

JANEL M. HERRIGAN

2012 FEB 28 PM 12:40

SUMMIT COUNTY
CLERK OF COURTS
ABIGAIL B. CYMERMAN

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

| | | |
|---------------------------------|---|-----------------------------|
| ABIGAIL B. CYMERMAN |) | CASE NO. CV 2011-01-0095 |
| |) | |
| Plaintiff |) | JUDGE AMY CORRIGALL JONES |
| |) | |
| -vs- |) | |
| |) | |
| |) | <u>ORDER</u> |
| INFOCISION MGMT. CORP., ET AL., |) | |
| |) | Final and Appealable |
| Defendants |) | |

On January 6, 2011, the Plaintiff-Appellant, Abigail Cymerman (Appellant), filed this administrative appeal from the decision of the Ohio Unemployment Compensation Review Commission pursuant to Ohio Revised Code § 4141.282(H).

The transcript of proceedings was filed on February 14, 2011. The briefing schedule pursuant to Ohio Summit County General Division Local Rule 19.03 and order of the court is now complete. On July 29, 2011, Appellee Infocision Management Corp. adopted the brief of Appellee Ohio Department of Job and Family Services (Appellee) filed the same day. The issues raised by this administrative appeal are now deemed submitted. Also pending before the court is Appellant's motion to supplement the record filed on May 6, 2011.

The facts of the case are as follows. Appellant was employed by Appellee Infocision Management Corp. until on or about March 11, 2010 when she was discharged. On May 4, 2010, the Director of Job and Family Services issued a redetermination that held that she was discharged without just cause and entitled to unemployment benefits. Her former employer appealed and on November 2, 2010, a hearing was held before a hearing officer for the Unemployment Compensation Review Commission. The decision by the hearing officer, sent

on November 10, 2010, reversed the redetermination and found that Appellant Cymerman was discharged by her employer for just cause in connection with work. The Hearing officer found, in part, that,

The Claimant was sufficiently at fault... In this case, the Claimant failed to perform the required work to satisfaction, and she was informed of the expectations at the time of hire. In addition, the expectations were reasonable and the requirements did not change. Accordingly, the facts of this case meet the requirements of [*Tzangas, Plakas and Mannos, Attorneys v Administrator Ohio Bur. Of Emp. Serv.* (1995), 73 Ohio St. 3d 694] and therefore, the employer discharged the claimant for just cause shown in connection with work.

The Review Commission denied further appeal and Appellant filed this administrative appeal on January 6, 2011.

Before the court will rule on the underlying appeal, it will address Appellant's motion to supplement the record. Appellant seeks to include evidence concerning the amount of overpayment the Department of Job and Family Services is seeking the return of from Appellant. Appellee argues, in a footnote to its July 29, 2011 brief, that the difference in the amount is due to a subsequent Decision dated April 6, 2011, which was not appealed. The Ninth District has ruled that, "On appeal to the court of common pleas, 'the appeal shall be heard upon [the] record certified by the [review] commission.' With respect to this provision, the Ohio Supreme Court has stated 'the Court of Common Pleas is not authorized to receive evidence but the appeal shall be heard upon such record certified by the board.'" *Coughlin v Ohio Bureau of Empl. Servs.*, 2002 Ohio 1637 citing; *Hall v American Brake Shoe Co.* (1968), 13 Ohio St. 2d 11, 14; Ohio Revised Code §4141.28(N)(1). This matter is not part of the certified record and is not properly before the court. This court may only review the decision of the Unemployment Compensation Review Commission presently before it. The Decision Disallowing Request for Review and the Decision of the Unemployment Compensation Review's Hearing Officer for the case at bar are attached to Appellant's administrative appeal

filed before this court, thus that is the decision appealed. The court may not review a separate Decision by supplementing the record in this matter. Appellant's motion is hereby **DENIED**. As such, the issues addressed in Appellant's affidavit filed on August 15, 2011 are moot. Consequently, this order deals with only the amount of overpayment stated in the case at bar, \$1,885.00. Any other collection disputes between these parties must be handled separately.

The role of the court of common pleas upon appeal from the Unemployment Compensation Review Commission is limited to determining whether the Review Commission's decision is supported by evidence in the record. A decision supported by competent, credible evidence going to all essential elements of the dispute will not be reversed as being against the manifest weight of the evidence. See Ohio Revised Code § 4141.282(H); *Angelkovski v Buckeye Potato Chips Co.* (1983), 11 Ohio App. 3d 159. The jurisdiction of the court is limited to a determination of whether the Commission's decision was unlawful, unreasonable, or against the manifest weight of the evidence. Ohio Revised Code § 4141.282(H); *Tzangas, Plakkas & Mannos v Ohio Bur. Of Emp. Serv.* (1995), 73 Ohio St. 3d 694 at 696-697; *Irvine v Unemp. Comp. Bd. Of Review* (1985), 19 Ohio St. 3d 15 at 17; *DiGiannantoni v Wedgewater Animal Hospital, Inc.* (1996), 109 Ohio App.3d 300 at 305. The common pleas court must give due deference to the Commission's resolution of evidentiary conflicts and the court may not substitute its judgment for that of the Commission. If, at the agency level, a preponderance of reliable, probative, and substantial evidence exists, the common pleas court must affirm the agency's decision. *Budd Co. v Mercer* (1984), 14 Ohio App.3d 269.

Upon appeal, a court may reverse such decisions only if they are unlawful, unreasonable, or against the manifest weight of the evidence. Ohio Revised Code §4141.282(H); *Tzangas, supra*; *Irvine, supra*. If the evidence supports the Review

Commission's conclusion, a reviewing court may not substitute its own findings of fact. *Durgan v Ohio Bur. Of Emp. Serv.* (1996), 110 Ohio App.3d 545 at 551. Appellant argues that the decision of the Review Commission was unlawful and unreasonable. Appellant argues that she signed a "Release and Settlement Agreement" from her employer which stated that she would be unable to collect unemployment benefits. Appellant argues that this is both unlawful and unreasonable. Upon Appellant's admission this matter was mentioned in the November 2, 2010 hearing. The hearing officer did not cite this "agreement" as a reason Appellant was unable to collect unemployment benefits and made no reference to it in the decision. The hearing officer received and weighed evidence and found that the discharge of Appellant was for good cause and cited *Tzangas, Plakas and Mannos, Attorneys v Administrator Ohio Bur. Of Emp. Serv.* (1995), 73 Ohio St. 3d 694 as applied to facts of the case unrelated to the "agreement." According to the above standard of review, this court may not find that the hearing officer made the finding he did for reasons not cited.

Appellant claims that the decision was against the manifest weight of the evidence. Unsuitability for a position, as the hearing officer found in this case, constitutes fault sufficient to support a just cause termination.

An employer may properly find an employee unsuitable for the required work, and thus to be at fault, when: (1) the employee does not perform the required work, (2) the employer made known its expectations of 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. *Tzangas, Plakas and Mannos, Attorneys v Administrator Ohio Bur. Of Emp. Serv.* (1995), 73 Ohio St. 3d 694.

Appellant disagrees with all four points required by the above standard. Under Ohio law, "Where conflicting testimony exists, the Ohio Unemployment Compensation Review Commission, not the court, resolves the conflicts and determines the credibility of the witnesses." *Cottrell v Dir., Ohio Dep't of Job & Family Services*, 2006 Ohio 793. After a

thorough review of the record, the court finds that there was competent, credible evidence to support the conclusions made below as to the above four requirements.

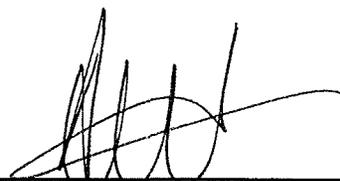
The record contains sufficient credible evidence that Appellant Cymerman was discharged by her employer with just cause. The court is unable to find that the Review Commission's decision was unlawful, unreasonable or against the manifest weight of the evidence.

Appellant argues that the court should reverse the decision of the hearing officer because Appellees did not properly follow Ohio Revised Code §4141.282(F) and because the case was improperly transferred between administrative agencies below pursuant to 4141.28(B) and (C). A review of the record does not reveal any reasons for reversal in line with Appellant's arguments and Ohio law.

The decision of the Ohio Unemployment Compensation Review Commission is **AFFIRMED**. This administrative appeal is **DISMISSED** with prejudice.

This shall serve as a final appealable order. There is no just cause for delay.

IT IS SO ORDERED.



Judge Amy Corrigall Jones

CC: Attorney Patrick McQuenny
Attorney Mark Ludwig
Attorney Kathleen Gadd