

MAR 26 2012

TOLEDO, OHIO

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LUCAS COUNTY

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COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

THIS IS A FINAL
APPEALABLE ORDER

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Mary E. Boellner,	*	Case No. CI 11-4268
Appellant,	*	OPINION AND JUDGMENT ENTRY
vs.	*	Honorable James D. Jensen
Director, Ohio Dept. of Job and Family services, et al.,	*	
Appellees.	*	

This cause is before the Court on an appeal filed by Mary E. Boellner from a decision of the Unemployment Compensation Review Commission denying unemployment compensation benefits and ordering repayment of overpaid benefits. After consideration of the record, briefs, and applicable law, this Court affirms the decision of the Commission.

I.

Mary E. Boellner was hired as a bookkeeper by Village Farm Dairy Co. (Village Farm) on May 1, 1989. During her employment, Ms. Boellner was "responsible for accounts receivable, accounts payable, general ledger, inventories and monthly profit and loss statement[s]" for the eighteen convenience stores owned by Village Farm.

Ms. Boellner was terminated on November 10, 2010 for violating company policy.

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Thereafter, Ms. Boellner applied for unemployment compensation benefits. Initially, Ms. Boellner was granted unemployment benefits. The employer appealed. On December 21, 2010, the Ohio Department of Job and Family Services issued a Redetermination finding that Ms. Boellner had been discharged without just cause. Boellner's application was allowed with a benefit year beginning November 7, 2010. The employer appealed again.

On December 28, 2010, the Ohio Department of Job and Family Services transferred jurisdiction to the Ohio Unemployment Compensation Review Commission (Commission). The Commission held a telephone hearing on March 31, 2011. Mary Boellner appeared. Donald Kowalski, Vice-President of Village Farm appeared on behalf of the employer.

When asked why Ms. Boellner was terminated from her position as bookkeeper, Vice-President Kowalski testified that there was a problem with the lottery-related revenue in one of the stores:

A. It came to light that there was a negative balance being entered for one of my stores for 28 weeks and nobody sent a flag up to Paul. The negative bank balance in turn let another employee steal \$7900 undetected.

* * *

Q. And how did um, how did your company become aware that this was a concern?

A. Ms. Boellner was actually the one that told me that there was a negative cash-in-bank balance. * * *

Q. And when did she inform you that there was a concern like this?

A. Four or five days before the termination date.

Q. Did she give any explanation as to why she hadn't brought that to your attention before early November?

A. No.

Q. Did you ask her why?

A. No. I was digging in to see how far it was going. I was out of town at the time and when I came back I pulled out the paperwork just to see how long it had been going on and I found that it was going on for seven months.

Q. All right, in statements made to the Department of Job and Family Services, um Ms. Boellner maintains that she had informed uh your company of shortages in inventory from this location prior to uh this November date. Had there been discussions like that?

A. Inventory, yes. Cash, no.

Q. All right, um was there some investigation based on her discussions of the inventory shortages?

A. Yes.

Q. What sort of investigation?

A. It's a process of elimination to try to find out which employee it is. Eventually everybody was let go at the location for the inventory because we could not prove who was letting inventory go out the door.

Q. All right, had Ms. Boellner ever been warned or disciplined in the past about um failing to, to note something like this?

A. No, but it was her responsibility to catch the fact that it was happening.

Hrg. Tr. 7:17-9:18 (March 31, 2011).

During her testimony, Ms. Boellner denied any wrongdoing. While she did admit to receiving the lottery numbers from the stores every month, she denied responsibility for reviewing the numbers or reporting any inconsistencies or shortages:

Q. But did you review that figure on a monthly basis?

A. I would, I would get the figure, but no I would not review it. I would take a look at it, but it was not something that I would put in the books, it's not something that I would done that and it was only after I saw there was a negative high cash balance did I bring it to their attention, that I brought it to their attention about the accounting * * * .

* * *

Q. In regards to the negative bank balance, did you see that for seven months it was

negative?

A. I, it, I wouldn't have looked at that figure and its possible to be negative. Other stores have had negative and there's if uh, but I see the figure once a month and I see it probably three weeks after the month has been closed and it's nothing that I would use in the books. That was not a figure I used in the books.

* * *

Q. Well, what prompted you to talk to Mr. Kowalski about it in November?

A. When I saw that there was an extremely high negative figure, I then I went back and looked and saw that it was a negative figure, but it wasn't until I saw it was a high negative figure was I, did it even occur to me that.

Q. Well what made you look it and see that it was a high negative figure?

A. It said, it just jumped out at me when I happened to look at that spreadsheet, but there's spreadsheet for every store, there's 18 stores and there's 18 spreadsheets that I look at and it just happened to jump out at me that it was a high negative figure.

Q. So did you just miss that it was a negative figure for the seven months prior to that or six months prior to that?

A. It's not something that I use, so if there's no reason for me to, to even pay any attention to it. It is something I thought the supervisors were supposed to use if they did an audit of the store, when they did an audit of store and they used that figure to see if the cash was right or not. It was not something I used. * * * .

Q. Why would the information be given to you if you it wasn't something that you were (inaudible).

A. It was just on a spreadsheet that I used and every week somebody in the office would put in what the lottery sales were, what the, what the commissions were, how much money they put in the bank, and at the bottom of the spreadsheet it came up with a cash-in-bank and that was used for the supervisors. It was not something I used. I used the lottery sales, I used the commission in order to put the journal entry in for the books. That was the cash-in-bank was nothing that I used and up until two years ago when the auditors insisted it be put into the books, it was never even used in the books, but when the auditors insisted and we did it once a year, I would take that figure and put it on the books, so it was not something that I looked at every month, every week, anything.

Hrg. Tr. 11:11-13:25 (March 31, 2011).

In a decision mailed April 4, 2011, the hearing officer reversed the Director's

Redetermination finding Village Farm did have just cause to discharge Ms. Boellner. The decision disallowed Ms. Boellner's claim and requires her to repay \$5,250 of benefits to which she was not entitled. Ms. Boellner requested review by the full Commission. The full Commission disallowed Ms. Boellner's request in a decision mailed June 22, 2011.

On July 14, 2011, Ms. Boellner appealed to the Lucas County Court of Common Pleas pursuant to R.C. 4141.282. A certified transcript of the record of proceedings was filed by the Commission on August 22, 2011. Ms. Boellner filed a brief on November 14, 2011. The Director of the Ohio Department of Job and Family Services filed a brief on January 12, 2012. Ms. Boellner filed a reply brief on January 20, 2012.

II.

R.C. 4141.282 gives any interested party the right to appeal a decision of the unemployment compensation review commission to the court of common pleas. "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." R.C. 4141.282(H).

The Court has no authority to make factual findings or to determine the credibility of witnesses, rather, the duty of the court is to determine whether the commission's decision is supported by the record. *Irvine v. State Unemployment Comp. Bd. of Review*, 19 Ohio St. 3d 15, 18, 482 N.E.2d 587 (1985) (citations omitted). "The fact that reasonable minds might reach different conclusions is not a basis for the reversal of the board's decision." *Id.*, citing *Craig v. Bureau of Unemployment Comp.*, 83 Ohio App. 247, 260, 83 N.E.2d 628 (1st Dist. 1948).

III.

The his April 4, 2011, Decision, the Commission Hearing Officer held that Ms. Boellner was discharged for just cause in connection with work and that she must repay unemployment compensation benefits to which she was not entitled. In support of his decision, the Commission Hearing Officer cited evidence that Ms. Boellner failed to report a negative cash-in-bank balance from one of the stores for seven months. He found that the failure constituted "neglect of her job duties." The Commission Hearing Officer reasoned that Ms. Boellner "knew or should have known that she was to report concerns like the negative balance to the employer and that failure to do so would be neglect of her job duties."

In her brief, Ms. Boellner argues that for twenty years, she was never accused of demonstrating an unreasonable disregard for her employer's best interest and claims "the record is devoid of management policies affirmatively requiring appellant to assume that her accurate reports would not be read and devoid of written policies requiring her to 'sen[d] a flag up to Paul' when there was a cash shortage in a lottery account."

Whether or not Village Farm is "devoid of the management policies" is not an issue before the Court for review in this appeal. "In considering whether the decision is against the weight of the evidence *it must consider the evidence heard by the Board or a referee and properly admitted by the Board or the referee.*" *Simon v. Lake Geauga Printing Co.*, 69 Ohio St.2d 41, 45, 430 N.E.2d 468 (1982) (citations omitted). "The decision of purely factual questions is primarily within the province of the referee and the board of review." *Id.* A reviewing court "may not make factual findings or determine a witness's credibility and must affirm the commission's finding if some competent, credible evidence in the record supports it." *Williams v. Ohio Dept. of Job & Family Servs.* 129 Ohio St.3d 332, 2011-Ohio-2897, 951 N.E.2d

1031, ¶20 (citation omitted).

Here, a representative of the employer testified that it was Ms. Boeller's responsibility to "catch" a shortage in lottery income and report the same to management. Ms. Boeller, on the other hand testified that it was not her responsibility to monitor how much money each store put "in the bank" for lottery sales but solely the responsibility of her supervisors upon submission of her reports.

A review of the record reveals that there existed competent, credible evidence from which the Unemployment Review Commission could determine that Mary Boellner "knew or should have known that she was to report concerns like the negative balance to the employer and the failure to do so would be neglect of her job duties." The decision of the Commission was not unlawful, unreasonable, or against the manifest weight of the evidence. Accordingly, the Commission's decision denying unemployment benefits is affirmed.

In regard to overpayment, The hearing officer found that Ms. Boellner was overpaid benefits in the amount of \$5,250 beginning with the week ending December 11, 2010 and ending with the week ending March 19, 2011.

If the Department determines that an individual has been overpaid benefits, for reasons other than fraud, it may require repayment of any such overpayments. R.C. 4141.35(B). A review of the record reveals credible evidence from which the hearing officer could determine that Ms. Boellner was overpaid benefits. The decision of the Commission was not unlawful, unreasonable, or against the manifest weight of the evidence. Accordingly, the Commission's decision requiring repayment of overpaid benefits in the amount of \$5,250 is affirmed.

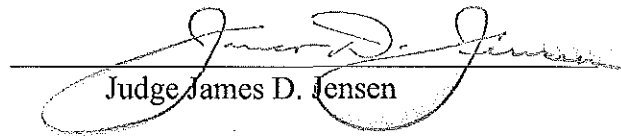
JUDGMENT ENTRY

It is ORDERED that the decision of the Unemployment Compensation Review Commission is affirmed.

It is further ORDERED that the Clerk of Courts shall serve a copy of this Judgment Entry upon all parties.

THIS IS A FINAL APPEALABLE ORDER.

March 20, 2012


Judge James D. Jensen

cc: Eric A. Baum, Esq.
Peter O. DeClark, Esq.
Village Farm Dairy Company, Inc.