[Cite as *Heller v. Ohio Dept. of Jobs & Family Servs.*, 2010-Ohio-517.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92965

JEANIE GAITHER HELLER

PLAINTIFF-APPELLANT

vs.

OHIO DEPARTMENT OF JOBS & FAMILY SERVICES, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-674584

BEFORE: Cooney, J., Kilbane, P.J., and Jones, J.

RELEASED: February 18, 2010
JOURNALIZED:

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Plaintiff-appellant, Jeanie Heller ("Heller"), appeals the trial court's judgment affirming the decision of the Unemployment Compensation Review Commission ("Commission") denying her unemployment benefits on the basis that she was discharged by her employer, defendant-appellee, Koinonia Homes, Inc. ("KHI"), for just cause. Finding no merit to the appeal, we affirm.

{¶ 2} In June 2007, KHI, which operates group homes for the mentally and developmentally disabled, hired Heller as a manager of vocational services. While Heller was on duty on March 11, 2008, one of the residents choked on an apple. Heller was the senior staff person in the area at that time. KHI maintains that when she spoke with her supervisor, Jeff Dubitsky ("Dubitsky"), about the incident, he instructed her to notify the nursing department immediately. Heller failed to comply with Dubitsky's instructions.

{¶ 3} Dubitsky held a disciplinary meeting with Heller and advised her that she was suspended for five days. He instructed her not to have any communication with other staff members regarding her suspension. He further instructed her to go directly home and serve her suspension. She was not to return to her work site. KHI claims that Heller ignored Dubitsky's instructions and went back to her office, approximately one mile

away. Heller told other staff members about the suspension and referred to Dubitsky in a derogatory manner. She also referred to KHI management as "stupid evil people." Dubitsky learned of Heller's actions, and Nancy Dubrow, KHI's director of human resources, advised Heller that she was discharged for insubordination.

{¶ 4} Heller maintains that she advised Dubitsky of the choking incident and that she handled the situation properly because the resident was scheduled to see a doctor later that day. She claims that she did advise the nursing department of the incident later that day. The next day, at her meeting with Dubitsky, she was advised of her five-day suspension. She maintains that she was never instructed to not return to the work site. Rather, she claims that Dubitsky suggested that she take some time off from work. She also does not recall being instructed to refrain from discussing the incident with other staff members. After the meeting, she went back to her office to retrieve her personal cell phone. She admits she told other employees that she had been suspended, but she denies ever referring to Dubitsky or others at KHI in a derogatory manner.

{¶ 5} In March 2008, Heller filed an application for unemployment benefits. Defendant-appellee, Director, Ohio Department of Job and Family Services ("ODJFS"), initially allowed her application, finding that she was

discharged without just cause. By a redetermination of benefits, the ODJFS reversed the initial determination and found that Heller was discharged for just cause in connection with her work. Heller appealed this redetermination, and the matter was transferred to the Commission. Following a telephonic hearing, the Commission affirmed the redetermination and ruled that she had been discharged for just cause. Heller filed a request for review, which the Commission denied. She then appealed to the Cuyahoga County Common Pleas Court under R.C. 4141.282. In February 2009, the common pleas court affirmed the Commission's decision, finding that the decision "was not unlawful, unreasonable or against the manifest weight of the evidence."

{¶ 6} Heller now appeals, raising four assignments of error for our review. In the first assignment of error, she argues that the Commission hearing officer erred when he allowed KHI to read written hearsay statements into the record. In the second assignment of error, Heller argues that the hearing officer erred when he accepted inadmissible hearsay evidence on the issue of credibility. We shall discuss these assignments of error together, as they are related.

Standard of Review

{¶ 7} R.C. 4141.282 governs the standard of review for decisions by the Commission. R.C. 4141.282(H) provides that the common pleas court shall reverse the Commission's decision only if it finds "that the decision of the commission was unlawful, unreasonable, or against the manifest weight of the evidence." Appellate courts are to apply the same standard of review as the trial court. *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Serv.*, 73 Ohio St.3d 694, 697, 1995-Ohio-206, 653 N.E.2d 1207. Appellate courts are not permitted to make factual findings or to determine the credibility of witnesses, but they do have the duty to determine whether the Commission's decision is supported by the evidence in the record. Id. at 696, citing *Irvine v. Unemp. Comp. Bd. of Rev.* (1985), 19 Ohio St.3d 15, 17-18, 482 N.E.2d 587, 590.

Hearsay Evidence

{¶ 8} Heller claims that KHI failed to serve her with a copy of the three written statements of other KHI employees prior to her Commission hearing in violation of the Commission's rules.

{¶ 9} At the hearing, the hearing officer questioned Dubitsky about what occurred after his meeting with Heller. Dubitsky stated that "immediately after our conversation [Heller] had left the main office and returned to the Day Hab facility. Had several conversations with staff,

pack[ed] up boxes from her office, had conversations with consumers, and that was a direct violation of what we just spoke about."

{¶ 10} The hearing officer then asked if the KHI staff told Dubitsky about the conversations. He replied, "[y]es in fact, I have three written statements from staff, signed by them, of what she said." The hearing officer asked if Dubitsky forwarded these statements to ODJFS. Dubitsky replied, "[n]o we haven't at this time." The hearing officer then asked Dubitsky to "[g]o ahead and read them into the record."

{¶ 11} Dubitsky proceeded to read statements from Jerry Lynn Walker ("Walker"), Renata Harris ("Harris"), and Jude Fenwick ("Fenwick"). Walker's statement provided in pertinent part: Heller "entered the Day Hab. very upset and seemed hurt. She began to tell staff, Renata Harris, Jude Fenwick, myself, and the staff * * * that she had been suspended for five days, at first she said that our boss Jeff, did not feel that she handled the situation that occurred on March 11th * * * in a timely manner. * * * [Heller stated] that she had worked for a bunch of evil people in life. * * * [Heller] stated that she wasn't going to allow a young 'shithead' like [Dubitsky] talk to her in any kind of way."

{¶ 12} Harris's statement provided the following: Heller "stated that she was suspended for five days due to she didn't make a phone call about a

client that was sick. * * * [S]he then packed up her personal items out of the office that were in boxes * * *."

{¶ 13} Lastly, Fenwick's statement indicated that Heller "looked upset. Her face was red. She said, he gave me five days. I responded, oh that [ ] suck[s] and left the room."

{¶ 14} The hearing officer then asked Dubitsky when he learned about these conversations. Dubitsky replied, "I had actually called after our suspension meeting. Within five minutes, to speak to another staff, they already [knew] that * * * [Heller] had already come to the office and pack up boxes."

{¶ 15} It is clear from a review of this exchange that the hearing officer elicited these statements from Dubitsky. A hearing officer has the discretion to accept or reject any evidence. *Metzenbaum v. Unemp. Comp. Bd. of Rev.* (Sept. 4, 1997), Cuyahoga App. No. 72233, citing *Nordonia Hills Bd. of Edn. v Unemp. Comp. Bd. of Rev.* (1983), 11 Ohio App.3d 189, 463 N.E.2d 1276. The object of the hearing is to ascertain the facts that may or may not entitle the claimant to unemployment benefits. *Simon v. Lake Geauga Printing Co.* (1982), 69 Ohio St.2d 41, 43, 430 N.E.2d 468.

{¶ 16} Moreover, under 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." In reviewing this language, found in former R.C. 4141.28(J), the Ohio Supreme Court stated:

> "This court previously has not analyzed this specific segment of R.C. 4141.28(J), however, its meaning is apparent: the Board of Review and the referee need not apply stringent rules in determining the admissibility of evidence into the record. The logical corollary is such evidence placed in the record is not only admissible but also must be weighed and considered when making a decision. If evidence which is inadmissible in a court of law is to be disregarded when and if reviewed, there is no reason to admit such evidence at the administrative level or for purposes of subdivision (J) of R.C. 4141.28." *Simon* at 43.

{¶ 17} And, as this court has recognized:

> "It is well settled that a referee may use hearsay evidence in making unemployment compensation decisions. 'As a general rule, * * * administrative agencies are not bound by the strict rules of evidence applied in court. * * * The hearsay rule is relaxed in administrative proceedings, but the discretion to consider hearsay evidence cannot be exercised in an arbitrary manner.'" *Cully v. Admr., Ohio Bd. of Emp. Serv.*, (Oct. 13, 1994), Cuyahoga App. No. 66187, citing *Haley v. Ohio State Dental Bd.* (1982), 7 Ohio App.3d 1, 6, 453 N.E.2d 1262.

{¶ 18} Furthermore, there was no indication that KHI planned to offer these statements into the record, so it was not required to provide Heller with a copy of the statements. Heller also contends that the hearing officer had an affirmative duty to protect her at the hearing because she was a pro se litigant. However, "[p]ro se civil litigants are bound by the same rules and procedures as those litigants who retain counsel. They are not to be accorded greater rights and must accept the results of their own mistakes and

errors." *Meyers v. First Natl. Bank of Cincinnati* (1981), 3 Ohio App.3d 209, 111 N.E.2d 412, citing *Dawson v. Pauline Homes, Inc.* (1958), 107 Ohio App. 90, 154 N.E.2d 164. Therefore, we find no error in the hearing officer's requesting that Dubitsky read the written statements into the record.

{¶ 19} Heller also argues that Walker's statement was inadmissible because it was hearsay that challenged the credibility of her testimony. She cites *Johnson v. Bd. of Rev.* (Mar. 28, 1985), Cuyahoga App. No. 48918, to support her argument that a hearing officer may not accept disputed hearsay evidence from an absent witness in preference to testimony from a claimant present at the hearing.

{¶ 20} In *Johnson*, the claimant was discharged because her work did not improve after receiving a warning and suspension from her employer. Johnson was not represented by counsel at the Commission hearing. She admitted that she was discharged by her employer but claimed that she had not received any complaints about her work. The employer was represented by an attorney, who had no personal knowledge of the facts leading to Johnson's discharge. The attorney testified solely from the records he provided to the hearing officer.

{¶ 21} On appeal, we found that there was no indication that Johnson received advance notice about the specific nature of her employer's

dissatisfaction with her work. We also found that the notes describing what Johnson had allegedly failed to do in her assigned work area were hearsay. Johnson maintained that these allegations were untrue, and as a result, her veracity was at issue. We noted that "'to give credibility to the written statements of a person not subject to cross-examination because he did not appear at the hearing and to deny credibility to the claimant testifying in person makes a mockery of any concept of a fair hearing.'" Id., quoting *Shirley v. Admr., Ohio Bur. of Emp. Serv.* (Oct. 11, 1978), Hamilton App No. C-77431. Based on these circumstances, we concluded that the hearing officer gave more credence to the hearsay reports and unsworn allegations of the employer's attorney than to Johnson herself. *Johnson*.

{¶ 22} However, *Johnson* is distinguishable from the instant case. Unlike Johnson, Heller had notice of the events resulting in her suspension and ultimately resulting in her discharge. Furthermore, Heller was discharged for her failure to follow Dubitsky's instructions to proceed directly home and not discuss her suspension with coworkers. Her testimony that she returned to her office and told others about her suspension confirms her coworkers' written statements — that she returned to her office and informed them that she was suspended.

{¶ 23} Heller further argues that the hearing officer's decision was unreasonable because the statements of Harris and Fenwick contained no mention of derogatory remarks about Dubitsky. Heller claims that these two statements demonstrate that she returned for her cell phone in a professional manner. She contends that if Walker's statement had been excluded, the Commission would have granted her application for unemployment compensation benefits.

{¶ 24} The irony of Heller's argument, however, is that she first asks us to disregard Walker's written hearsay statement, but consider the more favorable hearsay statements of Harris and Fenwick. We refuse to do so. In an administrative hearing such as this, the fact-finder is not required to blindly accept sworn testimony over otherwise inadmissible evidence. *Fisher v. Bill Lake Buick*, Cuyahoga App. No. 86338, 2006-Ohio-457, citing *Hansman v. Ohio Dept. of Job & Family Serv.*, Butler App. No. CA2003-09-224, 2004-Ohio-505. Rather, the duty of the fact-finder is to weigh and consider the reliability of the evidence and the credibility of the witnesses. Id. See, also, *Simon*. In the instant case, there is nothing in the record to indicate that the hearing officer considered the hearsay testimony in an arbitrary manner and, further, we find no error in the hearing officer's decision to give weight to such evidence.

{¶ 25} Accordingly, the first and second assignments of error are overruled.

Duty to Develop the Record

{¶ 26} In the third assignment of error, Heller argues that the hearing officer breached his duty to "fully and fairly develop" the record concerning KHI's disciplinary practices. She claims that the hearing officer should have developed evidence as to how KHI operates its system of progressive discipline.

{¶ 27} Under R.C. 4141.281(C)(1), the Commission shall provide the parties with an opportunity for a fair hearing. "In conducting hearings, all hearing officers shall control the conduct of the hearing, exclude irrelevant or cumulative evidence, and give weight to the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of serious affairs. 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. Hearing officers are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure." R.C. 4141.281(C)(2).

{¶ 28} Heller contends that the hearing officer should have developed evidence as to how KHI applies its system of progressive discipline. She

claims that just cause was not established because there was no evidence to show how her failure to obey Dubitsky's orders harmed KHI. She relies on *Apex Paper Box Co. v. Admr., Ohio Bur. of Emp. Serv.* (May 11, 2000), Cuyahoga App. No. 77423, where this court found that: "[w]hen the reason for discharge is a policy violation, the reason can only constitute just cause if the policy was fair and was fairly applied. To be 'fair' a policy must be communicated to the employee. 'Fairly applied' means whether the policy was applied equally to all the employees." (Internal citations omitted.)

{¶ 29} In *Apex*, the employee was discharged for failing to punch out at lunch one day before leaving the building. On that same day, five to ten other employees left for lunch without punching out. The employee claimed that she did not know it was an established work rule to punch out before leaving for lunch. We found that the record contained competent, credible evidence that the time clock policy was not fair and was not fairly applied. Id.

{¶ 30} However, *Apex* is distinguishable because the fair application of a work policy is not at issue in the instant case. KHI discharged Heller for insubordination. She ignored Dubitsky's instructions requiring that she not return to her work site and that she not discuss her suspension with other employees.

{¶ 31} Furthermore, the hearing officer had no duty to present Heller's case for her. As this court stated in *Fasolo v. Admr., Ohio Bd. of Emp. Serv.* (Jan. 21, 1988), Cuyahoga App. No. 52839: "[t]he [hearing officer] is not acting as either party's advocate and has no responsibility to 'develop' either party's position to the detriment of the other. The [hearing officer's] duty is to act impartially and ascertain the facts." See, also, *Cully*.

{¶ 32} Here, a review of the record reveals that the hearing officer acted properly in conducting the hearing. The hearing officer explained the format of the hearing to Heller and asked questions of all witnesses. Heller was also given ample opportunity to present her case, to cross-examine witnesses, and to give closing argument. Furthermore, Heller chose to appear without counsel at the hearing and must accept the result of her mistakes or errors. See *Li v. Precision Elec., Inc.* (Feb. 24, 1994), Cuyahoga App. No. 65791, citing *Meyers*.

{¶ 33} Therefore, the third assignment of error is overruled.

Just Cause Determination

{¶ 34} In the fourth assignment of error, Heller argues that the Commission hearing officer erred in finding that the manifest weight of the evidence supported a determination of just cause for her discharge from KHI.

{¶ 35} To be eligible for unemployment compensation benefits in Ohio, claimants must satisfy the criteria in R.C. 4141.29(D)(2)(a), which provides that no individual may be paid benefits if the individual has been discharged for just cause in connection with the individual's work. "The claimant has the burden of proving her entitlement to unemployment compensation benefits under [R.C. 4141.29(D)(2)(a)], including the existence of just cause for quitting work." *Irvine* at 17, citing *Shannon v. Bur. of Unemp. Comp.* (1951), 155 Ohio St. 53, 97 N.E.2d 425; *Canton Malleable Iron Co. v. Green* (1944), 75 Ohio App. 526, 62 N.E.2d 756; 54 Ohio Jurisprudence 2d (1962), Unemployment Compensation, Section 35.

{¶ 36} Just cause has been defined as "'that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.'" *Irvine* at 17, citing *Peyton v. Sun T.V.* (1975), 44 Ohio App.2d 10, 12, 335 N.E.2d 751. "'In order to have just cause for discharge, pursuant to R.C. 4141.29, there must be some *fault on the part of the employee involved*, in the absence of an overwhelming contractual provision. Such fault does not require misconduct, but, *nonetheless, fault must be a factor in the justification for discharge*.'" (Emphasis sic.) *Euclid Manor Nursing Home v. Bd. of Rev., Ohio Bur. of Emp. Serv.* (1985), 28 Ohio App.3d 17, 18, 501 N.E.2d 635, citing

Sellers v. Bd. of Rev., Ohio Bur. of Emp. Serv. (1981), 1 Ohio App.3d 161, 164, 440 N.E.2d 550.

{¶ 37} Furthermore, whether just cause exists is unique to the facts of each case. *Irvine* at 18. The factual questions are primarily within the province of the referee and the board, and this court has limited power of review. Id. It, therefore, follows that the lower court's judgment will be affirmed if the evidence supports the claim that Heller was terminated through her own fault. *Milyo v. Bd. of Rev., Ohio Bur. of Emp. Serv.* (July 30, 1992), Cuyahoga App. No. 60841.

{¶ 38} Heller argues that other than Walker's statement, no evidence was offered at the hearing to demonstrate that the retrieval of her personal cell phone was an "unreasonable disregard" for KHI's best interests. She claims that she mistakenly disobeyed Dubitsky's order when she returned to her office to retrieve her cell phone.

{¶ 39} In the instant case, the Commission denied Heller's claim for unemployment benefits, finding that:

> "Claimant's [Heller] supervisor suspended her for failing to provide adequate care to a choking resident. At the end of the suspension meeting, he instructed claimant not to have any communications with co-workers about the disciplinary action. Claimant ignored these instructions and told co-workers about the suspension meeting. She went further and made profane and insulting remarks about Mr. Dubitsky and others in management at Koinonia Homes. The employer was justified in terminating claimant's employment based upon her insubordination. It will

> be held that claimant was discharged by Koinonia Homes for just cause in connection with work."

{¶ 40} We note that the resolution of credibility and factual questions are the Commission's responsibility. *Tzangas* at 696; *Irvine* at 17. Consequently, when reviewing a decision of the Commission, we are precluded from making factual findings. Id. "[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 v. Cincinnati* (1988), 38 Ohio St.3d 12, 19, 526 N.E.2d 1350, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 461 N.E.2d 1273. Here, the Commission found KHI's evidence more credible than Heller's. Therefore, we find that the Commission's "just cause" determination is supported by evidence in the record. See *Bovenzi v. Ohio Bur. of Emp. Serv.* (April 17, 1980), Cuyahoga App. No. 40638 (where this court found that an employee's refusal to comply with the supervisor's direct order constituted insubordination, which justified the employee's discharge).

{¶ 41} Thus, we find that the Commission's decision was not unlawful, unreasonable, or against the manifest weight of the evidence.

{¶ 42} Accordingly, the fourth assignment of error is overruled.

Judgment is affirmed.

It is ordered that appellees recover of appellant 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.

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COLLEEN CONWAY COONEY, JUDGE

MARY EILEEN KILBANE, P.J., and
LARRY A. JONES, J., CONCUR