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IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

PAKJ, LLC,) CASE NO.: CV 2015 02 0913
)
 Appellant,) JUDGE CALLAHAN
)
 v.)
)
 ADMINISTRATOR, UNEMPLOYMENT) JUDGMENT ENTRY
 COMPENSATION REVIEW) Final, Appealable Order
 COMMISSION, et al.,)
)
 Appellees.)

This matter is before the Court upon the Administrative Appeal filed on February 19, 2015 by the Plaintiff/Appellant, PAKJ, LLC (“PAKJ”). PAKJ appeals the Decision of the Unemployment Compensation Review Commission (“Review Commission”) mailed on January 21, 2015, that affirmed the Hearing Officer’s Decision finding that the Claimant/Appellee, Rachel Brouman (“Claimant”) was discharged by PAKJ without just cause in connection with work.

The Director’s File, including the certified transcript of proceedings, was filed March 19, 2015. PAKJ filed its brief on May 8, 2015. Appellee, Director, Ohio Department of Job and Family Services (“Director”), filed a brief on June 8, 2015, in support of the Review Commission’s Decision. PAKJ filed a Reply Brief on June 15, 2015. The briefing schedule is now complete and the issues raised by this administrative appeal are deemed submitted for this Court’s consideration.

I. Background

The Claimant worked for PAKJ from July 25, 1987, until Claimant was discharged from employment on July 1, 2014¹. At the time of her discharge, Claimant was a customer service representative and also handled accounts receivable, shipping and billing tasks. (Tr. Sandra A. Costill, p.6, ln.9-12; Tr. Claimant, p.13, ln.1-2). PAKJ is a rubber products manufacturer. The office that Claimant worked in employed five people.

In April 2014, Claimant made a sexual harassment complaint to management. (Tr. Costill, p.7, ln.13-15). The company proceeded to investigate the allegations and as a part of the investigation, the company's attorney requested that Claimant make a statement under oath. (Tr. Costill, p.7, ln.6-12). Prior to questioning Claimant, Claimant's supervisors had discovered that, in 2010, Claimant had forwarded an e-mail to a male co-worker which contained various photographs of topless women. (Tr. Costill, p.8, ln.18-19).

On July 1, 2014, during the questioning, the following exchange occurred:

Q. Have you ever sent any kind of nude or partial nude photographs of any kind –

A. Hell no.

Q. Let me finish. Sorry. Have you ever sent nude or partially nude photographs of anybody to anybody at Primeline²?

A. No. (Rachelle Brouman Statement under Oath, p.47, ln.25 – p.48, ln.1-7. (July 1, 2014).

¹ Claimant began working for SML, Inc. on July 25, 1987. PAKJ was formed in 2012 and continued with the same unemployment account. (Tr. Sandra A. Costill, p.5, ln.19-21). The term of employment is dictated by the unemployment account, thus Claimant's term of employment began on July 25, 1987.

² PAKJ was doing business at Primeline Enterprises.

Claimant was terminated later that day, on July 1, 2014. (Tr. Claimant, p.17, ln.11-14). She received a letter terminating her employment, without further explanation as to why. (Tr. Claimant, p.13, ln.11-14). Nor did she receive a verbal explanation for the reason of her termination. (Tr. Claimant, p.13, ln.15-16). Two days later, Claimant filed an application for unemployment benefits with the Ohio Department of Job and Family Services (“ODJFS”). On July 21, 2014, PAKJ notified the ODJFS that Claimant was terminated for lying about having any involvement in sending nude photos to a co-worker (PAKJ’s Response to Appeal³).

On August 8, 2014, the ODJFS denied Claimant’s request for unemployment benefits, finding just cause for her termination based upon a violation of a work rule. Claimant sought a redetermination. The ODJFS’s Redetermination Unit affirmed the initial determination on September 17, 2014. Claimant then filed an appeal to the Review Commission.

On November 10, 2014, a hearing was held before the Hearing Officer via telephone. The Claimant and her attorney Jerome Linnen participated in the hearing, as well as PAKJ’s representative, Sandra Costill (“Costill”), General Manager and Chief Financial Officer, and PAKJ’s attorney, Jack Morrison. Upon consideration of the testimony presented of Claimant, the Hearing Officer reversed the redetermination, finding no just cause for Claimant’s termination in a Decision mailed on November 19, 2014. On December 10, 2014, PAJK appealed that decision to the Review Commission, which affirmed the Hearing Officer’s Decision. The Decision was mailed on January 21, 2015. PAJK timely files the instant appeal.

³ Contained within transcript, unnumbered page; Exhibit B of PAKJ’s Brief.

II. Decision

The Hearing Officer's stated sole issue to determine was whether Claimant was discharged by PAKJ without just cause in connection with work. *Decision by Hearing Officer Griest*, (Nov. 19, 2014). In his findings of fact the Hearing Officer found "Claimant's supervisors felt that claimant's answer to the above-noted question, as asked on July 1, 2014, was untruthful given her actions in 2010." *Id.* The Hearing Officer further found "[a]t the hearing of this matter, claimant admitted that she had answered "no" when asked if she had sent sexually oriented photographs to male co-workers. Claimant testified that she misunderstood the question and thought that the employer was asking is she had ever sent sexually oriented photographs of herself to male co-workers". *Id.*

The Hearing Officer based his decision on whether the claimant was discharged without just cause in connection with work under R.C. 4141.29(D)(2)(a) and whether the Claimant's separation was a non-disqualifying separation from employment pursuant to R.C. 4141.01(R)(2). In considering these statutes, the Hearing Officer reasoned that Claimant was discharged without just cause because PAKJ's decision was based upon the conclusion that Claimant failed to be truthful about her conduct, but that the Claimant provided credible, first-hand testimony to establish that she was not intentionally untruthful, but simply misunderstood the question as asked. The Hearing Officer found that the evidence and testimony did not establish that Claimant engaged in fault or misconduct that would serve to suspend her unemployment benefit rights. Thus, the Hearing Officer's Decision was that Claimant was discharged without just cause and the separation was non-disqualifying.

III. Arguments

PAKJ presents two assignments of error. PAKJ's first assignment of error asserts that the Hearing Officer failed to apply the proper standard in relation to a claim of employee dishonesty. PAKJ states that while the majority of unemployment compensation matters are analyzed under R.C. 4141.29(D)(2)(a), applying the "just cause" standard, R.C. 4141.29(D)(2)(e) expressly allows an employer to terminate an employee for dishonesty in the form of deceitful acts without liability for unemployment compensation. PAKJ argues that a claim for dishonesty can be analyzed under R.C. 4141.29(D)(2)(e) without application of the "just cause" standard. (PAKJ cites *Oriana House, Inc. v. Terrell*, 9th Dist. No. 19550, 2000 Ohio App. LEXIS 975 (Mar. 15, 2000)).

PAKJ further argues that the Hearing Officer misunderstood the dishonesty standard found in R.C. 4141.29(D)(2)(e) by expressing his belief that "dishonesty" in the unemployment context means only substantive theft of more than \$75. (Tr. Hearing Officer, p.11, ln.12-15.) PAKJ argues that a clear reading of R.C. 4141.29(D)(2)(e) allows an employer to terminate an employee for deceitful acts, not just theft, without unemployment compensation liability (also citing to *Oriana House*, at *3). PAKJ complains that the Hearing Officer avoided using "dishonesty" in his questions, which shortchanged PAKJ's position.

In its second assignment of error, PAKJ argues that the Hearing Officer's Decision is against the manifest weight of evidence. PAKJ states that "just cause" for termination exists when an employee "displays an unreasonable disregard for his employer's best interests." *Clucas v. RT 80 Express, Inc.* 9th Dist. No. 11CA009989, 2012-Ohio-1259, ¶6. PAKJ argues that by covering up her own behavior in an investigation into cross-allegations of inappropriate

conduct between two employees, she attempted to tip the outcome of the investigation in her favor, thereby impairing the employer's investigation into the dispute. As to Claimant's statement under oath, PAKJ argues that in responding to the Hearing Officer's inquiry about how Claimant misunderstood the question, PAKJ notes that Claimant did not state that she did not remember the activity (of sending the nude photographs). PAKJ asserts that the Claimant's explanation for her false answer cannot be considered credible because it directly contradicts her earlier sworn testimony.

The Director argues that the testimony presented at the administrative hearing was conflicting, with the Claimant's testimony differing from Costill's on the issue of whether the Claimant was shown the emails at issue at the time of the "statement under oath". The Director argues that when faced with conflicting testimony, as here, "the commission, not the court, resolves the conflicts and determines the credibility of the witnesses." *Cottrell v. ODJFS*, 10th Dist. No. 05AP-978, 2006-Ohio-793, 2006 Ohio App. LEXIS 713, ¶15.

PAKJ replies that the Director did not address its first assignment of error, therefore, it can be presumed that it had no adequate defense to the error and the matter should be reversed on that basis alone. PAKJ secondly argues that the three areas focused on by the Hearing Officer are irrelevant: (1) that no complaint was made about the Claimant's inappropriate emails in 2010 by the recipient; (2) that the Claimant was never previously written up for any prior disciplinary action; and (3) that the Claimant misunderstood the critical question at her statement under oath, thinking it was a question as to whether she sent nude photos of herself. PAKJ emphasizes that the grounds for the Claimant's termination was not the 2010 conduct, but rather her answer to the 2014 question qualified as "dishonesty" under R.C. 4141.29(D)(2)(e).

IV. Standard of Review

R.C. 4141.282(H) governs the common pleas court's standard of review in an administrative appeal regarding a decision in an unemployment compensation review case:

"The court shall hear the appeal upon receipt of the certified record provided by the commission. 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 trial court's power to review the Review Commission's decision is strictly limited to determining whether the board's decision is supported by evidence in the certified record. *Tzangas, Plakas & Mannos v. Adm'r, Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 696, 653 N.E.2d 1207 (1995). The trial court is not permitted to make factual findings, determine the credibility of witnesses, or substitute its judgment for that of the commission. *Irvine v. Unemployment Comp. Bd. of Review*, 19 Ohio St.3d 15, 18, 482 N.E.2d 587 (1985). The reviewing court must defer to the commission on decisions involving close questions. *Id.* "Every reasonable presumption must be made in favor of the [decision] and the findings of facts [of the Review Commission]." *Ro-Mai Industries, Inc. v. Weinberg*, 176 Ohio App.3d 151, 2008-Ohio-301, 891 N.E.2d 348, ¶7 (9th Dist.), quoting *Karches v. Cincinnati*, 38 Ohio St.3d 12, 19, 526 N.E.2d 1350 (1988). As long as the certified record contains evidence supporting the Review Commission's decision, then the trial court cannot substitute its judgment for the Review Commission's. *Ro-Mai Industries, Inc.*, 2008-Ohio-301, at ¶8. A judgment supported by some competent, credible evidence will not be reversed as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

V. Analysis

The Hearing Officer only cited R.C. 4141.29(D)(2)(a) (discharge for just cause) and R.C. 4141.01(R)(2) (non-disqualifying discharge from employment) as the legal basis for his Decision. There is no challenge as to the analysis of R.C. 4141.01(R)(2) and thus it is unnecessary for the trial court to review this portion of the Hearing Officer's Decision.

PAKJ contends that the Claimant is not entitled to benefits under R.C. 4141.29(D)(2)(e) and there is no need to consider the "just cause" standard. However, the *Oriana House* court held it is necessary to consider both the "just cause" and dishonesty prongs. *Oriana House, supra*, *10-16. While not explicitly cited in the Law section, the Hearing Officer's Decision in the Reasoning section reflects he considered both prongs.

The Hearing Officer based his Decision upon whether the Claimant failed to be truthful during the questioning, which PAKJ argues is the basis of the Claimant's termination. Thus, even though the Hearing Officer discussed the lack of prior discipline and the 2010 email in the Findings of Fact section, such issues did not appear in the recitation of his Reasoning. The Hearing Officer stated in his Reasoning that the Claimant provided "credible, first hand testimony to establish that she was not intentionally untruthful, but simply misunderstood the question as asked." Such determinations of credibility of a witness and fact finding are left to the reviewing board and cannot be disturbed by the trial court. *Irvine*, 19 Ohio St.3d at, 18.

Moreover, there is no discussion or analysis in the Hearing Officer's Decision to reflect that he based his Decision on an erroneous standard of dishonesty limited to an interpretation of theft of more than \$75. While the Hearing Officer did state this legal standard during the November 10, 2014 hearing, he did not state or rely on that portion of the statute when deciding

the issue of dishonesty. Instead, he looked to the Claimant's alleged deceitful act, her answer in the 2014 sworn statement, in rendering his Decision.

In consideration of the fact that the stated cause of termination was the Claimant's dishonesty in answering the question at issue, the Court further finds no error in finding that Claimant's action was a not deceitful act and thus not constituting an act of dishonesty under R.C. 4141.29(D)(2)(e) due to the Hearing Officer's finding that the Claimant's testimony that she misunderstood the question was credible.

Based upon review of the certified record, the Review Commission's Decision, the applicable law and the legal standard for the Court's review of the Commission's Decision, the Court can find no error in the Hearing Officer's Decision that the Claimant was discharged without just cause for finding that the Claimant's testimony was credible in determining that she did not engage in fault or misconduct to warrant suspension of her unemployment compensation rights under R.C.4141.29(D)(2)(a)⁴.

VI. Conclusion

The Court finds the Decision of the Review Commission finding the Claimant was discharged without just cause thus allowing benefit rights, was not unlawful, unreasonable, or against the manifest weight of the evidence.

Wherefore, it is the order of this Court that PAKJ's appeal is found to be not well-taken and is hereby **denied**. It is further ordered that the January 21, 2015 Decision of the Review Commission is **affirmed**.

⁴ PAKJ's argument that the Hearing Officer's statement that he was avoiding using the word "dishonesty" shortchanged its position was stated during Costill's questioning and any impact as to Claimant's testimony is speculative. The Claimant answered the initial questioning without any further clarification, to which PAKJ found

Costs are taxed to Appellant PAKJ, LLC.

This is a final, appealable order.

IT IS SO ORDERED.

JUDGE LYNNE S. CALLAHAN

cc: Attorneys Jack Morrison, Jr. / Thomas R. Houlihan / Christine M. Faranda
Attorney Susan M. Sheffield
Appellee Rachelle R. Brouman

her to be dishonest and terminated her employment. In this hearing, Claimant responded to the Hearing Officer's inquiry that she misunderstood the question at issue—the sole issue of the dishonesty.

**PURSUANT TO CIV R 58 (B)
THE CLERK OF COURTS SHALL
SERVE UPON ALL PARTIES NOT IN DEFAULT
FOR FAILURE TO APPEAR NOTICE OF
THIS JUDGMENT AND IT'S DATE OF
ENTRY UPON THE JOURNAL**