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IN THE COMMON PLEAS COURT OF RICHLAND COUNTY, OHIO

KAREN P. ZELLNER

Appellant/Plaintiff,

v.

DIRECTOR, OHIO DEPARTMENT OF
JOB AND FAMILY SERVICES, et al.,

Appellees/Defendants.

Case No. 2011-CV- 0640 H

**DECISION ON
ADMINISTRATIVE APPEAL**

This employment termination case is before the court of common pleas upon the administrative appeal of Appellant/Plaintiff Karen P. Zellner (hereinafter "Zellner"), filed May 23, 2011. The court has reviewed the March 10, 2011 decision of the Unemployment Compensation Review Commission upon the certified record and transcript provided by the commission, and pursuant to O.R.C. § 4141.282(H). All parties have submitted extensive briefs upon the issues to be considered in this administrative appeal. This court has reviewed the pleadings, the briefs submitted, the transcript of the hearing testimony, submitted by the Unemployment Compensation Review Commission pursuant to O.R.C. § 4141.282(F)(1), and the administrative record

submitted on the court's docket on 12-7-11

B.S.
Deputy Clerk

filed in this case.

PROCEDURAL HISTORY

The instant appeal is brought for the court to review the Decision of the Unemployment Compensation Review Commission, mailed March 10, 2011. The following Case History appears in the Decision:

The claimant, Karen P. Zellner, filed an Application for Determination of Benefit Rights. The Director allowed the application with a benefit year beginning January 24, 2010.

On September 30, 2010, the Director issued a Redetermination which held that claimant was discharged by Signature Health Services Mansfield LLC without just cause in connection with work. Other matters may have been addressed by the Redetermination which are not relevant to this case.

On October 6, 2010 Signature Health Services Mansfield LLC (hereinafter referred to as "Signature Health") filed an appeal from the Redetermination.

On October 7, 2010, the Ohio Department of Job and Family Services transferred jurisdiction to the Unemployment Compensation Review Commission.

On November 23, 2010, December 13, 2010, and January 27, 2011, hearings were held before Hearing Officer Valerie A. Roller, by telephone. Claimant appeared and participated in all of the hearings. The employer was represented by G. Brenda Coe (sic), Esq. of Buckingham, Doolittle & Burroughs, LLP with Corporate Clinical Director Deborah Locke and Executive Director Patricia Long testifying on the employer's behalf.

The Decision was mailed to all interested parties on March 10, 2011. A Decision Disallowing Request for Review was mailed to all interested parties on April 27, 2011. This appeal was timely filed on May 23, 2011.

The March 10, 2011 Decision reversed the September 30, 2010 Director's Redetermination, and held that Zellner was discharged by Signature Health Services Mansfield LLC for just cause in connection with work.

The transcripts of the hearings held on November 23, 2010, December 13, 2010, and January 27, 2011 reveal the following sequence of witnesses allowed and disallowed:

November 23, 2010:

Norma Hopkins (disallowed for Zellner)
Jennifer Kline (allowed for Signature Health)

December 13, 2010:

Jennifer Kline (allowed for Signature Health)
Karen Zellner (allowed for herself)
Lisa Kent (disallowed for Zellner)
Norma Hopkins (disallowed for Zellner)
Deborah Locke (allowed for Signature Health)
Patricia Long (allowed for Signature Health)

January 27, 2011

Karen Zellner (allowed for herself)
Rebecca Gordon (disallowed for Zellner)
Diana Fuller (allowed for Zellner, with restrictions on the scope and length of her testimony)

LEGAL DISCUSSION

In an administrative appeal of a decision for the Unemployment Compensation Review Commission, the common pleas court shall hear the appeal on the certified record provided by the commission.¹ 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.² Where a claimant is unrepresented by counsel and the referee refuses to permit the claimant to present all of her witnesses, deeming the witnesses' testimony to

¹ O.R.C. § 4141.282(H).

² Id.

be cumulative, and puts words in the claimant's mouth, essentially testifying for the record, the claimant has been denied a fair hearing.³ A termination pursuant to company policy will constitute just cause only if the policy is fair, and fairly applied.⁴ A court's review of the fairness of a company policy is necessarily limited to a determination of whether the employee received notice of the policy; whether the policy could be understood by the average person; and whether there was a rational basis for the policy. The issue of whether the policy was fairly applied relates to whether the policy was applied to some individuals but not others.⁵ The review commission or hearing officer conducting the proceeding shall advise each party as to rights, aid in examining and cross-examining witnesses, and give every assistance compatible with the discharge of the official duties of the review commission or hearing officer.⁶

In the instant administrative appeal, Plaintiff/Appellant was denied the opportunity to present any witnesses, except for Ms. Diana J. Fuller. In each case it was determined by Hearing Officer Valerie Roller that the testimony of the witness would be duplicative of the testimony of Ms. Zellner.

During the November 23, 2011 hearing, Plaintiff/Appellant, appearing pro se, emphasized the need for her witnesses to be allowed to testify because of Signature Health's failure to respond to her subpoena for relevant records:

Ms Zellner: Well, can I say this much? Um, I'm relying on my witnesses, I got no documentation from them.

³ Perry v. Buckeye Community Services, 48 Ohio App. 3d 140, 1988 Ohio App. LEXIS 1840, (Ohio Ct. App. 4th Dist., Pike County 1988) at syllabus.

⁴ Shaffer v. American Sickle Cell Anemia Assn., 1986 Ohio App. LEXIS 7116, 4-5 (Ohio Ct. App., Cuyahoga County June 12, 1986) citing Harp v. Administrator, Bureau of Unemployment Compensation (1967), 12 Ohio Misc. 34.

⁵ Id.

⁶ OAC Ann. § 4146-7-02.

Hearing Officer: From them, being Signature Health?

Ms Zellner: My subpoenas, yes I got no subpoenas, I got no documentation on any of the subpoenas I asked for. So I should at least have my physical witnesses.⁷

Later in that hearing, the following exchange regarding the subpoenaed documents occurred between the Hearing Officer, Ms. Zellner and Brenda Coey, counsel for Signature Health:

Hearing Officer: . . . Ms. Zellner indicated to me, Ms. Coey, that she did not receive any of the information responsive to the subpoena, however I know you did provide information because I received it. Did you also send a copy of that packet to Ms. Zellner?

Ms. Coey: Yes we did, but that's one of the problems we're dealing with FedEx on, apparently where Ms. Zellner lives, they're having some difficulty getting it to her.

Hearing Officer: They weren't able to deliver it?

Ms. Coey: Correct. Um, we're still, we've been on the phone with them trying to get them to deliver it to her before now, but apparently that hasn't happened.

Ms. Zellner They said it was sent late delivery and I wouldn't get it until after 4:00.

Hearing Officer: Alright well, clearly we have to be able to have possession of the records. . . So since I'm going to start with taking the testimony from your client Ms. Coey, Ms. Zellner will have it by the time we get to her testimony in her case.⁸

During the December 13, 2010 hearing, Ms. Zellner attempted to ascertain what information responsive to her subpoenas, if anything, had been sent to the Hearing

⁷ Appeals Docket No. H-2010008986, Unemployment Compensation Review Commission, November 23, 2010, page 8 at lines 16-21.

⁸ Appeals Docket No. H-2010008986, Unemployment Compensation Review Commission, November 23, 2010, page 12 at lines 14-26 and page 12 lines 1-7.

Officer and stated that she had never received anything in response to her subpoenas, other than eight weekly time logs.⁹ The Hearing Officer shut down her questions and said that Zellner would have to question opposing counsel about it.¹⁰ Despite being fully aware of the problems with Zellner getting her subpoenaed information, the Hearing Officer made no attempt to determine whether the subpoenaed information had ever been delivered, was complete, and matched with the information from which she and Ms. Coey were working. Ms. Zellner was subjected to cross examination on documents that had apparently never been delivered in response to her subpoena.¹¹ The Hearing Officer allowed Attorney Coey to disparage Zellner for being unable to find and respond to a document that Attorney Coey's client had failed to provide.¹²

Despite Zellner having stated the importance of having her witnesses testify where she had not received responses to her subpoena, the Hearing Officer disallowed most of her witnesses as duplicative of her own testimony. With regard to the testimony expected from Rebecca Gordon, the following excerpts are relevant:

From the December 13, 2010 hearing, transcript page 5:

Hearing Officer: Uh, before I connect you to, to the rest of the call. I wanted to find out again, who are your witnesses? What is it you anticipate Mrs. Gordon's going to testify about?

Ms. Zellner: She will be testifying for my, uh, the discharge.

Hearing Officer: Discharge, okay, and what about Ms. Hopkins?¹³

⁹ Appeals Docket No. H-2010008986, Unemployment Compensation Review Commission, December 13, 2010, page 10.

¹⁰ Id.

¹¹ Appeals Docket No. H-2010008986, Unemployment Compensation Review Commission, December 13, 2010, page 35-36.

¹² Id.

¹³ Id. at page 5 lines 20-24.

From the December 13, 2010 hearing, transcript page 9:

Hearing Officer: I will not connect Ms. Gordon until we get to the discharge portion of the hearing.

Ms. Zellner: Okay.

Hearing Officer: And then I'll connect her at the point we need her testimony for that.¹⁴

Those statements are the full extent of the conversation regarding witness Rebecca Gordon in the transcript of the December 13, 2010 hearing. Then in the January 27, 2011 hearing there was extensive discussion of Zellner's witnesses and whether or not they would be allowed to testify.¹⁵ The relevant sections follow:

Hearing Officer: I understand you have two potential witnesses, now I believe Ms. Gordon was one of the witnesses that you were seeking to have present testimony at the last hearing?

Ms. Zellner: No, she was never one for the last hearing. She was there because you've combined all three of them, but she is for the discharge alone.

Hearing Officer: Right, I understood that, but I thought we had talked about Ms. Gordon's testimony, and I had already ruled on that I thought we had discussed that her testimony was pretty much just going to duplicate yours?¹⁶

Ms. Zellner: Uh, no it will not, it, it, you have dismissed every one of my witnesses.

Hearing Officer: I'm aware of the history Ms. Zellner, and what I indicated to you that we won't do duplicate testimony. And then what you had indicated to me in the last hearing was that you were anticipating Ms. Gordon testifying in regard to the um,

¹⁴ Id. at page 9 lines 21-25.

¹⁵ Appeals Docket No. H-2010008986, Unemployment Compensation Review Commission, January 27, 2011, page 3.

¹⁶ Id. at page 3 lines 15-25.

Ms. Zellner: There are questions that I need to ask her though

Hearing Officer: Well, I

Ms. Zellner: Pertaining to the,

Hearing Officer: Well we've got a twofold problem, she, she was then permitted because she was excluded as a witness to sit and hear all of the testimony, and as I witness she would not have been permitted to do that.

Ms. Zellner: She wasn't here.

Hearing Officer: I thought in my notes, I have that she was with you.

Ms. Zellner: She has never been at my home, no she has note (sic). Lisa and Norma was here (sic). You always called her, or never called her by cell phone.

Hearing Officer: Alright, but she, ***it's accurate that I had indicated to you at the last hearing that, that I wouldn't permit her to testify***, I am remembering correctly. (Emphasis added).

Ms. Zellner: I don't remember that.

Hearing Officer: Well you just made the statement that I wouldn't let any of your witnesses testify.

Ms. Zellner: I'm saying, no, I said you're not letting any of my witnesses testify and that is not fair to me.¹⁷

Hearing Officer: Well, as I said, it's not an attempt to be unfair to you, we just don't permit duplicate testimony.

Ms. Zellner: You're using their witnesses, you're allowing all of their witnesses to collaborate each other's story.

Hearing Officer: I'm not allowing any duplicate testimony, I'm not treating them any differently than I am you. That's a policy that we won't duplicate testimony. It has nothing to do with the fact that you're the claimant, it just has to do with the policy of duplicating information.

Ms. Zellner: Well in my first two hearings I was allowed to have a witness

Hearing Officer: It's not a matter of you're not being allowed to have a

¹⁷ Appeals Docket No. H-2010008986, Unemployment Compensation Review Commission, January 27, 2011, page 4.

witness, it's just matter of whether your witnesses are duplicating testimony or whether they are presenting new testimony. And whether they've got firsthand,

Ms. Zellner: (inaudible)

Hearing Officer: I understand Ms. Zellner, you don't like my ruling. I, I' well aware of that, what is it that you anticipate that Ms. Locke is going to, or not ms. Locke, Ms. Fuller will be able to testify to this afternoon?

Ms. Zellner: Uh, well, we're not talking about Ms. Fuller, we were talking about Ms. Gordon.

Hearing Officer: ***I've already excuded Ms. Gordon's testimony in the last hearing, that ruling's not going to change.*** What is it that you anticipate that Ms. Fuller would be able to present?¹⁸ (Emphasis added).

It is apparent form the quoted selections from the hearing transcript that the Plaintiff/Appellant had a much better grasp of what had occurred in the first two hearings than the Hearing Officer did. In the first two hearings, the Hearing Officer never stated that Rebecca Gordon was excluded from testifying; in fact, she stated that Ms. Gordon would be called in the discharge portion of the hearing. Nevertheless, the Hearing Officer started out the third hearing with the exclusion of Rebecca Gordon firmly embedded in her mind and refused to listen to the Plaintiff/Appellant's objections.

A termination pursuant to company policy will constitute just cause only if the policy is fair, and fairly applied.¹⁹ The March 17, 2011 letter provided by Rebecca Gordon detailing what her proffered testimony would have been²⁰ is highly relevant to whether Signature Health's company policy was fair and fairly applied. The issue of

¹⁸ Appeals Docket No. H-2010008986, Unemployment Compensation Review Commission, January 27, 2011, page 5.

¹⁹ Shaffer v. American Sickle Cell Anemia Assn., 1986 Ohio App. LEXIS 7116, 4-5 (Ohio Ct. App., Cuyahoga County June 12, 1986) citing Harp v. Administrator, Bureau of Unemployment Compensation (1967), 12 Ohio Misc. 34.

²⁰ Appellant's Brief in Support of Her Administrative Appeal, Exhibit 9.

whether the policy was fairly applied relates to whether the policy was applied to some individuals but not others.²¹ While Rebecca Gordon's testimony may have been duplicative of Plaintiff/Appellants' with regard to being instructed to record their time in 30 minute increments, it would have been non-duplicative on the issue of whether the time keeping policy had been fairly applied to all similarly situated nurses or not. In this case the Hearing Officer clearly lost her way.

The court finds this case to be analogous to Perry v. Buckeye Community Services, 48 Ohio App. 3d 140 (Ohio App. 4th Dist. 1988). In *Perry*, the referee for the Unemployment Compensation Board of Review refused to allow Perry to call all of her witnesses, deeming those witnesses testimony to be cumulative. Further, the referee put words in Perry's mouth and essentially testified for himself for the record. The appeals court found that Perry had been denied her full panoply of due process rights and had been denied a fair hearing.

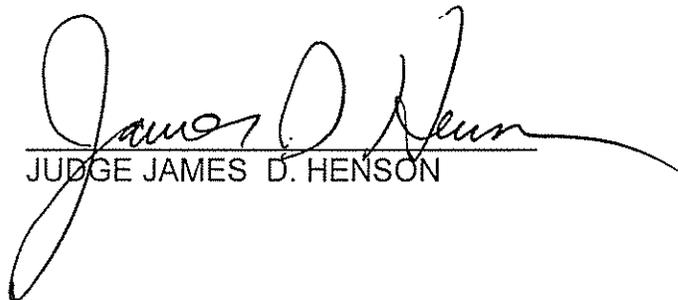
During the hearings in the instant case, the Hearing Officer refused to permit Plaintiff/Appellant to call all of her witnesses except Diana Fuller. She deemed all the other witnesses' testimony to be duplicative of Plaintiff/Appellant's without carefully ascertaining the purport of the proffered testimony of Rebecca Gordon. She claimed to have excluded Rebecca Gordon's testimony as duplicative, but had made no such determination and, in fact, had agreed to call Rebecca Gordon to testify in the discharge portion of the hearings. Furthermore, the Hearing Officer made unreasonable restrictions on the testimony of Ms. Fuller, as to both length of testimony and its content. The Hearing Officer impeded Plaintiff/Appellant's examination of witnesses throughout

²¹ *Id.*

the hearings, rather than aiding her in eliciting the testimony of the witnesses as is required by Ohio Administrative Code § 4146-7-02.

This court finds that Plaintiff/Appellant Karen Zellner was denied her full panoply of due process rights and was denied a fair hearing. The court expressly makes no finding regarding the weight or credibility of the evidence. The court finds that the March 10, 2011 Decision of the Unemployment Compensation Review Commission was unlawful and unreasonable for the reasons stated above.

IT IS THEREFORE ORDERED that March 10, 2011 Decision of the Unemployment Compensation Review Commission is hereby reversed and the matter is remanded to the Unemployment Compensation Review Commission for a fair hearing that comports with the requirements of due process.



JUDGE JAMES D. HENSON

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Judgment Entry was served according to local rules and sent by regular U.S. Mail this _____ day of _____ 2011 to the following:

Jonathan A. Good
Patrick MacQueeney
Brenda G. Coey

Deputy Clerk