

JAN 07 2013

LINDA K. FANKHAUSER, CLERK,
PORTAGE COUNTY, OHIO

IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

JANICE KAPPAN)	CASE NO. 2011 CV 01441
)	
Plaintiffs,)	JUDGE LAURIE J. PITTMAN
)	
v.)	ORDER AND JOURNAL ENTRY
)	
OHIO DEPARTMENT OF)	
JOB AND FAMILY SERVICES, et al.,)	
)	
Defendants.)	

This is an administrative appeal brought by Appellant Janice S. Kappan (“claimant”), who is appealing the decision of the Ohio Unemployment Compensation Review Commission (“Review Commission”), denying unemployment compensation benefits from her former (“employer”), Schneller, LLC.

R.C. 119.12 sets forth a specific standard of review to be applied in R.C. 119.12 appeals to the Common Pleas Court. This court must affirm the decision of the administrative agency when its decision is supported by reliable, probative and substantial evidence and is in accordance with the law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110.

Appellant set forth two assignments of error:

1. The finding that Claimant was discharged for just cause is not supported by the evidence.
2. The Commission erred in failing to enforce the subpoenas requested by Claimant.

A. The Standard of Review

The Court is required to observe the standard of review set forth in R.C. 4141.282(H), when considering appeals of decisions rendered by the Review Commission. That section states:

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 remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission.

This strict standard of review was reiterated in the leading case on Ohio unemployment compensation law, *Tzangas, Plakas & Mannos v. Ohio Bur. Of Emp. Serv.* (1995), 73 Ohio St.3d 694. In *Tzangas*, the Ohio Supreme Court specified that: “the board’s role as fact-finder is intact; a reviewing court may reverse the board’s determination only if it is unlawful, unreasonable, or against the manifest weight of the evidence.” *Id.* At 697. The standard of review in *Tzangas* was recently affirmed by the Ohio Supreme Court. *Williams v. Ohio Department of Job & Family Services*, 2011-Ohio-2897 (Ohio Sup. Ct.), at Para 19.

Although the Review Commission’s decision should not be “rubber-stamped,” a reviewing court may not rewrite the Commission’s decision merely because it could or would interpret the evidence differently. *Kilgore v. Board of Review* (1965), 2 Ohio App.2d 69. The parties are not entitled to a trial *de novo*. *Id.* “Rather, the courts’ role is to determine whether the decision of the review commission is supported by evidence in the certified record.” *Roberts v. Hayes*, 2003-Ohio-5903, at Para 12. “If the court finds that such support is found, then the court cannot substitute its judgment for that of the Review Commission.” *Id.*

The determination of factual questions is primarily a matter for the hearing officer and the Review Commission. *Brown-Brockmeyer Co. v. Roach* (1947), 148 Ohio St. 511. As the trier of fact, the Review Commission and its hearing officer are vested with the power to review the evidence and believe or disbelieve the testimony of the witnesses. “The fact that reasonable minds might reach different conclusions is not a basis for the reversal of the [review commission’s] decision.” *Roberts v. Hayes, supra, citing Irvine v. State of Ohio Unemp. Comp. Bd. Of Rev.*, (1985), 19 Ohio St. 3d 15, at 18. If some credible evidence supports the commission’s decision, the reviewing court must affirm. *C.E. Morris v. Foley Construction Co.* (1978), 54 Ohio St. 2d 279.

Accordingly, this Court must defer to the Review Commission’s determination of purely

factual issues that concern the credibility of witnesses and the weight of conflicting evidence. *Angelkovski v. Buckeye Potato Chips* (1983), 11 Ohio App.3d 159, 162.

STATEMENT OF THE CASE

Janice Kappan was discharged from her employment by Schneller LLC on May 9, 2011. After her discharge, Kappan applied for unemployment compensation benefits. The Director held that Kappan was discharged for just cause. Kappan appealed, and the Director's redetermination was the same. Kappan requested further appeal, and the case was transferred to the Commission for hearing.

In preparation for her appeal, Kappan submitted a timely request for subpoenas. The record shows that document subpoenas were served to Schneller LLC for employees Allan Eads and Dominic Aliberti.

A telephone hearing was held August 17, 2011. Neither Eads nor Aliberti appeared for the hearing, nor was the requested information produced. The decision of the hearing officer affirmed the Director's redetermination, finding that Kappan was discharged for just cause.

Kappan requested a further review by the Commission on September 21, 2011. The Commission disallowed the request for review. Kappan then filed a timely appeal to this Court.

FACTS OF THE CASE

1. Claimant worked as a burn lab technician for her employer from March, 2006, until her discharge from employment on May 9, 2011.
2. Claimant's duties included quality assurance, research, performing lab tests on products and the calibration of machines. Claimant's responsibilities were reasonable.
3. The employer has a progressive discipline policy, requiring several written warnings before an employee is discharged. The employer's shop rules include "failure to follow instructions and substandard work". Claimant received the employee handbook at the time of her hire, which includes these policies.
4. Claimant received four to six weeks of training when she was hired, and the Claimant's duties did not substantially change throughout her tenure.

5. Other employees were successfully completing the same job as the Claimant.
6. One of Claimant's job responsibilities was to calibrate equipment on a daily basis. During the months of April and May, 2011, Claimant failed to calibrate the equipment 20% of the time, the calibration was completed incorrectly 28% of the time, and Claimant completed the calibrations successfully 52% of the time. Claimant was discharged for failure to complete this work properly.
7. Claimant was given a written warning in regards to her job performance on March 4, 2011.
8. Claimant was placed on a performance improvement program on March 25, 2011.
9. On April 8, 2011, Claimant was given a final written warning.
10. In preparation for her appeal, Kappan submitted the following timely request for subpoenas by email on August 11, 2011, seven days before the telephone hearing scheduled for August 17, 2011:
 - a) Allan Eads, Tech Service
The actual computer data used to show that I had not completed the required calibrations on the OSU machine.
 - b) Allan Eads, Tech Service
The data showing that the aforementioned calibrations were completed before my time on the machine and since my dismissal.
 - c) Dominic Aliberti, I.T. Department
Documentation from the I.T. Department verifying that they have/have not made any changes in the OSU programs. And also to verify that no one in/or outside of Schneller have made any changes to the programs involved.

The record shows copies of document subpoenas served to Allan Eads and Dominic Aliberti.

11. The subpoenaed information was not available for the hearing, but the hearing officer asked Claimant to proffer the substance of the testimony, which Claimant did. Claimant did not ask to continue or postpone the hearing.
12. Claimant was *pro se* during the administrative process.

FINDINGS

Claimant was denied benefits on the ground that she was discharged with just cause in connection with work pursuant to ORC 4141.29(D)(2)(a).

This section provides in pertinent part as follows:

“(D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:

- (2) For the duration of the individual’s unemployment if the Director finds that:
 - (a) The individual *** has been discharged for just cause in connection with the individual’s work.”

“Just cause” has been defined as “that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act. *Irvine, supra*, at 17, quoting *Peyton v. Sun T.V.* (1975), 44 Ohio App.2d 10, 12. Each case must be considered upon its particular merits.

Unsuitability of an individual for a position may constitute fault enough for a finding of termination with just cause. *Tzangas, Plakas, & Mannos v. Administrator, O.B.E.S.*, 73 Ohio St.3d 694, 1995-Ohio-206. In that case, the Supreme Court established four standards which must be met to find unsuitability for a position, and therefore just cause for termination based on “fault”:

- (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 expectation was reasonable, and (4) the requirements of the job did not change since the date of the original hiring for that position.

See also *Williams v. UCRC* 2011-Ohio-2458.

Most of the testimony below was consistent. The testimony below in conflict should be resolved by the Commission, not the reviewing court. The hearing officer is not bound by common law or statutory rules of evidence in the administrative hearing process. The hearing officer’s finding a preponderance of credible evidence supported just cause when the *Tzangas* factors were applied.

In the case at bar, the employer’s representative testified. This Court has no authority to substitute its judgment for judgment of the Review Commission on contested factual matters.

The Commission's decision was based upon testimony provided on August 17, 2011, and all the exhibits. The Review Commission's conclusion was supported with credible evidence.

The Employee further states that her subpoenas were not honored by the Employer. Yet the Employee, while complaining that the subpoenas were not honored, failed to ask to postpone the hearing. The Employee was allowed to proffer what she thought the subpoenas would produce. When the hearing officer indicated he felt he could make a fair decision without the additional information and he would issue his decision, the Employee chose not to ask for a postponement.

Pro se civil litigants are bound by the same rules and procedures as those of retained counsel.

CONCLUSION

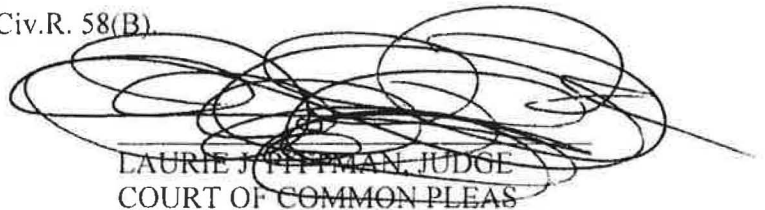
The hearing officer specifically found the Employee-Claimant was discharged for just cause and was ineligible for unemployment compensation benefits. The evidence presented during the administrative process supports the hearing officer's decision.

The decision of the Review Commission was not unlawful, unreasonable or against the manifest weight of the evidence.

IT IS THEREFORE ORDERED that the decision of the Review Commission is affirmed. The appeal of Janice S. Kappan is denied. Costs to the Appellant.

The Clerk is instructed to serve, upon all parties, notice of this judgment and its date of entry upon the journal in accordance with Civ.R. 58(B).

SO ORDERED.



LAURIE J. PITTMAN, JUDGE
COURT OF COMMON PLEAS

cc: File
Attorney Susan Sheffield
Attorney Nancy Grimm