IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Regina Houttekier,	*	Case No. CI0201601523
	*	
Plaintiff-Appellant,	*	JUDGE IAN B. ENGLISH
	*	
-vs-	*	
	*	
United Collection Bureau,	*	**OPINION AND JUDGMENT ENTRY**
	*	
Defendant-Appellee.	*	

This is an appeal from a decision issued by the Ohio Unemployment Compensation Review Commission ("UCRC"), which disallowed an application for unemployment benefits filed by plaintiff-appellant, Regina Houttekier. Having reviewed the administrative record, the arguments of the parties, and the applicable law, I find that the commission's decision was not unlawful, unreasonable, or against the manifest weight of the evidence and must, therefore, be affirmed.

I. CASE HISTORY

A. ODJFS Proceedings

Plaintiff worked as a medical collector for defendant-appellee United Collection Bureau ("UCB") from June 10, 2002, until her termination from employment on September 8, 2015. She filed an application for unemployment benefits with the Ohio Department of Job and Family

Services ("ODJFS") on September 14, 2015. In response to information requests by ODJFS, UCB reported that plaintiff was discharged "for failing reasonable suspicion drug test," while plaintiff disputed the test results. On October 6, 2015, ODJFS made an initial determination to disallow plaintiff's application, finding that she "failed required drug test" and was therefore "discharged with just cause." ODJFS also determined as a separate issue that plaintiff was physically disabled from work as of August 30, 2015, and thus ineligible for benefits until "this agency is provided evidence that this issue no longer exists and claimant is otherwise eligible." On October 19, 2015, plaintiff appealed the denial to defendant-appellee Director of ODJFS. On November 6, 2015, the Director issued a "redetermination" affirming the decision and findings of ODJFS on both issues, but modifying the inability-to-work date to September 24, 2015.

With respect to the issue of just cause, data contained in the Director's file reveals the following chronology. On August 11, 2015, plaintiff requested intermittent leave under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. 2611, due to chronic pain and myelopathy occasioned by degenerative spinal conditions. In connection with those conditions, plaintiff was taking a number of prescribed medications, including Adderall, Xanax, and Percocet. Plaintiff's request for FMLA leave was approved on August 27, 2015. Four days later, on August 31, 2015, plaintiff complained to her supervisor, Kellie Mulkey, that she should not be penalized for failing to make the required quota of collection calls over the preceding week, since she was absent two days on FMLA leave. Because plaintiff was purportedly "yelling and causing a disruption on the floor," she was taken by Ms. Mulkey and medical supervisor Scott Post into the office of Angel Carver, a vice president of UCB.

According to Ms. Carver, plaintiff "was being very loud, * * * fidgeting, acting erratic, glossy eyes, emotion high and low, one minute she is argumentative and the next she is crying."

Similar observations were made by Ms. Mulkey and Mr. Post. Ms. Carver instructed plaintiff to take her lunch break. When plaintiff returned from lunch, she was presented with a "Reasonable Suspicion/Observation Checklist," taken to Quest Diagnostics at Sunforest Court in Toledo for drug screening, and placed on unpaid leave pending the outcome of the drug test.

Upon her arrival at Quest Diagnostics, plaintiff "explained to the lady that [she] was on medication that will show positive." Plaintiff asked the woman "if [she] wanted to see all of my prescribed medicines [and] was told no." In a letter dated September 9, 2015, UCB notified plaintiff that the results of the drug test "came back as positive for controlled substances (see attachment). * * * Therefore, with this letter, we are terminating your employment with UCB effective August 31, 2015." The attached report, which originated from a Quest Diagnostics laboratory in Sarasota, Florida, indicated that plaintiff tested positive for amphetamine and cocaine metabolite. Plaintiff called the medical review officer for Quest Diagnostics in Sarasota and asked to be retested. The doctor informed plaintiff that she would have to pay $250 for a new test. Plaintiff then began to explain to the doctor why she believed that the test results were either inaccurate or not reflective of the contents of her urine. When plaintiff asked for a "copy of [the test] results," the doctor refused her request, stated that "only the company gets [the results] since they are the ones that paid and hung up on me."

B. UCRC Proceedings

Plaintiff appealed the Director's redetermination to the UCRC, and the matter was heard telephonically by a UCRC hearing officer on November 24, 2015. Only plaintiff and Jerry LaCourse, a human resource manager for UCB, testified at the hearing. Mr. LaCourse testified exceedingly briefly as to the company's drug policy, plaintiff's "erratic behavior" on August 31, 2015, and the results of the drug test.

Plaintiff testified that she takes only those drugs prescribed by her treating doctors, that she does not abuse drugs, and that "I'm currently under pain management program and the State of Ohio requires random drug tests and I have never tested positive there." Plaintiff stated that on August 31, 2015, she was not on cocaine, but was using prescription amphetamines. When asked by the hearing officer which of her prescribed drugs "would show up positive for cocaine," plaintiff referred to a previously submitted list of her medications, stated generally that "there's a few different ones that could cause a false positive," and identified the amphetamine Adderall as a drug that "definitely could also do that." Plaintiff further testified that the medical review officer for Quest Diagnostics confirmed that the drug panel revealed "no opiates in my system, which is incorrect. I take four Percocets a day for my pain and he told me, 'Ma'am you don't have opiates in your system.' And I said, 'Well, obviously, you guys have someone else's urine or something's not correct with it.'"

On cross-examination by Mr. LaCourse, plaintiff was asked if it was correct that she was "given the right to go ahead and get a re-drug testing [at her expense] and * * * failed to do that." Plaintiff responded: "No, that is not correct, sir. They told me that I would have to pay $250.00 and the doctor hung up on me. * * * I told them I wanted it retested but I didn't want it retested there."

In a decision mailed November 25, 2015, the hearing officer affirmed the Director's redetermination with respect to the issue of just cause and disallowed plaintiff's application for unemployment benefits. He found in particular:

> FINDINGS OF FACT
>
> United Collection Bureau, Inc. has a written and known drug policy that provides for discharge if an employee is under the influence of drugs while at work. On August 31, 2015, the claimant was acting erratic at work. The claimant was yelling and crying and her eyes were glassy. The claimant was sent for a drug

test. The test was positive for amphetamines and cocaine. The claimant had a prescription for amphetamines but provided no medical or scientific evidence that would account for the positive test for cocaine.

* * *

REASONING

The claimant was behaving erratically at work. She was sent for a drug test and it was positive for cocaine. The credible evidence shows the claimant was under the influence of drugs while at work and her discharge was reasonable. The Hearing Officer finds the claimant was discharged by United Collection Bureau, Inc. for just cause in connection with work.

Based on this finding the issue of claimant's ability to work is moot.

On December 16, 2015, plaintiff requested that the UCRC review the hearing officer's decision. Along with her request, plaintiff submitted what appears to be on-line research pertaining to proper drug-testing procedures and the occurrence of false-positive results. On January 13, 2016, the commission disallowed plaintiff's request for further review.

C. Judicial Proceedings

Plaintiff timely filed a pro se notice of appeal on February 12, 2016, but failed to name the Director as an appellee. On July 18, 2016, plaintiff submitted her own "file record," which she apparently assembled out of materials obtained through a request of ODJFS for information contained in her administrative claims file. On August 3, 2016, plaintiff filed an appellate brief entitled "Information Needed for Appeal." On October 14, 2016, she submitted an expert report opining that Quest Diagnostics failed to follow industry standards for drug-testing procedures. Although UCB had entered an appearance through counsel on June 9, 2016, it did not respond to plaintiff's filings.

In an Opinion and Judgment Entry dated November 4, 2016, the court sua sponte determined that pursuant to R.C. 4141.282, the matter could not be adjudicated in the Director's

absence or without a certified transcript of the administrative record provided by the UCRC. The court ordered plaintiff to amend her notice of appeal to name the Director as an appellee in lieu of dismissal and struck all filings subsequent to her notice of appeal. Plaintiff amended her notice of appeal on December 2, 2016. The Director entered her appearance through counsel on December 14, 2016, and a certified transcript of the administrative record was filed on January 3, 2017. The court then established a briefing schedule pursuant to R.C. 4141.282(G), which was extended to allow for plaintiff's retention of counsel. Plaintiff and the Director have since filed their respective appellate briefs, while UCB has elected to forego the filing of a brief. With all necessary parties before the court and briefing completed, the matter is now decisional.

II. STANDARD OF REVIEW

Judicial review of UCRC decisions is governed by R.C. 4141.282(H), which provides:

> The court shall hear the appeal on 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.

By requiring affirmance of UCRC decisions in the absence of any enumerated predicate finding, the General Assembly has chosen a particularly deferential standard of judicial review. *Elliott v. Bedsole Transp., Inc.*, 6th Dist. Lucas No. L-11-1004, 2011-Ohio-3232, ¶ 12 (In considering an unemployment-compensation appeal, the court "must apply a deferential standard of review * * * and determine whether the Commission's decision was unlawful, unreasonable, or against the manifest weight of the evidence"); *Jones v. Jones*, 4th Dist. Athens No. 07CA25, 2008-Ohio-2476, ¶ 18 ("This standard of review is highly deferential and even 'some' evidence is sufficient to sustain the judgment and prevent a reversal"); *Perry v. Buckeye Community Servs.*, 48 Ohio App.3d 140, 141, 548 N.E.2d 1308 (4th Dist.1988) ("The scope of review in a

case such as the one presented here is extremely limited both at the trial court and appellate levels");

In *Sinclair v. Ohio Dept. of Job & Family Servs.*, 8th Dist. Cuyahoga No. 101747, 2015-Ohio-1645, ¶ 7, the Eighth District Court of Appeals explained:

> Reviewing courts are precluded from making factual determinations or determining the credibility of the witnesses in unemployment compensation cases—that is the commission's function as the trier of fact, and reviewing courts must defer to the commission on factual issues regarding the credibility of witnesses and the weight of conflicting evidence. *Irvine* [*v. Unemp. Comp. Bd. of Review*], 19 Ohio St.3d [15] at 18, 482 N.E.2d 587 [1985]; *Tzangas*[, *Plakas & Mannos v. Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694] at 696, 653 N.E.2d 1207 [1995]. The courts' role is to determine whether the decision of the commission is supported by some competent, credible evidence in the record. *Tzangas*. If there is evidence in the record to support the commission's decision, a reviewing court cannot substitute its own findings of fact for those of the commission. *Lorain Cty. Aud. v. Unemp. Comp. Rev. Comm.*, 9th Dist. Lorain No. 03CA008412, 2004-Ohio-5175, ¶ 8. Moreover, every reasonable presumption should be made in favor of the commission's decision and findings of fact. *Banks v. Natural Essentials, Inc.*, 8th Dist. Cuyahoga No. 95780, 2011-Ohio-3063, ¶ 23, citing *Karches v. Cincinnati*, 38 Ohio St.3d 12, 19, 526 N.E.2d 1350 (1988). "The fact that reasonable minds might reach different conclusions is not a basis for the reversal of the board's decision. * * * When the board might reasonably decide either way, the courts have no authority to upset the board's decision." *Irvine*, 19 Ohio St.3d at 18, 482 N.E.2d 587; *Struthers v. Morell*, 164 Ohio App.3d 709, 2005-Ohio-6594, 843 N.E.2d 1231, ¶ 14 (7th Dist.).

Nevertheless, commission decisions are not immune from judicial invalidation. "While appellate courts may not make factual findings or determine credibility of witnesses, they must determine whether the board's decision is supported by evidence in the record." (Citations omitted.) *Reef v. Admr., Ohio Bur. of Emp. Servs.*, 6th Dist. Wood No. WD-95-070, 1996 Ohio App. LEXIS 1181, 8 (Mar. 1, 1996). "This standard applies to all reviewing courts, including common pleas courts and appellate courts." *Shepherd Color Co. v. Dir., Ohio Dept. of Job & Family Servs.*, 12th Dist. Butler No. CA2012-11-244, 2013-Ohio-2393, ¶ 19.

III. PROPRIETY OF HEARING OFFICER'S DECISION

Plaintiff generally contends that the commission's decision was unlawful, unreasonable, and against the manifest weight of the evidence. Although her various arguments are asserted in overlapping fashion, plaintiff essentially maintains that the hearing officer failed to "ascertain relevant facts and thoroughly develop the record" with respect to UCB's disciplinary policy, its finding of reasonable suspicion, and the accuracy and reliability of the drug test. Plaintiff also suggests that the commission improperly denied her request for further review "without reason" or any indication that it considered the additional information she submitted with that request.

A. Just Cause and Drug-Related Terminations

R.C. 4141.29(D)(2)(a) prohibits payment of benefits to any individual who "quit work without just cause or has been discharged for just cause in connection with the individual's work." Thus, "an employee who is discharged from employment for just cause is ineligible to receive unemployment benefits." *Crisp v. Scioto Residential Servs.*, 4th Dist. Scioto No. 03CA2918, 2004-Ohio-6349, ¶ 13. Correlatively, an individual "is entitled to unemployment compensation benefits if he or she quits with just cause or is discharged without just cause." *Upton v. Rapid Mailing Servs.*, 9th Dist. Summit No. 21714, 2004-Ohio-966, ¶ 13. *Accord Ro-Mai Indus. v. Weinberg*, 176 Ohio App.3d 151, 2008-Ohio-301, 891 N.E.2d 348 ¶ 9 (9th Dist.).

Although the statute omits a definition of "just cause," the Supreme Court of Ohio has broadly defined "'just cause, in the statutory sense, [as] that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.'" *Irvine v. Unemp. Comp. Bd. of Rev.*, 19 Ohio St.3d 15, 17, 482 N.E.2d 587 (1985), quoting *Peyton v. Sun T.V. & Appliances* (1975), 44 Ohio App.2d 10, 12, 335 N.E.2d 751 (10th Dist.1975). The standard of just cause for purposes of denying unemployment compensation, however, is more exacting than

the common-law standard of just cause for purposes of defeating a wrongful-discharge claim. *James v. Ohio Unemp. Rev. Comm.*, 10th Dist. Franklin No. 08AP-976, 2009-Ohio-5120, ¶ 12-13; *LaChappelle v. Dir., Ohio Dept. of Job & Family Servs.*, 184 Ohio App.3d 166, 2009-Ohio-3399, 920 N.E.2d 155, ¶ 21 (6th Dist.); *Struthers v. Morell*, 164 Ohio App.3d 709, 2005-Ohio-6594, 843 N.E.2d 1231, ¶ 18 (7th Dist.); *Peterson v. Dir., Ohio Dept. of Job & Family Servs.*, 4th Dist. Ross No. 03CA2738, 2004-Ohio-2030, ¶ 17; *Durgan v. Ohio Bur. of Emp. Servs.*, 110 Ohio App.3d 545, 549, 674 N.E.2d 1208 (9th Dist.1996).

In the unemployment-compensation context, "[f]ault on an employee's part is an essential component of a just-cause termination." *Williams v. Ohio Dept. of Job & Family Servs.*, 129 Ohio St.3d 332, 2011-Ohio-2897, 951 N.E.2d 1031 ¶ 24. *Accord Schivelbein v. Riverside Mercy Hosp.*, 6th Dist. Lucas No. L-11-1208, 2012-Ohio-3991, ¶ 14; *McCarthy v. Connectronics Corp.*, 183 Ohio App.3d 248, 2009-Ohio-3392, 916 N.E.2d 871, ¶ 13 (6th Dist.). Thus, the question "whether an employer has reason to fire an employee is an entirely different question than whether the employee's conduct constitutes just cause to deny unemployment benefits under the Act." *Summitville Tiles, Inc. v. Ohio Dept. of Job & Family Servs.*, 7th Dist. Columbiana No. 01-CO-17, 2002-Ohio-3004, ¶ 27; *see also Repacorp, Inc. v. Sloan*, 2d Dist. Miami No. 2015-CA-18, 2016-Ohio-608, ¶ 14 ("For unemployment-compensation purposes, * * * the question is not whether Repacorp was required to keep Sloan as an employee [but] whether Sloan was at fault for losing his job due to his refusal to stop taking prescribed morphine for chronic pain relief").

Manifestly, an employee who works under the influence of an illegal drug can be held at fault for his or her termination where the record "clearly demonstrates that [the employee] was aware of [the employer's] substance abuse policy and the ramifications of violating it." *Rhodes*

v. Unemp. Comp. Bd. of Rev., 7th Dist. Columbiana No. 98-CO-49, 2000 Ohio App. LEXIS 305, 14 (Jan. 25, 2000). "A positive drug test in these circumstances is just cause for termination," unless there is "reason to question the reliability of the test results." *Connolly v. Dir., Ohio Dept. Job & Family Servs.*, 7th Dist. Mahoning No. 01 CA 75, 2002 Ohio App. LEXIS 1211, 6-7 (Mar. 14, 2002). Generally, therefore, it is "not unreasonable or unlawful for the administrative agency to deny unemployment benefits to an employee discharged after he failed a random drug test." *Summitville Tiles, Inc.* at ¶ 29.

B. Disciplinary Policy

Plaintiff challenges the hearing officer's finding that UCB had "a written and known drug policy that provides for discharge if an employee is under the influence of drugs at work." The UCB Handbook of Security Policies and Procedures ("Handbook") provides:

> ALCOHOL AND DRUGS
>
> To protect your safety and the safety of all our associates, the use of alcohol or illegal drugs on company premises is prohibited. No associate shall work under the influence of illegal drugs or alcohol. No associate shall possess, sell or attempt to sell illegal drugs or alcohol on or with Company property or personnel.
>
> ANY ASSOCIATE who shows up for work or returns from lunch under the influence of alcohol or recreational drugs will be disciplined accordingly.
>
> If a representative of the Company has reason to believe an associate is selling or is under the influence of an illegal drug or alcohol during work hours, the associate will be immediately suspended from their duties.
>
> * * *
>
> DISCIPLINARY ACTIONS
>
> Occasionally, it becomes necessary for a Supervisor of the Company to take disciplinary action against an associate. Discipline results when an associate's actions do not conform with generally accepted standards of good behavior . . . when an associate violates work rules or when an associate's work performance is poor.

> The severity of the discipline depends on the nature and frequency of the offense. Discipline may include one or all of the following:
>
> - Verbal Warning
> - Written Warning
> - Suspension without pay
> - Termination
>
> UCB recognizes that there are certain types of associate problems that are serious enough to justify an immediate suspension, or in extreme situations, termination of employment.

Plaintiff argues that the policy on Alcohol and Drugs in the UCB Handbook provides only for the immediate *suspension* of an employee who is suspected of being under the influence of an illegal drug during work hours. For an employee who actually arrives at work or returns from lunch under the influence of recreational drugs, the policy states that the employee will be *disciplined accordingly*, that is, plaintiff argues, in accordance with the "general progressive disciplinary policy" outlined in the Disciplinary Actions section of the Handbook. Further, plaintiff continues, although the latter section "notes that under serious circumstances the employer can bypass progressive discipline, there was nothing supplied by the employer that would put Appellant on notice that she faced mandatory termination." Thus, plaintiff contends, it was necessary for the hearing officer to elicit testimony "as to the implications of failure to pass a drug test at the hearing." The court disagrees, finding that the record was sufficiently developed and supportive of the hearing officer's determination on this issue.

UCB submitted evidence that plaintiff was provided a copy of its Handbook on March 3, 2006. At that time, plaintiff signed an "Employee Acknowledgment Form" indicating that she received a copy of the Handbook and understood that "any failure to comply with all policies and standards outlined in the * * * Handbook * * * can and will result in disciplinary action up to and including termination of employment with United Collection Bureau, Inc." The Disciplinary

Actions section of the Handbook provides that discipline for the violation of work rules may include immediate termination, albeit "in extreme situations." In her answers on the ODJFS fact-finding questionnaire, plaintiff admitted that she was notified of the UCB drug policy and the penalties for failing a drug test.

Moreover, the court agrees with the Director that UCB, "as its prerogative, determined that appellant's positive drug test was severe enough to justify an immediate termination." As the Fourth District explained in *Wilson v. Matlack, Inc.*, 141 Ohio App.3d 95, 102-103, 750 N.E.2d 170 (4th Dist.2000):

> We recognize that [the employer's] action [in terminating appellee's employment after testing positive for marijuana] was arguably harsh in light of the appellee's twenty-seven years of drug-free service with the company. We would have preferred to see the appellee suffer a lesser sanction or be given a "second chance." Be that as it may, it does not follow that the appellee is entitled to unemployment benefits. *See Pugh v. Ohio Bur. of Emp. Serv.*, 1990 Ohio App. LEXIS 4981 (Oct. 30, 1990), Washington App. No. 89CA34, unreported (arbitrator's determination that discharge was "too severe" a sanction against employee does not affect decision concerning unemployment compensation).

It is true, as plaintiff asserts, that employers "must generally follow progressive discipline as progressive discipline creates expectations on which employees rely." Ohio courts have generally held that absent a sufficient justification for the deviation, an employer's failure to follow a mandatory progressive discipline procedure in terminating an employee constitutes a discharge without just cause, thus entitling the employee to receive unemployment benefits. *See Groves v. Dir., Ohio Dept. of Job & Family Servs.*, 11th Dist. Ashtabula No. 2008-A-0066, 2009-Ohio-2085, ¶ 14; *Peterson v. Dir., Ohio Dept. of Job & Family Servs.*, 4th Dist. Ross. No. 03CA2738, 2004-Ohio-2030, ¶ 20; *Eagle-Pitcher Industries, Inc. v. Ohio Bur. of Emp. Servs.*, 65 Ohio App.3d 548, 584 N.E.2d 1245 (3d Dist. 1989); *Pickett v. Unemp. Comp. Bd. of Rev.*, 55 Ohio App.3d 68, 70, 562 N.E.2d 521 (8th Dist.1989). "It has been observed that '[p]rogressive

disciplinary systems create expectations on which employees rely,' and '[f]airness requires an employee not be subject to more severe discipline than that provided for by company policy.'" *Ohio Assn. of Pub. School Emps. (OAPSE)/AFSCME Local 4, AFL-CIO v. Ohio Dept. of Job & Family Servs.*, 10th Dist. Franklin No. 12AP-81, 2012-Ohio-6210, ¶ 21, quoting *Mullen v. Admr., Ohio Bur. of Emp. Servs.*, 10th Dist. Cuyahoga No. 49891, 1986 Ohio App. LEXIS 5278, 13 (Jan. 16, 1986).

It is also true that UCRC hearing officers are responsible for developing a record on which a fair and informed decision can be rendered. *See* R.C. 4141.281(C)(2) ("Hearing officers have an affirmative duty to question parties and witnesses in order to ascertain the relevant facts and to fully and fairly develop the record"); *Youghiogheny & Ohio Coal Co. v. Oszust*, 23 Ohio St.3d 39, 41, 491 N.E.2d 298 (1986) ("The board of review has a statutory duty to hear the evidence, develop a record, and apply the law"); *Coles v. Ohio Dept. of Job & Family Servs.*, 2d Dist. Montgomery No. 24289, 2011-Ohio-3726, ¶ 35 (although "it is not the hearing officer's duty to make the entire case for either party * * * the hearing officer does have an affirmative duty to fully and fairly develop the record"); *Cunningham v. Jerry Spears Co.*, 119 Ohio App. 169, 174, 197 N.E.2d 810 (10th Dist.1963) ("The board, in performing its public function of passing on claims, is to act to insure that an adequate basis for decision exists").

In this case, however, there was no reason for the hearing officer to inquire as to why UCB chose to "bypass progressive discipline" in terminating plaintiff's employment, since the Handbook does not mandate progressive discipline when an employee is found to be working under the influence of illegal drugs. The alcohol-and-drug section of the Handbook provides that an offending employee "will be disciplined accordingly." The disciplinary-actions section of the Handbook provides that "one or all of the following" punitive measures, including termination,

may be taken in the event of a work-rule violation. This section does not create a progressive disciplinary system. Rather, it eschews the establishment of such a process. In contrast, for example, the Handbook's smoking policy specifically delineates progressively higher levels of discipline for each of four enumerated violations, culminating in termination upon the fourth infraction. Simply put, UCB's general disciplinary apparatus does not preclude termination for a first-time violation of its drug-and-alcohol policy, but authorizes it.

Accordingly, the hearing officer did not proceed unlawfully, unreasonably, or against the manifest weight of the evidence when he determined that UCB had "a written and known drug policy that provides for discharge if an employee is under the influence of drugs at work."

C. Reasonable Suspicion

Plaintiff also contests the reasonableness of the hearing officer's findings regarding her behavior on August 31, 2015, i.e., that she was "acting erratic at work * * * yelling and crying and her eyes were glassy." Plaintiff argues that Mr. LaCourse never testified that he observed her behavior on August 31, 2015. According to plaintiff, her "evidence explaining her behavior, being the only clearly sworn non hearsay testimony should have prevailed over unsworn documents in the record and an unclear record as to whether Mr. LaCourse observed anything of [her] behavior first hand."

The court agrees with plaintiff's characterization of Mr. LaCourse's testimony. Mr. LaCourse never stated that he was present in Ms. Carter's office when plaintiff exhibited the purported suspect behavior or that he witnessed plaintiff's conduct at any time on August 31, 2015. According to the documents submitted by UCB, the only persons present in Ms. Carter's office at the time plaintiff's behavior was deemed suspicious of drug use was Ms. Carter, Ms. Mulkey, and Mr. Post. The only other person mentioned in the documents as having observed

any of plaintiff's conduct is a Henryetta Gulley, who drove with plaintiff and Ms. Mulkey to Quest Diagnostics for the drug test. Moreover, it is eminently clear from the hearing transcript that Mr. LaCourse's testimony regarding plaintiff's "erratic behavior" was based entirely on his reading of statements made by Ms. Carver in an email she sent to a Randy Winkle on August 31, 2015. Thus, Mr. LaCourse's testimony is not evidence of plaintiff's behavior; it is evidence of the content of Ms. Carver's email. *See Liston's Painting v. Parzych*, 10th Dist. Franklin No. 98AP-1002, 1999 Ohio App. LEXIS 1789, 8 (Apr. 22, 1999); *Cunningham v. Jerry Spears Co.*, 119 Ohio App. 169, 175, 197 N.E.2d 810 (10th Dist.1963).

The issue becomes, therefore, whether the hearing officer lawfully and reasonably relied on the documents submitted by UCB in determining the suspicious nature of plaintiff's behavior that impelled the drug test. In *Simon v. Lake Geauga Printing Co.*, 69 Ohio St.2d 41, 430 N.E.2d 468 (1982), the Supreme Court of Ohio held that the commission had properly considered the employer's records and correspondence in determining that claimant was unjustified in arriving late for work on a third occasion, even though claimant gave the only testimony at the hearing. Citing to former R.C. 4141.28(J) [now R.C. 4141.281(C)(2)], which provides that UCRC hearing officers "are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure," the court expounded that "evidence which might constitute inadmissible hearsay where stringent rules of evidence are followed must be taken into account in proceedings such as this where relaxed rules of evidence are applied." *Id.* at 44.

In *Simon*, however, the claimant's testimony corroborated at least part of the declarations made in the employer's documents. Accordingly, Ohio appellate courts have since wrestled with the question of whether and under what circumstances hearsay may be given more weight than conflicting live testimony in unemployment-compensation proceedings. Some courts, including

the Sixth District Court of Appeals, have followed the so-called *Taylor* rule, which states generally that "where the sworn testimony of a witness is contradicted only by hearsay evidence, to give credibility to the hearsay statement and to deny credibility to the claimant testifying in person is unreasonable." *Taylor v. Bd. of Rev.*, 20 Ohio App.3d 297, 299, 485 N.E.2d 827 (8th Dist.1984). *Accord Voss v. Bailey's Tree & Landscape Serv.*, 6th Dist. Sandusky No. S-97-020, 1997 Ohio App. LEXIS 4804, 5-6 (Oct. 31, 1997) ("When determining the weight of the evidence, where the sworn testimony of a witness is contradicted only by hearsay evidence, it is unreasonable to give credibility to the hearsay statement and to deny credibility to the claimant testifying in person"). This rule, however, is not perceived as absolute; and it has been held not to apply automatically in every situation.

Thus, in *Hansman v. Dir., Ohio Dept. of Job & Family Servs.*, 12th Dist. Butler No. CA2003-09-224, 2004-Ohio-505, the Court of Appeals for the Twelfth District explained:

> However, we first note that in the majority of cases cited by appellant, this rule applied because there were reliability issues in regard to the hearsay evidence. Furthermore, at least two courts have factually distinguished cases from this rule or expressed an unwillingness to apply such a rigid rule in every situation. *See Adanich v. Ohio Optical Dispensers Bd.* (Oct. 8, 1991), Franklin App. No. 91-AP-300, 301, 1991 Ohio App. LEXIS 4885; *Mason v. Administrator, Ohio Bureau of Empl. Servs.* (Apr. 7, 2000), Hamilton App. No. C-990573, 2000 Ohio App. LEXIS 1524.
>
> We find that rigid application of a rule automatically crediting sworn testimony over hearsay evidence is inconsistent with the duty of the fact-finder to weigh and consider the evidence. The Ohio Supreme Court found that the logical corollary of allowing evidence in unemployment hearings that would be otherwise inadmissible is that such evidence must be weighed and considered, not only at the hearing itself, but also on appellate review. *Simon v. Lake Geauga Printing Co.* (1982), 69 Ohio St.2d 41, 43, 430 N.E.2d 468. A rigid rule would remove this duty from the fact-finder. Furthermore, we note that a fact-finder is not required to accept the testimony of a witness simply because no contrary evidence is presented. *See Wilhoite v. Kast*, Warren App. No. CA2001-01-001, 2001-Ohio-8621. Thus, we find that in an administrative hearing such as this, the fact-finder is not required to blindly accept sworn testimony over otherwise inadmissible

> evidence. Instead, the reliability of the evidence must be examined and weighed, as must the credibility of testifying witnesses.
>
> Thus, we find no merit to appellant's argument that the hearing officer was automatically required to credit his testimony above any hearsay evidence. Furthermore, after examining the type of hearsay evidence at issue in this case, we find no error in the hearing officer's decision to give weight to such evidence. The evidence at issue consists of letters written by USF Holland to appellant warning him that he violated company policy for absenteeism or tardiness on various occasions. These documents appear to have been created as part of a company policy, and not in contemplation of appellant's request for unemployment benefits and we find nothing inherently unreliable in the letters themselves.

Id. at ¶ 11-13.

Here, the evidence at issue consists of various emails, signed statements, and Reasonable Suspicion Checklists. These documents were prepared, signed, or created on August 31, 2015, when plaintiff was compelled by UCB to take the drug test, and they contain relevant statements by the individuals who personally observed plaintiff's behavior at the time. The Checklists in particular were generated pursuant to company policy. They contain the following directive: "When there is reasonable suspicion that an employee at work is unfit for duty, the supervisor or manager observing the behavior as well as another supervisor/manager as witness, if possible, must complete the checklist below." Observations of plaintiff's behavior as indicated on the Checklists include an unsteady gait, swaying, rambling speech, shouting, argumentative and excited demeanor, glassy eyes, slobbering, hostility, hyperactivity, erratic actions, and fumbling, jerky, and nervous movements. Plaintiff's testimony on the issue, however, was somewhat less than definitive. She merely explained that "the red eyes and glossiness was from me crying" and that with regard to "being loud, I have a hard time hearing anyways." *See Lippert v. Lumpkin*, 12th Dist. Butler No. CA2010-01-004, 2010-Ohio-5809, ¶ 23, fn. 1 (finding the *Taylor* rule inapplicable where hearsay evidence contradicts testimony that "is not definitive").

The *Taylor* rule does not prevent the hearing officer from relying on the documents submitted by UCB under these circumstances. Plaintiff did not directly or positively deny that UCB had grounds for reasonable suspicion, and the documents embody sufficient indicia of reliability to provide a reasonable basis for the hearing officer's decision. Accordingly, the court finds that the hearing officer's decision was not unlawful, unreasonable, or contrary to the manifest weight of the evidence in regard to this issue.

D. Reliability of Drug Test

Plaintiff further contends that the hearing officer "merely assumed the reliability of the [drug] test without any evidence to support it." She relies primarily on the Second District's decision in *Silkert v. Ohio Dept. of Job & Family Servs.*, 184 Ohio App.3d 78, 2009-Ohio-4399, 919 N.E.2d 783 (2d Dist.), which held:

> [W]here the existence of just cause depends upon a positive drug test for marijuana, the facts governing the reliability of the test are peculiarly within the knowledge of the employer, and the discharged employee presents some evidence to impeach the reliability of the test—in this case, his testimony that he had never used marijuana—the employer has a burden of coming forward with some evidence to show that the test administered is reliable.

Id. at ¶ 2.

Plaintiff argues that pursuant to *Silkert*, she adduced sufficient evidence at the hearing to impeach the reliability of the test, not only by denying the use of cocaine or non-prescription amphetamines, but also through her testimony that Quest Diagnostics refused to examine her proffered list of prescriptions and that the test failed to detect the presence of opiates in her system despite her regular use of prescription oxycodone. According to plaintiff, the hearing officer should have then required UCB to produce some evidence as to the reliability of the test and, having failed to do so, denied her the opportunity for a fair hearing.

Although not jurisdictionally bound by the holding in *Silkert*, this court wholeheartedly agrees with it. Nevertheless, the court finds this case fundamentally distinguishable from *Silkert*. In *Silkert*, the employer and the drug-screening company precluded claimant from taking a split-sample retest. *Id.* at ¶ 15-16. Here, it was plaintiff who declined the opportunity to retest the original sample, either because she wanted it performed free of charge, conducted at another facility, or both. A copy of the report of the drug test performed on plaintiff was submitted to the record. The report is signed and verified by the medical review officer, Steven Serlin, M.D., and certifies that the "test was conducted in accordance with applicable screening and confirmation cutoff levels as determined by the test performed on this applicant/employee." Nothing in *Silkert* suggests that due process requires further corroboration of the test's reliability under the instant circumstances. *See, e.g., Wilson*, 141 Ohio App.3d at 100, 750 N.E.2d 170 (affirming just-cause determination where the commission found in part that claimant "withdrew his request for an additional drug test when he discovered that any re-testing would be done on a split sample of the same urine specimen").

In a related argument, plaintiff maintains that the hearing officer should have questioned her "thoroughly regarding her testimony that she had medical prescriptions that * * * would have explained the positive finding." In fact, however, the hearing transcript manifestly reveals that plaintiff was afforded a full and fair opportunity to testify as to which of her prescriptions could produce a false positive for cocaine. Moreover, although repeating this argument in various forms and contexts throughout her appellate brief, plaintiff does not indicate what additional questions the hearing officer should have posed or what additional testimony she would have provided to explain the positive finding. *See Ray v. Admr., Ohio Bur. of Emp. Servs.*, 4th Dist. Ross No. 94 CA 2028, 1994 Ohio App. LEXIS 5593, 15-16 (Dec. 6, 1994) ("Although appellant

alleges the board prohibited relevant testimony * * *, appellant does not tell us anything about that alleged testimony or why it was relevant"). Certainly, the hearing officer was not required to make a case for plaintiff. *See Fredon Corp. v. Zelenak*, 124 Ohio App.3d 103, 111, 705 N.E.2d 703 (11th Dist.1997) ("Under Ohio case law, even when one or both parties appear *pro se*, a hearing officer has no duty to present or establish either party's case").

Thus, it cannot be found that the hearing officer disregarded his statutory obligations or deprived plaintiff of an opportunity for a fair hearing in determining that she was under the influence of drugs while at work.

E. Denial of Request for Review

Finally, plaintiff asserts that the UCRC gave "no attention" to the information she included with her request for review and merely disallowed her request "without reason." She claims also that since four pages of the information she faxed along with her request for review are not contained in the certified record, it is "unclear whether the Review Commission had the full benefit of [her] contentions before it when it disallowed [her] Request for Review."

The commission is obligated by statute to "consider a request for review by an interested party, including the reasons for the request." R.C. 4141.281(C)(5). While the commission "may allow or disallow" a request for review of a hearing officer's decision, *id.*, "it must examine and consider the entire record before it exercises that discretion." *Pfeifer v. Veterans Affairs*, 4th Dist. Pike No. 08CA781, 2009-Ohio-766, ¶ 17. In disallowing plaintiff's request for review, the commission stated that it made its decision "[u]pon consideration [of the request], and upon a review of the entire record." The court is not permitted to assume otherwise. *Houser v. Dir., Ohio Dept. of Job & Family Servs.*, 10th Dist. Franklin No. 10AP-116, 2011-Ohio-1593, ¶ 21 ("An appellate court must presume the regularity of administrative proceedings"). Thus, it

cannot be concluded that the commission failed to give proper consideration to plaintiff's request for review.

Assuming the commission did not receive or examine the first four pages of plaintiff's request for review would not alter the outcome in any event. Plaintiff does not reveal the nature, content, or source of the purportedly missing information, although the record suggests that it might be part of an article or commentary on drug testing copied from an unnamed website or other source. "In order to successfully appeal a judgment on procedural due process grounds, [the claimant] must show that he was prejudiced by the allegedly inadequate process * * *." *Reid v. MetroHealth Sys., Inc.*, 8th Dist. Cuyahoga No. 104015, 2017-Ohio-1154, ¶ 27. As it stands, plaintiff entreats the court to speculate that she might have been prejudiced by a possible failure of the commission to consider information gleaned from an unidentified source of unknown reliability. *See Bailey v. Fairchild*, 2d Dist. Champaign No. 10CA10, 2010-Ohio-5750, ¶ 27 ("In order to be credible, evidence must be elicited from a competent source"). Accordingly, plaintiff's remonstrations regarding the review-level process are found not well-taken.

JUDGMENT ENTRY

The court finds that the decision issued by the Unemployment Compensation Review Commission ("UCRC") determining that plaintiff-appellant, Regina Houttekier, was discharged from her employment for just cause is not unlawful, unreasonable, or against the manifest weight of the evidence. Therefore, the decision of the UCRC disallowing appellant's Application for Determination of Benefit Rights is ORDERED AFFIRMED.

Oct. 16, 2017
Date

Judge Ian B. English