

TENTH APPELLATE DISTRICT

Kathy J. Salyers,	:	
Appellant-Appellant,	:	
v.	:	No. 12AP-576
	:	(C.P.C. No. 11CVF-8-10658)
Director, Ohio Department of Job & Family Services et al.,	:	(ACCELERATED CALENDAR)
Appellees-Appellees.	:	
	:	

D E C I S I O N

Rendered on March 28, 2013

Kathy J. Salyers, pro se.

Michael DeWine, Attorney General, and Michelle T. Sutter,
for appellee, Director, Ohio Department of Job and Family
Services.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Appellant, Kathy J. Salyers, pro se, appeals from the judgment of the Franklin County Court of Common Pleas affirming a decision of the Ohio Unemployment Compensation Review Commission ("commission") finding that she committed fraudulent misrepresentation when she applied for unemployment compensation. For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} Appellant applied for unemployment compensation on November 7, 2008. She applied by telephone, and a printed version of the application listed her most recent

separating employer as Callos Professional Employment II, LLC ("Callos"), and noted that her last day there was July 9, 2008. Based on this information, the Ohio Department of Job and Family Services ("ODJFS") initially granted appellant benefits for \$110 a week, and it increased the amount to \$135 a week in February 2009.

{¶ 3} Appellant continued to receive benefits through the Fall of 2010. At that time, ODJFS discovered during a review of records it had from employers that appellant worked for Gap, Inc. ("the Gap") from late October to November 7, 2008.

{¶ 4} Diane Jerrell, a member of the ODJFS investigative unit, was assigned to investigate whether appellant committed fraudulent misrepresentation by applying for unemployment compensation without disclosing the Gap as her most recent separating employer. Jerrell sent appellant an email asking why she stopped working at the Gap and a letter asking why she failed to report her employment with the Gap. Appellant had not responded by the time Jerrell completed her investigation.

{¶ 5} At the conclusion of Jerrell's investigation, the director of ODJFS determined that appellant committed fraudulent misrepresentation and cancelled her benefits "due to fraudulent misrepresentation regarding a hidden disqualifying separation from employment." (ODJFS' Director's November 30, 2010 Decision, 1.) The director noted that appellant "intentionally failed to disclose this separation * * * on the application. In compliance with Section 4141.35(A), Ohio Revised Code, the weekly benefit amount and total benefits payable are reduced to zero." (ODJFS' Director's November 30, 2010 Decision, 1.) Consequently, appellant was required to repay the entire \$12,990 she received under her claim. The director sent the decision to appellant on November 30, 2010.

{¶ 6} Appellant faxed the director a letter on December 13, 2010 claiming that, when she applied for unemployment compensation, she told the ODJFS representative who took her application over the telephone that she went through "orientation" with the Gap, and she said the ODJFS representative did not find that information relevant. She also indicated that, on the same day she sent the fax, she spoke with an ODJFS employee named "Diane" about her conversation with the representative who took her

application over the telephone. (R. 18, p. 28.) Pursuant to R.C. 4141.281(B), appellant asked the director to redetermine whether she committed fraudulent misrepresentation. On February 17, 2011, the director issued a written decision indicating that he reviewed appellant's case again and found no reason to change his initial finding of fraud or his order that she repay the benefits she previously received.

{¶ 7} Appellant subsequently appealed the director's February 17, 2011 decision to the commission, as provided for in R.C. 4141.281(C)(1). Consequently, on March 7, 2011, the director of ODJFS transferred jurisdiction to the commission pursuant to R.C. 4141.281(B). Meanwhile, on March 3, 2011, appellant sent the commission a letter stating, "I believe that I gave all information I was asked for when I applied for Ohio Unemployment benefits in early November 2008." (R. 18, p. 39.) The commission scheduled a telephone hearing for appellant and appointed a hearing examiner pursuant to R.C. 4141.281(C)(2). At the hearing, Jerrell testified that ODJFS discovered that appellant applied for unemployment compensation without disclosing the Gap as her last employer. ODJFS made that discovery from a review of appellant's application, which Jerrell provided details of, and records it had from the Gap listing wages paid to appellant on dates immediately preceding appellant's application for benefits. Lastly, she testified that a woman took appellant's application over the telephone.

{¶ 8} Appellant testified at the hearing that she went through "orientation" with the Gap from late October to November 7, 2008, and that she left the Gap because she was unable to complete her assignments due to having severe headaches and being poorly trained. She explained that on the day she left the Gap, she called ODJFS to apply for unemployment compensation, and a "young man approximately * * * 23, 24 years old" took her application over the telephone. Appellant claimed she told the representative that she went through "orientation" at the Gap, and he did not ask any follow-up questions. (Tr. 8.) Instead, according to appellant, the representative wanted to know who her "last long-term employer" was, and she told him that it was Callos. (Tr. 9.) She testified that she did not consider herself to have been employed by the Gap because she was not properly trained there. However, appellant admitted that she was

paid for her services at the Gap. Lastly, appellant said that she sent emails and faxes to Jerrell.

{¶ 9} After the conclusion of the hearing, appellant sent the hearing examiner a copy of her December 13, 2010 fax to ODJFS after it had cancelled her application. However, appellant sent nothing to indicate that she responded to Jerrell's request for information during the investigation of her case.

{¶ 10} The hearing examiner held in a written decision that "[w]hen filing her Application for Determination of Benefit Rights in November of 2008, claimant failed to disclose that she had been employed by Gap and had been separated from employment with that employer just prior to filing her Application." (Hearing Examiner's June 6, 2011 Decision, 4.) Consequently, the hearing examiner affirmed the ODJFS director's February 17, 2011 decision.

{¶ 11} Pursuant to R.C. 4141.281(C)(3), appellant filed a request for the commission to review the hearing examiner's decision, and the commission denied appellant's request on July 27, 2011. Because the commission denied that review, the hearing examiner's decision became the final decision of the commission by operation of R.C. 4141.281(C)(3). Appellant filed an appeal to the trial court. Appellant argued that it was improper for the commission to deny her request for review and allow the hearing examiner's decision to become its final decision because the evidence failed to establish that she committed fraudulent misrepresentation when she applied for unemployment compensation. The trial court affirmed the commission's decision to deny appellant's request for review and to allow the hearing examiner's decision to become its final decision.

II. ASSIGNMENT OF ERROR

{¶ 12} Appellant filed a timely notice of appeal and assigns the following as error:

THE COURT ERRED TO THE PREJUDICE OF APPELLANT
IN FINDING THAT THE DECISIONS OF THE
UNEMPLOYMENT REVIEW COMMISSION WERE NOT
UNREASONABLE, UNLAWFUL OR AGAINST THE
MANIFEST WEIGHT OF THE EVIDENCE.

III. DISCUSSION

{¶ 13} In her single assignment of error, appellant argues that it was unreasonable, unlawful or against the manifest weight of the evidence for the commission to allow the hearing examiner's decision to become its final decision by operation of R.C. 4141.281(C)(3). We disagree.¹

{¶ 14} We begin by setting forth the standard for reviewing the commission's decision. A party dissatisfied with the commission's final decision may appeal to the common pleas court, which shall hear the appeal on the record certified by the commission. *Henderson v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 12AP-154, 2012-Ohio-5382, ¶ 6. "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).

{¶ 15} The trial court's decision may be appealed to this court. *Id.* at ¶ 7-8. This court's focus is on the commission's decision, rather than on that of the common pleas court. *Id.* at ¶ 8. The review applied by this court and the common pleas court is the same. *Id.* at ¶ 7. "Thus, our task is to review the commission's decision and determine whether it is supported by evidence in the certified record and is unlawful, unreasonable or against the manifest weight of the evidence." *Id.* at ¶ 8, citing *McGee v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 09AP-680, 2010-Ohio-673, ¶ 12.

{¶ 16} Appellant first contends that it was unreasonable and unlawful for the commission to allow the hearing examiner's decision to become its final decision because the hearing examiner relied on inadmissible hearsay. According to appellant, Jerrell's testimony, in which she referred to the contents of appellant's unemployment compensation application and wage records of the Gap, constitutes hearsay that cannot be used to support the hearing examiner's conclusion of fraudulent misrepresentation.

¹ Although the commission also denied appellant's request that it review the hearing examiner's decision, appellant raises no specific challenges to that decision. Therefore, appellant has abandoned that issue for appeal, and we need not address it. See *Hamilton v. Dayton Correctional Inst.*, 10th Dist. No. 06AP-469, 2007-Ohio-13, ¶ 10.

Pursuant to R.C. 4141.281(C)(2), "[h]earing officers are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure"; as such, the Ohio Rules of Evidence do not apply in unemployment compensation hearings. Accordingly, this court has held that hearsay is admissible in a commission hearing. *Moore v. Ohio Unemp. Comp. Review Comm.*, 10th Dist. No. 11AP-756, 2012-Ohio-1424, ¶ 25.

{¶ 17} Next, appellant argues that the commission's decision is against the manifest weight of the evidence. Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus. *See also Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 15 (stating that "[t]he phrase 'some competent, credible evidence' in *C.E. Morris* presupposes evidentiary weighing by an appellate court"). In reviewing a decision from the commission, a court may not make factual findings or determine witness credibility. *Irvine v. Unemp. Comp. Bd. of Review*, 19 Ohio St.3d 15, 18 (1985). The fact that this court might have come to a different conclusion is not a basis for reversing the commission's decision. *McGee* at ¶ 11. This court must instead defer to the commission's findings of facts. *Id.* *See also Simon v. Lake Geauga Printing Co.*, 69 Ohio St.2d 41, 45 (1982) (stating that the determination of factual questions is primarily a matter for the commission).

{¶ 18} We now determine whether it was against the manifest weight of the evidence for the commission to allow the hearing examiner's decision, that appellant committed fraudulent misrepresentation, to become its final decision. An individual is prohibited from making a fraudulent misrepresentation when applying for unemployment compensation. R.C. 4141.35(A). Fraudulent misrepresentation is a statement that an unemployment compensation applicant knows to be false. *Barilla v. Ohio Dept. of Job & Family Servs.*, 9th Dist. No. 02CA008012, 2002-Ohio-5425, ¶ 36; *Johnson v. Ohio Bur. of Emp. Servs.*, 8th Dist. No. 73591 (May 14, 1998); *Ridel v. Bd. of Review*, 7th Dist. No. 79 C.A. 72 (May 19, 1980). The intent to commit fraud may be

inferred from intrinsic or extrinsic evidence, as well as from the surrounding circumstances. *Johnson*. Whether an individual engaged in fraudulent misrepresentation is a factual finding. *Riley v. Ohio Bur. of Emp. Servs.*, 82 Ohio App.3d 137, 140 (3d Dist.1992). Therefore, we may not disturb that finding if it is based on some competent, credible evidence. *Id.*

{¶ 19} The printed version of appellant's application fails to list the Gap as her most recent separating employer and, instead, indicates her last day of employment was with Callos on July 9, 2008. The hearing examiner determined that appellant committed fraudulent misrepresentation when she told the ODJFS representative that Callos, and not the Gap, was her most recent separating employer. Although appellant consistently claimed she was not employed by the Gap, the hearing examiner need not have accepted that claim because the evidence established that appellant was an employee for the Gap since she provided services for the company and was paid for those services. *See* R.C. 4141.01(R)(1) (defining employment as "the performance of services for which" compensation is paid). Nor was it unreasonable for the hearing examiner to conclude that appellant concealed her employment with the Gap when she spoke with the representative based on the fact she applied for unemployment compensation on the day she left employment at the Gap.

{¶ 20} Taking all the facts and issues of credibility into consideration, it was within the province of the hearing examiner to conclude that appellant did not mention the Gap when she applied for unemployment compensation and, as such, made a fraudulent misrepresentation to the ODJFS representative that Callos was her most recent separating employer. We find this factual finding to be supported in the record by some competent and credible evidence. Therefore, the weight of the evidence supports the commission's decision and we conclude that the commission's decision is neither unreasonable nor unlawful. Accordingly, we overrule appellant's single assignment of error.

IV. CONCLUSION

{¶ 21} Because appellant's single assignment of error is overruled, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

CONNOR and DORRIAN, JJ., concur.
