-one days of the decision. Upon reconsideration, ODJFS affirmed its decision once again finding that Lambert was eligible for unemployment benefits.

Menorah Park appealed the redetermination decision within twenty-one days, and the matter was transferred to the UCRC. R.C. 4141.281 (C). Telephone evidentiary hearings were held on July 28, 2015 and August 17, 2015. On August 18, 2015, hearing officer, Sean Reid issued his decision reversing the ODJFS decision finding that Lambert was not entitled to unemployment compensation because she was terminated for just cause. R.C. 4141.29(D)(2)(a). Lambert timely filed her request for review of the hearing officer's decision. On September 16, 2015, UCRC denied Lambert's request for review.

On October 15, 2015, Lambert timely filed her Notice of Appeal to the decision of the UCRC in the Summit County Court of Common Pleas. R.C. 4141.282. In this administrative appeal, Lambert seeks the reversal of the Review Commission's final Decision that denied her claim for benefits on the basis that she was discharged for just cause under R.C. 4141.29(D)(2)(a).

FACTUAL HISTORY

Lambert was employed by Menorah Park from September 22, 2014 until April 17, 2015. She was employed as a marketer for the Summit and Portage County offices of Menorah Park. As part of her duties, Lambert was required to obtain home health referrals including Medicare referrals. Menorah Park used quotas for each marketer to ensure that the individual was effective and meeting the needs of the company.

Much of the testimony presented at the hearing by the employer's representative, Ms. Eve Davis (Davis) and Lambert contradicted. However, the parties did agree that Lambert was not meeting the company's expectations for monthly Medicare quotas at the time she was terminated. The parties also agreed that Lambert failed to meet the monthly Medicare quotas in each of the seven months that she was employed with Menorah Park. The parties also agreed that Lambert's job title and the duties associated with the job title did not change during the time Lambert was employed with Menorah Park.

The party's testimony differed regarding the reasons for Lambert's failure to maintain her quota and the reasonableness of her quotas. Lambert testified that she was unable to maintain her Medicare quotas because the Medicare referrals did not exist due to the changes in the health care market at the time she was employed with Menorah Park. Additionally, Lambert testified that in January, 2015 the director of nursing for her office resigned. A new director of nursing was hired and trained although the date this person was hired is not

contained within the record. Lambert testified that while the new director of nursing was being hired and trained, Lambert had to undertake additional duties which were not included in her original job description. Lambert alleged that the time she spent doing the work of the director of nursing took away from the time she had to obtain Medicare referrals. Finally, Lambert testified that she brought in numerous referrals to Menorah Park and received many bonuses for the referrals she retained for Menorah Park. She stated that these referrals were not Medicare referrals, but were referrals nonetheless.

Menorah Park's version of Lambert's employment differed. Davis worked with Lambert while she was employed with Menorah Park. Davis is employed by Menorah Park as the Director for Home Health Services. During Lambert's employment, Davis met with Lambert on multiple occasions. Davis testified that she provided Lambert with numerous verbal warnings that she was failing to meet the quota requirements for Medicare referrals. Davis stated that prior to Lambert's employment, the Summit and Portage offices of Menorah Park were exceeding the set Medicare quotas for the year. The quotas were 26 Medicare referrals for the Summit office and 16 Medicare referrals for the Portage office. Davis testified that Lambert was informed of these quotas during her interview to which she responded that obtaining the required number of Medicare referrals would be easy. Davis also testified that she had two other marketers who worked in other counties for Menorah Park and that each of these marketers were able to meet their required Medicare referral quotas.

Further, Davis testified that in addition to the informal verbal meetings, Lambert had a more formal meeting with Lambert to discuss her failure to maintain Medicare quotas on January 29, 2015. At this meeting, Davis stated she suggested multiple techniques to help Lambert increase her Medicare referrals. Evidence of this meeting and notes from other interactions with Lambert were included as evidence in the department file. Davis testified that as of the date of termination, Lambert had not attempted any of the suggestions she made to increase Medicare referrals. On March 20, 2015, Davis provided Lambert with a final written warning which stated that Lambert needed to increase her referrals within the next several weeks or else she would be terminated. From March 20, 2015 until her termination, Lambert continued to be deficient in her Medicare referrals. Accordingly, on April 17, 2015, Lambert was terminated for her failure to maintain Medicare referrals. Lambert argued at the hearing

that despite Davis's testimony to the contrary, she was terminated because of budget constraints and because her position was no longer needed at that office.

After careful consideration, the hearing officer issued the following findings of fact:

Claimant began working with Menorah Park on or about September 22, 2014. She was employed as a marketer for the Summit and Portage Offices. Her primary responsibility was to secure patient referrals including a set number of Medicare referrals.

In November, 2014, claimant received a warning that she had not been securing enough Medicare referrals.

Claimant was expected to achieve 26 Medicare referrals for the Summit office and 16 Medicare referrals at the Portage office per month.

In December 2014, claimant had 12 Medicare referrals for the Summit Office and 5 for the Portage office. In January, 2015, claimant failed to meet the required number of referrals, obtaining 10 for each office.

On or about January 29, 2015, the employer warned claimant again about her failure to meet the required number of Medicare referrals. The employer also suggested additional strategies that claimant could utilize to obtain more Medicare referrals and ways that claimant might improve her performance.

In February, 2015, claimant obtained 9 referrals for the Summit office and 4 referrals for the Portage office. Claimant's weekly Medicare referrals for March were also significantly below expectations. On March 20, 2015, Menorah Park issued claimant a final warning for poor job performance. Claimant was expressly warned that failure to show improvements would result in discharge.

During the weeks ending March 21 through April 11, claimant consistently failed to meet Medicare referral requirements for either office.

On April 17, 2015 Menorah Park discharged claimant for poor job performance.

Based on the findings of fact, the hearing officer determined that Lambert was terminated for just cause under R.C. 2141.29(D)(2)(a).

STANDARD OF REVIEW

A Common Pleas Court reviewing a determination by the UCRC may only reverse an unemployment compensation eligibility decision if the decision is unlawful, unreasonable, or against the manifest weight of the evidence. *Ro-Mai Industries, Inc. v. Weinberg*, 176 Ohio App.3d 151, 2008-Ohio-301, at ¶6, 891 N.E.2d 348 (citation omitted). Every reasonable presumption must be made in favor of the decision and the findings of fact of the UCRC. *Id.* at ¶7, citing *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19, 526 N.E.2d 1350. The resolution

of factual questions is chiefly within the UCRC's scope of review. *Id.* at ¶18, citing *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Serv.* (1995), 73 Ohio St.3d 694, 696, 653 N.E.2d 1207. The Court's role is to determine whether the decision of the UCRC is supported by evidence in the certified record. *Id.* (citations omitted). If the reviewing court finds that such support is found, then the court cannot substitute its judgment for that of the UCRC. *Id.* (citations omitted). The fact that reasonable minds might reach different conclusions is not a basis for reversal of the UCRC's decision. *Id.*, citing *Irvine v. Unemp. Comp. Bd. of Rev.* (1985), 19 Ohio St.3d 15, 18, 482 N.E.2d 587. The court must give due deference to the administrative resolution of evidentiary conflicts. The hearing officer is the trier of fact and the weight to be given evidence and credibility of witnesses is to be made by the trier of fact.

LAW & ANALYSIS

Lambert challenges the UCRC's decision claiming the UCRC erred in determining she was terminated for just cause and claiming she was denied a fair hearing when the hearing officer excluded her witness who was willing to testify on her behalf at the telephonic hearing.

A. UCRC'S JUST CAUSE DETERMINATION

Lambert states that the UCRC's just cause determination was improper because the finding was against the manifest weight of the evidence and because the hearing officer failed to take into consideration that Menorah Park eliminated her position. Lambert asks this Court to reverse the decision of the UCRC denying her unemployment benefits.

A trial court must utilize the civil manifest weight of the evidence standard when reviewing the UCRC's determination. *Westphal v. Cracker Barrell Old Country Store, Inc.*, 9th Dist. Lorain County No. 09CA009602, 2010 Ohio App.LEXIS 163, 12 (January 25, 2010). The civil manifest weight of the evidence standard provides that judgments supported by some competent, credible evidence going to all essential elements of the case will not be reversed by a reviewing court. *Id.*

To be eligible for unemployment, the applicant must satisfy the essential elements established by R.C. 4141.29(D)(2)(a) which specifically disallows unemployment if the employee 'quit his work without just cause or has been discharged for just cause in connection with his work.' *Tzangas, Plakas & Mannos*, 73 Ohio St. at 697. Unsuitability for a position constitutes fault sufficient to support a just cause determination. *Id.* Accordingly, the UCRC will find just cause where an employer found an employee unsuitable for the required work and

thus be at fault. In order to make this determination, the UCRC must find (1) the employee does not perform the required work, (2) the employer made expectations known to the employee at the time of hiring, (3) the expectations were reasonable, and (4) the requirements of the job did not change since the date of the original hiring for that particular position. *Id.* at 698-9.

In this matter, competent credible evidence was presented to support the UCRC's finding on all four essential elements of just cause. The hearing officer found that the employer presented sworn credible testimony from Davis. Davis testified that the claimant was aware of the Medicare referral expectations at the time she was hired and that she was not meeting the expectations. Davis also testified that the claimant was provided with multiple warnings that she was not meeting her quotas for Medicare referrals. The final written warning was provided to Lambert on March 20, 2015 and specifically stated that Lambert would be terminated if she did not increase her Medicare referrals within the next several weeks. Despite these warnings, Lambert failed to meet her Medicare quotas in any month that she was employed with Menorah Park and did not increase her Medicare referrals in the last several weeks of her employment. Such evidence is clearly sufficient to establish prongs one and two of the just cause determination.

Additionally, evidence existed to support the hearing officer's findings that the quotas were reasonable and the Lambert's job duties did not change. Davis explained that other marketers for other offices were also meeting their quotas; evidencing that the quotas were reasonable. Further, Davis testified that despite Lambert's claims that her job duties changed, that Lambert was not given additional duties and that her job requirements did not change since the date of the original hiring. Davis even stated that she asked Lambert on multiple occasions to stop doing the additional tasks she was undertaking to focus on her job duties as a marketer.

Accordingly, Davis testified to all essential elements of the claim. The fact that Lambert's testimony contradicted Davis does not change that competent creditable evidence was presented which supports the hearing officer's findings. This Court may not reverse the UCRC's decision simply because of a difference of opinion on the credibility of witnesses and the evidence. *Westphal* at ¶14. The hearing officer stated in his decision that he considered Davis's testimony to be credible and Lamberts testimony to be contradictory. Based on this finding, it is clear that the hearing officer weighed Davis's testimony as more dispositive in

reaching its determination. Accordingly, competent creditable evidence existed, and this Court cannot say that the hearing officer's decision was against the manifest weight of the evidence.

Further, the evidence did not establish that the hearing officer failed to consider the elimination of the position with Menorah Park when reaching its decision. The testimony was not such to conclusively establish that Lambert's position was eliminated. To the contrary, Davis testified that the employer just trained a new marketer which was Lambert's position and further, no one testified that Lambert was terminated because the position was eliminated. Rather, Davis testified Lambert was terminated, because she failed to meet her essential job duties. The hearing officer was under no obligation to believe the position was eliminated when the testimony was such that it could support a finding that the position was not eliminated.

Accordingly, in reviewing the evidence presented to the hearing officer, this Court finds that competent credible evidence was presented and that such evidence was sufficient to support the hearing officer's decision. This Court must therefore deny Lambert's first assignment of error.

B. THE HEARING OFFICER'S EXCLUSION OF LAMBERT'S WITNESS

Lambert states she had a witness prepared to testify on her behalf at the telephonic hearing before the UCRC, but the hearing officer did not allow the witness to testify. Lambert asks this Court to remand the matter for another hearing where she may present her witness.

{¶16} The principles of due process in administrative hearings shall be applied to all hearings conducted under the authority of the commission. R.C. §4141.28(C)(2). That subparagraph goes on to provide, "[i]n 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." Thus, it has been held that "[t]he hearing officer has broad discretion in accepting and rejecting evidence and in conducting the hearing in general." *Bulatko v. Dir., Ohio Dept. of Job & Family Servs.*, 7th Dist. App. No. 07 MA 124, 2008-Ohio-1016, ¶11.

{¶17} The hearing officer's discretion is tempered only to the extent that he must afford each party an opportunity to present evidence that provides insight into the very subject of the dispute. *Id.*, citing *Owens v. Admr., Ohio Bur. Of Emp. Servs.* (1999), 135 Ohio App.3d 217, 220, 733 N.E.2d 628. The key factor in deciding whether the hearing satisfied procedural due process is whether the claimant had the opportunity to present the facts which demonstrate that she was entitled to unemployment benefits. *Id.* at ¶12. See, also, *Gregg v. SBC*

Ameritech, 10th Dist. App. No. 03AP-429, 2004-Ohio-1061. This is because “[t]he object of the hearing is to ascertain the facts that may or may not entitle the claimant to unemployment benefits.” *Bulatko*, at ¶11; *Owens*, at 220; *Simon v. Lake Geauga Printing Co.* (1982), 69 Ohio St.2d 41, 43, 430 N.E.2d 468.

Adkins v. Dir., Ohio Dept. of Job & Family Services, 10th Dist. App. No. 08AP-182, 2008-Ohio-4109, at ¶¶16-17.

Lambert received notice and ample opportunity to be heard during the telephonic hearing. The hearing officer explained the procedure to the parties. The employer offered ample evidence of Lambert’s deficiencies and subsequent termination. Lambert had the opportunity to cross examine the employer’s witness, Davis. Additionally, the hearing officer provided Lambert ample opportunity to present relevant and factual information about the incident that led to her termination.

Regarding Lambert’s requested witness, Ms. Depinalaw, Lambert proffered to the hearing officer that Ms. Depinalaw was the replacement Director of Nursing who began working with Menorah Health after the previous director of nursing resigned in January, 2015. Lambert stated that Ms. Depinalaw would testify as to the extensive work Lambert had to undertake over and above her required marketing duties when the Director of Nursing position was vacant. The hearing officer chose to exclude this evidence as unnecessary considering Lambert’s testimony already covered the increased duties she was required to perform.

In conducting hearings, “all hearing officers shall control the conduct of the hearing, exclude irrelevant and 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.” R.C. 2121.28(C)(2). Here, Ms. Depinlaw’s testimony is clearly relevant as Lambert claims that her job duties changed from the time she was hired to the time she was terminated negating the fourth required essential element of a just cause finding as stated above. However, this Court does not have evidence to support that Ms. Depinlaw’s testimony was unreasonably considered cumulative. The hearing officer stated that the testimony ‘was not necessary’ and further stated that Lambert had already testified that she had taken on additional responsibilities with Menorah Park. Further, considering Ms. Depinlaw was not an employee in November when the deficiencies were first explained to Lambert or in January when the Director of Nursing discontinued her employment with Menorah Park, it does not appear that Ms. Depinlaw would

have firsthand knowledge of the information Lambert wanted her to testify to, i.e. the work Lambert had to do when the position was vacant.

Finally, the burden is on Lambert to establish that the failure to present the testimony violated Lambert's due process rights. *Wright v. Directory, Ohio Dep't of Jobs & Family Servs.*, 9th Dist. Lorain County Case No. 2012CA010264, ¶9, 2013-Ohio-2260, (June 3, 2013). In this effort, Lambert has failed to present any sort of evidence such as proffered the testimony to support her position that Ms. Depinlaw's testimony was not cumulative. Lambert was not represented by counsel at the hearing, however, pro se litigants are held to the same rules, procedures and standards as those litigants represented by counsel and must accept the results of their own mistakes and errors. *Adkins v. Dir., Ohio Dept. of Job & Family Services*, 10th Dist. App. No. 08AP-182, 2008-Ohio-4109, at ¶20 (citations omitted). The hearing officer is to remain impartial and has no duty to present or establish either party's case, *Fredon Corp. v. Zelenak* (1997), 124 Ohio App.3d 103, 111, 705 N.E.2d 703. Thus, it was Lambert's responsibility to object, ask for a continuance, or proffer the testimony her witness planned to present.

Upon review of the record there is nothing to indicate an abuse of the hearing officer's discretion by limiting the evidence at the hearing and this Court finds Lambert was afforded all process that was due in this administrative hearing.

Having found no procedural irregularities and no cause expressed for finding the decision 'unreasonable' or 'against the manifest weight of the evidence', this Court must AFFIRM the UCRC determination that Lambert was terminated for just cause and is therefore ineligible for unemployment compensation benefits.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the decision of the UCRC hearing officer denying unemployment compensation benefits to Appellant Lambert on the basis of a just cause termination is AFFIRMED. This is a final and appealable Order; there is no just cause for delay.

It is so Ordered.



JUDGE PAUL J. GALLAGHER

cc: Attorney Jon Dilino
Attorney Sarah O. Lauter
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