

**IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO**

COMMON PLEAS COURT
2012 DEC 14 AM 8:35

Tammy Harvey

CASE NO. 12CIV0595

Appellant/Plaintiff

FILED
DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

vs.

**Director, Ohio Dept. of
Job & Family Services**

and

JUDGE JAMES L. KIMBLER

RA Kalfas Home Improvements Inc.

**Judgment Entry with Instructions
to the Clerk**

Appellees/Defendants

Procedural History of Case

Ms. Harvey filed for unemployment benefits after she was discharged from employment by Attorney David Pasz and RA Kalfas Home Improvements, Inc. She applied for benefits on August 11, 2011. She received notice from the Ohio Department of Job & Family Services, (ODJFS), that it was denying her application. The Determination of Benefits was issued on August 31, 2011.

Ms. Harvey then filed an appeal of that Determination. The appeal resulted in the ODJFS issuing a Redetermination of Benefits that affirmed the Determination of August 31, 2011. That decision was issued on October 11, 2011.

Ms. Harvey then filed an appeal of that Redetermination Decision which led the ODJFS to transfer jurisdiction to the Unemployment Compensation Review Commission, (UCRC). That transfer of jurisdiction took place on October 26, 2011.

The UCRC held an evidentiary hearing on November 18, 2011. That hearing resulted in a decision that was issued on February 28, 2012. In that decision, the hearing officer affirmed the Redetermination of Benefits Decision, finding that Ms. Harvey was discharged for just cause.

On March 10, 2012, Ms. Harvey filed a Request for Review of the hearing officer's decision of February 28, 2012. That request for review was disallowed by the full UCRC on March 21, 2012. Ms. Harvey then filed her notice of appeal to this Court on April 19, 2012.

Findings of Fact

Ms. Harvey worked for R.A. Kalfas Home Improvements, but her direct supervisor was Attorney David Pasz. Attorney Pasz and R.A. Kalfas Home Improvements had an arrangement whereby Ms. Harvey was paid by the home improvements company, but she worked for Attorney Pasz as his legal secretary. She also did some work for the home improvements company, but her primary job was working for Attorney Pasz. It is indicative of the relationship that while the owner of the home improvements company testified that he could discharge her, he "probably wouldn't" have done so absent the request by Attorney Pasz.

Attorney Pasz required Ms. Harvey to keep his schedule. This had apparently been an issue between them for some time prior to August 10, 2011. On that date Attorney Pasz had a court hearing that was not put on his schedule. Although he didn't miss the hearing, since he apparently had independent knowledge of it, he considered that to be the final mistake in the relationship between Ms. Harvey.

The reason why this mistake was so critical to Mr. Pasz was that prior to August 10, 2011, a foreclosure case had been dismissed by a court because Ms. Pasz was not present. Attorney Pasz testified that he was not present because Ms. Harvey had not placed the hearing on his calendar.

That mistake took place in December of 2010. After that mistake Attorney Pasz testified that he tried to install a system whereby there would be an alert as to the scheduled hearings. He testified that after those changes were made, there were still scheduling errors. He also testified that there were several instances of Ms. Harvey not getting work done in a timely manner.

Issues Raised on Appeal

Ms. Harvey argues in her appeal that the decision of the hearing officer, which affirmed the Redetermination of Benefits Decision of October 11, 2011, was "incorrect and against the manifest weight of the evidence."

Although the language quoted above is set forth in Ms. Harvey's appeal as an "Assignment of Error", she also lists three issues that she believes are determinative of her appeal. Those issues are:

1. Whether R.A. Kalfas Home Improvements had standing to contest her application for unemployment benefits;

2. Whether the conditions of her employment had been changed by the employer in such a manner that Ms. Harvey could no longer do her duties effectively; and

3. Whether Attorney David Pasz, who appeared as both a witness and also as an attorney for R.A. Kalfas Home Improvements should have been allowed to testify if he was also acting as the representative for R.A. Kalfas.

Standard of Review

The duty of this Court, when considering such an appeal, is to decide whether the appellant has shown that the decision of the Commission was "unlawful, unreasonable, or against the manifest weight of the evidence". R.C. 4141.282 (H), *Tzangas, Plakas & Mannos v. Administrator, Ohio Bureau of Employment Servs.*, 73 Ohio St. 3d 694 (Ohio 1995).

This Court may not rewrite the Commission's decision merely because it could or would interpret the evidence differently. *Kilgore v. Board of Review*, 2 Ohio App. 2d 69 (Ohio Ct. App., Jackson County 1965). What this Court must determine is whether the decision of the Commission is supported by evidence in the certified record. *Roberts v. Hayes*, 2003 Ohio 5903 (Ohio Ct. App., Summit County Nov. 5, 2003) at ¶12.

The determination of factual questions is primarily for the hearing officer and the Commission. *Brown-Brockmeyer Co. v. Roach*, 148 Ohio St. 511 (Ohio 1947). A common pleas court hearing an appeal pursuant to R.C. 4141.282 cannot reserve the Commission's decision simply because it would have reached a different conclusion based on the evidence heard by the hearing officer. *Roberts v. Hayes*, supra. A reviewing court must affirm if some credible evidence supports the Commission's decision. *C. E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St. 2d 279 (Ohio 1978). A reviewing court must defer to the Commission's determination of purely factual issues that concern credibility of witnesses and the weight of conflicting evidence. *Angelkovski v. Buckeye Potato Chips Co.*, 11 Ohio App. 3d 159 (Ohio Ct. App., Franklin County 1983).

Discharge for Just Cause

"1. An appellate court may reverse the Unemployment Compensation Board of Review's "just cause" determination only if it is unlawful, unreasonable or against the manifest weight of the evidence.

2. Fault on behalf of the employee is an essential component of a just cause termination.

3. Unsuitability for a position constitutes fault sufficient to support a just cause termination.

4. 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 substantially since the date of the original hiring for that particular position." *Tzangas, Plakas & Mannos v. Administrator, Ohio Bureau of Employment Servs.*, (1995), 73 Ohio St. 3d 694, paragraphs 1-4 of the opinion syllabus.

The Court of Appeals for the Ninth Appellate District has explained the concept of discharging an employee for "just cause" in *Durgan v. Ohio Bureau of Empl. Servs.*, 110 Ohio App. 3d 545 (Ohio Ct. App., Lorain County 1996). In that decision the following language appears:

"R.C. 4141.29(D)(2)(a) prohibits the payment of unemployment compensation if the employee "has been discharged for just cause in connection with his work." "Just cause, in the statutory sense, is that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act." (Emphasis added.) *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Serv.* (1995), 73 Ohio St. 3d 694, 697, 653 N.E.2d 1207, quoting *Irvine v. State, Unemployment Comp. Bd. of Rev.* (1985), 19 Ohio St. 3d 15, 17, 482 N.E.2d 587" *Durgan v. Ohio Bureau of Empl. Servs.*, 110 Ohio App. 3d 545, 549 (Ohio Ct. App., Lorain County 1996). The Ninth Appellate District recently quoted the language above with approval in *Clucas v. Rt 80 Express, Inc.*, 2012 Ohio 1259 (Ohio Ct. App., Lorain County Mar. 26, 2012).

Definition of Employer

For purposes of Ohio's unemployment compensation law, the definition of "employer" is found in R.C. § 4101.01 (A) (1).

The definition of "employment" is found in R.C. § 4101.01 (B) (1).

The Ohio Supreme Court has held the following regarding the test for whether a business entity is an employer for purposes of Ohio's unemployment compensation law:

"2. The three tests provided by the Ohio Unemployment Compensation Act by which it may be determined that one employing another shall be exempt from the operation of the act, to the effect that (i) the person employed is free from control or direction over the performance of

his service; (ii) that such service is outside the usual course of the business for which such service is performed and (iii) that such individual so employed is customarily engaged in an independently established trade, occupation, profession or business, do not serve to widen the scope of the term "employment" as used in the statute so as to *include* persons not otherwise included, but to *exclude* from the definition of the term "employment," persons who perform incidental service and who, but for such limitations, might be classed as employees of the person for whom such incidental service is rendered." *Commercial Motor Freight, Inc. v. Ebright* (1944), 143 Ohio St. 127, paragraph 2 of the opinion syllabus.

In an unemployment compensation case the claimant has the burden of proof to show that he or she has a right under the statute to compensation, and the employer has the burden of proof to show that there is an exemption to that right. *M. Conley Co. v. Anderson*, (5TH. District), 2004 Ohio 4216.

Holding

The decision of the UCRC to affirm the Redetermination of Benefits Decision was not against the manifest weight of the evidence.

Discussion

As shown by the court decisions and statutes quoted above this Court must affirm the decision of the UCRC to affirm the Redetermination of Benefits Decision if there is some credible evidence that establishes that Ms. Harvey was discharged for just cause. In making that decision this Court cannot substitute its judgment for that of the UCRC or the hearing officer. It cannot weigh the credibility of the witnesses, but must, rather defer to the hearing officer's determinations as to the credibility of the witnesses.

Applying these tests to the evidence offered in the certified transcript this Court finds that there is sufficient evidence for the hearing officer to have concluded that Ms. Harvey did not perform the required work; that her employer made the duties of the job known at the time she was hired; and that there was not a substantial change in the requirements of the job since the time that Ms. Harvey was hired. Further this Court finds that it was reasonable for Attorney Pasz to have discharged her for improper performance of her job duties.

With regard to the issue of whether R.A. Kalfas Home Improvements Inc. was or was not Ms. Harvey's employer, this Court finds that while the arrangement between it and Attorney Pasz was somewhat unusual, there was sufficient evidence in the certified transcript that it was

not against the manifest weight of the evidence for the hearing officer to hold that the company was Ms. Harvey's employer.

Finally Ms. Harvey raises the issue of whether Attorney Pasz could act as both attorney and witness for R.A. Kalfas Home Improvements Inc. This Court notes that this issue was raised by Ms. Harvey's counsel to the hearing officer. That officer concluded there was no problem with Attorney Pasz both representing the company and testifying as a witness. This Court believes that it is not in a position to second guess the decision of a hearing officer for an administrative agency upon an administrative appeal regarding whether the hearing officer should allow an attorney to also appear as a witness. Therefore, this Court does not reach that issue.

Order

The decision of the Unemployment Compensation Review Commission is hereby affirmed. Costs are taxed to Ms. Harvey but all costs over and above her initial deposit are waived.

SO ORDERED, ADJUDGED, and DECREED.



Judge James L. Kimbler

INSTRUCTIONS TO THE CLERK

Pursuant to Civil Rule 58, the clerk is hereby directed to serve upon the following parties, notice of this judgment and its date of entry on the docket:

Justin C. Miller
3443 Medina Rd. Suite 101-E
Medina, OH 44256

David Pasz
12001 Prospect Road, Suite A1
Strongsville, OH 44149

Patrick MacQueeny
Ohio Attorney General's Office
615 West Superior Ave., 11th Floor

Cleveland, OH 44113-1899

Notice was mailed by the clerk of court on Dec. 19, 2012.

Deirdra M. Lucas
DEPUTY CLERK OF COURT