[Cite as *Martin v. Ohio Dept. of Job & Family Servs.*, 2010-Ohio-57.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
TARA L. MARTIN	:	W. Scott Gwin, P.J.
	:	Julie A. Edwards, J.
Plaintiff-Appellant	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 2009 CA 00067
	:	
	:	
OHIO DEPARTMENT OF JOB AND FAMILY SERVICES, et al.	:	O P I N I O N

Defendant-Appellee

CHARACTER OF PROCEEDING:	Civil Appeal from Stark County Court of Common Pleas Case No. 2008 CV 04570
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	January 11, 2010

APPEARANCES:

For Plaintiff-Appellant

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Edwards, J.

{¶1} Plaintiff-appellant, Tara Martin, appeals from the February 17, 2009, Judgment Entry of the Stark County Court of Common Pleas affirming the decision of the Unemployment Compensation Review Commission that plaintiff-appellant was terminated from her employment with defendant-appellee Amherst Alliance, LLC for just cause and was not entitled to unemployment compensation benefits.

STATEMENT OF THE FACTS AND CASE

{¶2} Commencing on January 27, 2004, appellant Tara Martin was employed as a State Tested Nurse's Aide (STNA) at appellee Amherst Alliance's facility in Massillon, Ohio that provides care to senior citizens. On May 4, 2008, appellant's supervisor was Jill Woodburn, an RN. Betty Smith, an LPN, also was one of appellant's supervisors and was present at the facility on May 4, 2008.

{¶3} Appellant testified that, on May 4, 2008, she was passing out drinks to residents with two other STNAs, Jennifer Powell and Trudy Beard. Appellant testified that while doing so, Melissa Marsh, another employee who had bragged about having a criminal background, "got up into my face and said she doesn't want to hear her name come out of my mouth and I said I don't know what you're talking about and she said she was going to kick my f'ing ass." Transcript at 38. According to appellant, Marsh threatened three or four times to kick appellant's ass. The incident occurred in the dining room in front of approximately 25 residents and, according to appellant, lasted approximately 20 minutes. Appellant testified that, during the incident, Jill Woodburn sat at her desk and never moved from her station outside the dining room to break up the fight. Appellant also testified that Betty Smith did not do anything to break up the

fight. Both Woodburn and Smith subsequently took Marsh out of the dining room with them.

{¶4} Appellant finished what she was doing and then when it was time for her to go to the dining room where Marsh was, she went to see her husband, who also worked at the facility, because she felt that none of the nurses was doing anything and she was very upset. According to appellant, her husband went and talked to Jill Woodburn, the RN supervisor, who allegedly told him that he had just missed a good fight. Appellant testified that her husband received permission from Woodburn to clock appellant out, and that, after her husband clocked her out, appellant left the facility approximately one half hour after the incident with Marsh. Appellant did not ask a supervisor for permission to leave the facility even though she knew that the facility had a policy requiring an employee to speak to a supervisor before leaving. When asked whether there was anyone present that day who could have given her permission to leave, appellant testified that she "could've talked to any one of the nurses but they were just sitting there watching it all go on." Transcript at 40.

{¶5} Later the same day, appellant called the Director of Nursing at home and reported the incident. Appellant was told to report to work the following day.

{¶6} Appellant was terminated from her employment on May 5, 2008, at the end of her shift after appellee Amherst Alliance completed an investigation.[1] When appellant met with the Director of Nursing on May 5, 2008, she had an opportunity to write out her version of the events of May 4, 2008 on the employee discipline form, but did not do so. There was also a box on the form where an employee can check whether

[1] Jennifer Powell, who also left the facility the same morning after the incident, was also terminated.

he or she agrees or disagrees with the facts as stated. However, appellant did not check either box.

{¶7} Appellant filed a police report on May 5, 2008.

{¶8} Appellant's initial request for unemployment compensation benefits was allowed by appellee Director, Ohio Department of Job and Family Services who found that appellant had been discharged without just cause. Appellee Amherst Alliance then filed an appeal. Pursuant to a redetermination letter mailed on June 26, 2008, appellee Director affirmed the initial determination.

{¶9} Appellee Amherst Alliance then filed an appeal from the redetermination. An evidentiary hearing before an Unemployment Compensation Review Commission hearing officer was held on September 8, 2008. As memorialized in a decision mailed on September 9, 2008, the hearing officer reversed the June 26, 2008, redetermination, finding that appellant was discharged for just cause in connection with her work. The hearing officer, in his decision, stated, in relevant part, as follows:

{¶10} "Claimant failed to establish justification for her abandonment of her job on May 4, 2008, by leaving work without permission from a supervisor and for falsification of her time card by asking another employee to punch out her time card before leaving work. Her discharge was based on sufficient fault to merit a finding that she was discharged for just cause in connection with work."

{¶11} Appellant's request for further review by the Unemployment Compensation Review Commission hearing officer was denied.

{¶12} Appellant then filed an appeal with the Stark County Court of Common Pleas pursuant to R.C. 4141.282. After the parties filed briefs, the trial court, as

memorialized in a Judgment Entry filed on February 17, 2009, affirmed the decision of the Unemployment Compensation Review Commission that appellant was discharged for just cause. The trial court, in its Judgment Entry, stated in relevant part, as follows:

{¶13} "Specifically, the Court finds, although another employee may have been responsible for initiating the argument on May 4, 2008, Martin [appellant] voluntarily left her employment without the permission of her supervisors and allowed another employee (i.e., her husband) to clock-out her time card. Both of these actions were prohibited by the employee handbook provided to Martin during her training and were punishable up to, and including, termination. While the handbook prescribes progressive discipline for leaving work without permission, it explicitly provides that 'clocking or recording another employee's time or having one's own time clocked or recorded by another person is grounds for immediate dismissal.' Although Martin argues that her husband was given permission to clock-out her time card, neither Martin's husband nor the supervisor testified as to such permission. Accordingly, it was within the providence of the Hearing Officer, as the trier of fact, to accept or reject such contention. The Hearing Officer rejected such an argument and this Court will not substitute its own judgment on such factual matter."

{¶14} Appellant now raises the following assignment of error on appeal:

{¶15} "THE COURT OF COMMON PLEAS ERRED BY AFFIRMING THE DECISION OF THE APPELLEE, THE REVIEW COMMISSION OF THE STATE OF OHIO, UNEMPLOYMENT COMPENSATION, BECAUSE IT IS UNREASONABLE UNLAWFUL, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I

{¶16} Appellant, in her sole assignment of error, argues that the trial court erred by affirming the decision of the Unemployment Review Commission that appellant was discharged with just cause and was not entitled to unemployment compensation benefits. We disagree.

{¶17} An appeal of a decision rendered by the Review Commission is governed by R.C. 4141.282(H), which provides, in pertinent part: " * * * If the court finds that the decision is 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, such court shall affirm the decision of the commission."

{¶18} An appellate court's standard of review in unemployment compensation cases is limited. An appellate court may reverse a board's decision only if the decision is unlawful, unreasonable or against the manifest weight of the evidence. See, *Tzangas, Plakas & Mannos v. Administrator, Ohio Bureau of Employment Services*, 73 Ohio St.3d 694, 696, 1995-Ohio-206, 653 N.E.2d 1207, citing *Irvine v. Unemp. Comp. Bd. Of Review* (1985), 19 Ohio St.3d 15, 17-18, 482 N.E.2d 587. An appellate court may not make factual findings or determine the credibility of the witnesses, but rather, is required to make a determination as to whether the board's decision is supported by evidence on the record. *Id.* The hearing officers are in best position to judge the credibility of the witnesses as the fact finder. *Shaffer-Goggin v. Unemployment Compensation Review Commission*, Richland App. No. 03-CA-2, 2003-Ohio-6907, citing, *Hall v. American Brake Shoe Co.* (1968), 13 Ohio St. 2d 11, 233 N.E.2d 582; *Brown-Brockmeyer Co. v. Roach,* (1947), 148 Ohio St. 511, 76 N.E.2d 79.

{¶19} A reviewing court is not permitted to make factual findings, determine the credibility of witnesses, or substitute its judgment for that of the commission; where the commission might reasonably decide either way, the courts have no authority to upset the commission's decision. *Irvine v. Unemployment Comp. Bd. of Review* (1985), 19 Ohio St.3d 15, 17, 482 N.E.2d 587. "'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 at ¶ 7, quoting *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19. "[I]f the evidence is susceptible of more than one construction, we must give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the trial court's verdict and judgment." *Karches,* 38 Ohio St.3d at 19.

{¶20} We note 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.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

{¶21} In order to qualify for unemployment compensation benefits, a claimant must satisfy the criteria set forth in R.C. 4141.29(D)(2)(a). That section provides:" * * *

{¶22} "(D) * * * [N]o individual may * * * be paid benefits * * *:

{¶23} "(2) For the duration of the individual's unemployment if the director finds that:

{¶24} "(a) The individual quit his work without just cause or has been discharged for just cause in connection with the individual's work, * * *."

{¶25} The Ohio Supreme Court has defined "just cause" 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 Review (1985), 19 Ohio St.3d 15, 17; *Tzangas* at 697, 653 N.E.2d 1207. The determination of whether just cause exists for an employee's dismissal under R.C. 4141.29 is based upon whether there was some fault on the part of the employee that led to the dismissal. *Tzangas,* supra at paragraph two of the syllabus. Furthermore, where an employee demonstrates '"unreasonable disregard for [the] employer's best interests,'" just cause for the employee's termination is said to exist. *Kiikka v. Ohio Bur. of Emp. Servs.* (1985), 21 Ohio App.3d 168, 169, 486 N.E.2d 1233, quoting *Stephens v. Bd. of Rev.,* Cuyahoga App. No. 41369, 1980 WL 355009. See, also, *Binger v. Whirlpool Corp.* (1996), 110 Ohio App.3d 583, 590, 674 N.E.2d 1232.

{¶26} At issue is whether appellant was discharged for just cause. The trial court found that appellant was discharged for just cause in connection with her employment because she voluntarily left her employment without the permission of her supervisors and also allowed her husband, who was also an employee, to clock her out. As noted by the trial court, both of these actions were prohibited by the employee handbook provided to appellant.

{¶27} Appellant, on December 8, 2006, had signed a form acknowledging that she received a copy of the handbook and that she was familiar with the information contained in the same. The employee handbook provided to appellant states under "Attendance and Absenteeism", in relevant part, as follows:

{¶28} "You are expected to be at your workstation, in your work area and ready to work, at the start of your scheduled work shift. You are expected to remain in your work area until the end of your scheduled work shift and either you are relieved by your

replacement for the next shift or your supervisor tells you that you may leave your work area at the end of your shift. With permission of your supervisor, you are permitted to leave your work area during your shift for your scheduled breaks and your scheduled lunch." As noted by the trial court, the handbook prescribes progressive discipline for leaving work without permission.

{¶29} With respect to "Timeclock Procedures", the handbook states that all employees "must clock in or record their own time" and that "[c]locking or recording another employee's time or having one's own time clocked or recorded by another person is grounds for immediate dismissal." (Emphasis added).

{¶30} There is no dispute appellant did not clock herself out on May 4, 2008, and that appellant herself never received permission from her supervisor before leaving on such date. As a result of appellant's departure, appellee Amherst Alliance had less than one employee to every ten residents, which was its preferred level, and residents were left unattended.[2] While appellant testified at the hearing that her husband had received permission from Jill Woodburn for appellant to leave, we note that neither appellant's husband nor Jill Woodburn testified at the hearing. Nor did appellant's husband submit an affidavit. At the hearing, Denise Beck, the nursing home administrator, testified that Jill Woodburn indicated that appellant's husband "came over and said [appellant] was upset and she was leaving, had clocked her out and left." Transcript at 29.

{¶31} Moreover, while appellant contends that she had to leave because she felt physically threatened by Melissa March who, she testified, she believed was capable of

[2] Testimony was adduced at the hearing that appellee Amherst Alliance was required by the State of Ohio to have one employee for very 15 residents.

following through on her threats, the testimony adduced at the hearing demonstrates that appellant waited until approximately one half hour after the incident with Marsh on May 4, 2008 to leave. By then, Marsh was no longer in the area. Appellant also worked a full day on May 5, 2008 before she was terminated. As noted by appellee Amherst Alliance in its brief, "appellant felt safe enough to continue to work for another half hour and go find her husband to have him clock her out. She felt safe enough to return to work the next day and work the entire shift without complaint to her supervisor."

{¶32} Based on the foregoing, we find that the decision of the Unemployment Compensation Review Commission denying appellant unemployment compensation benefits was not unlawful, unreasonable or against the manifest weight of the evidence. The evidence clearly established that appellant knowingly violated two written work rules and in doing so, abandoned the residents who were under her care. We find, therefore, the trial court, therefore did not err in affirming the same.

{¶33} Appellant's sole assignment of error is, therefore, overruled.

{¶34} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Edwards, J.

Gwin, P.J. and

Delaney, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/Patricia A. Delaney

JUDGES

[Cite as *Martin v. Ohio Dept. of Job & Family Servs.*, 2010-Ohio-57.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

TARA L. MARTIN Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
OHIO DEPARTMENT OF JOB AND FAMILY SERVICES, et al. Defendant-Appellee	:	CASE NO. 2009 CA 00067

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/W. Scott Gwin

s/Patricia A. Delaney

JUDGES