[Cite as *Robey v. McMichael*, 2009-Ohio-5834.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92766

GREGORY SCOTT ROBEY

PLAINTIFF-APPELLANT

vs.

EBONY McMICHAEL, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-663464

BEFORE: Celebrezze, J., Gallagher, P.J., and Sweeney, J.

RELEASED: November 5, 2009

JOURNALIZED:

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Gregory Scott Robey, appeals from a line of unemployment compensation decisions finding in favor of former employee, Ebony C. McMichael. After a thorough review of the record, and for the following reasons, we reverse the decision of the lower court.

{¶ 2} Ms. McMichael began employment with the law firm of Robey & Robey as a legal secretary on March 19, 2007. Robey & Robey is a small husband-and-wife firm with appellant, Gregory, and his wife, Margaret, as the only attorneys. Ms. McMichael was employed from her starting date to November 29, 2007 as a legal secretary working Monday through Thursday, 32 hours a week. Fridays were staffed by appellant's mother.

{¶ 3} Soon after Ms. McMichael began employment, she learned she was pregnant. Upon discovering this, she informed Margaret Robey. According to Ms. McMichael, in September 2007, she asked Margaret if she could return to work six weeks after delivering her baby, but Margaret told her that the firm could not hold the position open for that long. Ms. McMichael testified that, upon learning of Margaret's decision, she did not bring it up again.

{¶ 4} Shortly before Ms. McMichael's due date, the firm hired a replacement so that Ms. McMichael could train her. On Ms. McMichael's

last day of work, November 29, 2007, she was able to train her replacement for the day and then went into labor. Her child was born the next day.

{¶ 5} The replacement that the firm hired did not meet their expectations and was let go. The firm placed an ad for the open position approximately six weeks after Ms. McMichael left to give birth to her child. Ms. McMichael testified that she saw the advertisement for the open position she used to occupy and called to inquire if she could have her old job back. She testified that she was told the position had already been filled.

{¶ 6} On January 22, 2008, Ms. McMichael filed an application for determination of benefits with the Ohio Department of Job and Family Services for unemployment benefits. On February 13, 2008, the director of Ohio Department of Job and Family Services issued an initial decision holding that Ms. McMichael was unemployed from Robey & Robey due to a lack of work and determined that she was entitled to $5,434 in unemployment benefits. Appellant filed for a redetermination, which resulted in the director affirming the original determination on March 21, 2008.

{¶ 7} On April 1, 2008, appellant filed a timely appeal of the director's redetermination. The director transferred jurisdiction to the Unemployment Compensation Review Commission (the "Commission"). The Commission held a hearing by telephone on May 27, 2008. After listening to testimony,

the Commission hearing officer found that Ms. McMichael was separated from employment due to lack of work. Appellant appealed this agency determination, which the Commission disallowed.

{¶ 8} Appellant then appealed the Commission's decision to the Cuyahoga County Common Pleas Court pursuant to R.C. 4141.282. On January 8, 2009, the lower court affirmed the Commission's decision granting Ms. McMichael unemployment benefits. Appellant appeals this decision to this court citing three assignments of error:

{¶ 9} "I. Because the employer had no legal duty to provide a maternity leave to its sole employee, and no maternity leave was negotiated, employee voluntarily terminated her employment when she left to have her baby and was not eligible for unemployment benefits;

{¶ 10} "II. Because claimant quit her job when she left to have her baby, she is not entitled to unemployment benefits;

{¶ 11} "III. The commission's decision that claimant was separated from employment due to lack of work is unreasonable, contrary to law and against the manifest weight of the evidence and must be reversed."

{¶ 12} Because each of appellant's assignments of error address the same decision by the review Board and involve the same issues, they will be addressed together.

Law and Analysis

{¶ 13} A party dissatisfied with the ultimate decision of the Unemployment Compensation Board of Review may appeal that decision to the appropriate court of common pleas, which shall hear the appeal solely on the record certified by the Board of Review. R.C. 4141.282. See *Wigest Corp. v. Todd* (April 4, 1997), Lucas App. No. L-96-327. Pursuant to the statute, the common pleas court may reverse the decision of the board only if the decision is unlawful, unreasonable, or against the manifest weight of the evidence. R.C. 4141.282(H). Absent one of these findings, the trial court must affirm the board's decision. *Tzangas, Plakas & Mannas v. Ohio Bur. of Emp. Serv.*, 73 Ohio St.3d 694, 1995-Ohio-206, 653 N.E.2d 1207. The *Tzangas* court noted further that an appellate court may not make factual findings or determine the credibility of witnesses. Id. at 696-697.

{¶ 14} Rather, factual determinations are the exclusive province of the hearing officer and the Board of Review. *Hall v. American Brake Shoe Co.* (1968), 13 Ohio St.2d 11, 14, 233 N.E.2d 582; *Brown-Brockmeyer Co. v. Roach* (1947), 148 Ohio St. 511, 76 N.E.2d 79. An appellate court may not weigh the evidence and substitute its judgment for that of the administrative hearing officer in factual determinations. *Simon v. Lake Geauga Printing Co.* (1982), 69 Ohio St.2d 41, 45, 430 N.E.2d 468. Determinations that are supported by some competent, credible evidence will not be reversed as

against the manifest weight of the evidence. *C. E. Morris Co. v. Foley Const. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus.

{¶ 15} In order to be eligible for unemployment compensation benefits in Ohio, a claimant must satisfy the criteria set forth in R.C. 4141.29(D)(2)(a) which provides in part: "(D) * * * [No] individual may * * * be paid benefits * * *: (2) For the duration of his unemployment if the administrator finds that: (a) The individual quit his work without just cause or has been discharged for just cause in connection with the individual's work * * *."

{¶ 16} The Ohio Supreme Court has recognized that "the purpose of R.C. Chapter 4141 is to protect employees from economic adversity." *Lorain Cty. Aud. v. Ohio Unemp. Comp. Rev. Comm.*, 113 Ohio St.3d 124, 2007-Ohio-1247, 863 N.E.2d 133, ¶20, citing *Tzangas*, supra. However, the "Ohio Unemployment Compensation Act does not protect against voluntary unemployment." *King v. State Farm Mut. Auto Ins. Co.* (1996), 112 Ohio App.3d 664, 668, 679 N.E.2d 1158.

{¶ 17} Appellant argues that Ms. McMichael terminated her employ with the firm in order to have a child and that she expressed an intent not to return so that she could remain home with her growing family. However, Ms. McMichael testified that she did not wish to remain at home with her children. Rather, she wished to return to work after six weeks — her doctor's recommended period of rehabilitation following pregnancy. Ms.

McMichael testified that she expressed this intent to Margaret and that Margaret told her that would not be possible.

{¶ 18} While such leave is required by the Family Medical Leave Act, Robey & Robey is not covered by this law because it has fewer than 50 employees. Section 2611(4)(A), Title 29, U. S. Code. Also, Robey & Robey did not violate Ohio's employment discrimination law by not offering Ms. McMichael maternity leave because they have fewer than four employees. R.C. 4112.01(A)(2).

{¶ 19} The review commission chose to believe Ms. McMichael's version of events. Even with this determination, R.C. 4141.29(D)(2)(c) specifies that "no individual * * * be paid benefits * * * [f]or the duration of the individual's unemployment if the director finds that * * * [s]uch individual quit work to marry or because of marital, parental, filial, or other domestic obligations." "While pregnancy constitutes a good and worthy cause for leaving work, it is clearly not attributable to the employer or to the condition of the labor market." *Neff v. Board of Review, Bureau of Unemployment Compensation* (1953), 117 N.E.2d 533, 536, 67 Ohio Law Abs. 276, 52 O.O. 285.

{¶ 20} Ms. McMichael left her position to have a child. Just as in *Neff*, Ms. McMichael's reason for terminating employment was not attributable to the employer or to the labor market. No leave of absence was negotiated between the employer and employee. Taking Ms. McMichael's testimony as

true, she was not entitled to a leave of absence. She terminated her employment to have a child. While this court is sympathetic to her position, the unemployment compensation provisions codified in R.C. 4141, et seq., do not give Ms. McMichael the right to benefits when her reasons for leaving were "parental, filial, or other domestic obligations." R.C. 4141.29(D)(2)(c). Therefore, the grant of unemployment benefits to Ms. McMichael constitutes an abuse of discretion that must be reversed.

{¶ 21} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellees costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

SEAN C. GALLAGHER, P.J., and
JAMES J. SWEENEY, J., CONCUR