IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

SANDRA K. McDONNELL,	*	
Plaintiff/Appellant	*	CASE NO.: **CV2011 0605**
-v-	*	
LIMA MEMORIAL HOSPITAL, et al	*	**DECISION & JUDGMENT ENTRY**
Defendant/Appellee	*	
	*	

* *

This is an appeal by Sandra K McDonell (employee) from a decision of the Unemployment Compensation Review Commission mailed on July 6, 2011 in which the Commission disallowed the employee's request for review of an earlier decision of the Commission, mailed on June 7, 2011 and in which the Commission decided to reverse the earlier administrative determination that appellant McDonnell was entitled to unemployment benefits. In the June 7, 2011 decision, the hearing officer determined that the appellant/employee, Sandra K. McDonnell, was separated from her employment with the employer, Lima Memorial Hospital under disqualifying conditions, specifically that McDonnell was discharged by the employer with just cause in connection with work. The hearing officer reasoned that:

> **"[Claimant] was not performing her duties within the established perimeters of the hospital. She was not performing**

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her duties in accordance with the protocols accepted by the nurse profession. This is misconduct.

The employer attempted to work with the claimant. She was not receptive to the employer's suggestions. Her performance did not improve. Therefore, the misconduct rises to the level of just cause for one's discharge. Claimant was discharged fro just cause in connections with work."

The Commission refused to review this decision. The employee, McDonnell, contends that she was "incapacitated with a sudden illness and was unable to telephone the Review Commission at the time of her scheduled hearing" on May 24, 2011. Appellant McDonnell further contends that she called the Commission on May 25, 2011 and that here request for a rehearing was denied. McDonnell argues that she had a reasonable excuse for not appearing at the May 24, 2011 hearing and should have been granted a rehearing.

This matter is governed by R.C. 4141.282(H). That section provides that the court of common pleas shall reverse the commission's decision only if it finds "that the decision of the commission was unlawful, unreasonable, or against the manifest weight of the evidence." "[W]hile appellate courts are not permitted to make factual findings or to determine the credibility of witnesses, they do have the duty to determine whether the [commission's] decision is supported by the evidence in the record." *Tzangas, Plaka & Mannos v. Ohio Bur of Empl. Servs.* (1995), 73 Ohio St. 3d 694, 696.

The record of the proceeding below include the transcript of a telephonic evidentiary hearing that took place on May 24, 2011, as well as documents from the claimant's file. The record also demonstrates that the hearing had originally been scheduled for March 15, 2011, but that it was

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continued to May 24, 2011 at the appellant's request. The transcript of the May 24, 2011 hearing is relatively short. During the hearing, Maxine Crawford, clinical manager of the appellee hospital's ICU/CCU testified as to how McDonnell did not perform up to the expectations of the hospital and why she was terminated from employment. Appearances were noted in the transcript. There is no mention in the transcript as to McDonnell's absence or why she was not there, and the transcript obviously contains no questions or testimony on behalf of McDonnell. McDonnell was the appellee at the hearing level.

The record also contains a letter from McDonnell to the Commission, dated June 26, 2011 (faxed on June 27, 2011) wherein McDonnell requested a rehearing. June 26, 2011 was more than a month after the hearing date and nineteen days after the notice of the decision was mailed on June 7, 2011.

R.C. 4141.281(D)(6) provides

> "NO APPEARANCE ---- APPELLEE
>
> "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."

There is no issue that written notice of the hearing was not sent to the McDonnell's last known address. The issue is whether McDonnell showed "good cause" for not appearing as required by statute, and thus, whether the

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Commission should have given her another hearing. When deciding this issue, this Court must focus on the decision of the Review Commission and decide whether its decision was unlawful, unreasonable, or against the manifest weight of the evidence. *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Serv.* (1995), 73 Ohio St.3d 694. While "good cause" is not defined under Ohio Unemployment Compensation Law, the Ohio Supreme Court has dealt with the term in workers compensation cases. In *Hawkins v. Indus. Comm. of Ohio*, the Ohio Supreme Court found that "good cause" for a change of payment request can be established through unforeseen or changed circumstances. *State ex rel. Hawkins v. Indus. Comm. of Ohio*, 100 Ohio St.3d 21, 2003-Ohio-4765, at ¶ 7. While *Hawkins* did not involve "good cause" for failing to appear at a hearing, the Ohio Supreme Court's standard provides direction in unemployment compensation cases where the issue of good cause to appear at a hearing is raised. *Lorain County Auditor v. Unemployment Comp. Review Com'n*, 9th Dist. No. 03CA008412, 2004 -Ohio-5175, ¶11. "Good cause" for failing to appear at a hearing under R.C. 4141.281(D)(5) requires a lack of culpability on the part of the appealing party. *Id.*at ¶18.

This Court may reverse the Review Commission's determination only if it is unlawful, unreasonable, or against the manifest weight of the evidence. *Tzangas, supra*, at 697. Further, "[e]very reasonable presumption must be made in favor of the [decision] and the findings of fact[ ] [of the Review Commission]." *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19, 526 N.E.2d 1350. Appellees correctly point out that the notice of hearing

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contained the direction that "**[a] party who failed to appear has fourteen (14) days after the hearing to provide a written statement showing good cause for the non-appearance.**" McDonnell did not give a written statement until June 27, 2011, which was more than fourteen days after the hearing. She may have called the Commission on May 25, 2011, but there is no evidence in the record concerning that call or to substantiate her excuse. This Court finds the Commission's decision to not grant another hearing was not unlawful, unreasonable, or against the manifest weight of the evidence given the record and requirements of R.C. 4141.281(D)(6).

Moreover, this Court finds the determination that defendant was fired for just cause is also not unlawful, unreasonable, or against the manifest weight of the evidence. In *Irvine v. Unemployment Comp. Bd. Of Review* (1985), 19 Ohio St.3d 15, 17, the Supreme Court of Ohio described "just cause" as:

> The term "just cause" has not been clearly defined in our case law. We are in agreement with one of our appellate courts that "there is of course, not a slide-rule definition of just cause. Essentially, each case must be considered upon its particular merits. Traditionally, just cause, in the statutory sense, is that which, to an ordinary 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."

It must be mentioned that the claimant has the burden of proving his entitlement to unemployment compensation benefits and to prove that he was discharged by his employer without just cause, or quit work with just cause. R.C. 4141.29(D)(2)(a); *Shephard v. Ohio Dept. of Job & Family Servs.*, 166 Ohio App.3d 747, 2006 -Ohio- 2313; *Irvine*, supra. Hullinger must be able to demonstrate a showing of entitlement to unemployment

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compensation by showing that he was free from fault in bringing about his termination. *Case Western Reserve University v. Ohio Bureau of Employment Services*, 8th Dist. App. No. 79189, 2002 -Ohio- 40. On close questions, when the board might reasonably decide either way, this Court has no authority to upset the agency's decision. *Irvine*, supra. The determination of whether just cause exists necessarily depends upon the unique factual consideration of the particular case. Determination of purely factual questions is primarily within the province of the hearing officer and Review Commission. This Court is limited to determining whether some competent, credible evidence contained in the record supports the hearing officer's decision. *Angelkovski v. Buckeye Potato Chips Co.* (1983), 11 Ohio App.3d 159, 161. This Court "cannot usurp the function of the trier of fact by substituting its judgment for the hearing officer. The decision of purely factual questions is primarily within the province of the referee and the board of review." See *Clark v. Buckeye Rubber Products, Inc. (*Nov. 14, 1990), Allen App. No. 1-89-76, unreported.

After carefully reviewing the evidence before the hearing officer, the Court finds the hearing officer's determination that McDonnell was was discharged with just cause is supported by the evidence in the record as is the decision to not grant a new hearing. The determination is not unlawful, unreasonable, or against the manifest weight of the evidence. Only a decision that 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' " is deemed to be against the manifest weight of the

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evidence. *Phillips v. Ohio Bur. of Emp. Servs.* (Aug. 26, 1988), 6th Dist. No. S-88-8, at *2, quoting 3 Ohio Jurisprudence 2d 817, Appellate Review, Section 819. Therefore, if some competent, credible evidence going to all the essential elements of the case supports the commission's decision, the decision must stand, (*Phillips,* at *1. Accord *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus) and the court cannot reverse it as being against the manifest weight of the evidence. *Angelkovski,* supra; *Shaffer v. Ohio Unemp. Rev. Comm.,* 11th Dist. No. 2003-A-0126, 2004-Ohio-6956, at ¶ 19. Accord *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

Therefore, it is ORDERED, ADJUDGED and DECREED that the employee's appeal is not well taken and the decision of the Review Commission is affirmed. The employee/appellant shall pay the costs. Judgment for costs.

It is so ORDERED.

January 24, 2012

Jeffrey C. Reed.

Jeffrey C. Reed, Judge

The Clerk of this Court shall forward a file stamped copy of this Judgment Entry by regular mail to each attorney of record and each party not represented by counsel. The fact of mailing shall be noted on the docket and cross

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