

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Sheri L. Mustafa,	:	
Appellant-Appellant,	:	
v.	:	No. 12AP-305 (C.P.C. No. 11CVF-14571)
St. Vincent Family Centers, Inc. et al.,	:	(REGULAR CALENDAR)
Appellees-Appellees.	:	

D E C I S I O N

Rendered on December 6, 2012

Marcus A. Ross, for appellant.

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

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} Sheri L. Mustafa, appellant, has filed an appeal from the judgment of the Franklin County Court of Common Pleas, in which the court affirmed the decision of the Unemployment Compensation Review Commission ("commission"), appellee, a division of the Ohio Department of Job & Family Services ("ODJFS"), appellee. In its decision, the commission found appellant was not entitled to receive unemployment benefits.

{¶ 2} The facts will be set forth in more detail in addressing appellant's assignments of error. On January 31, 2011, after three interviews, appellant signed an offer letter and accepted employment as a kindergarten teacher with St. Vincent Family Centers, Inc. ("St. Vincent"), appellee, which operates a school focused on educating children with behavioral issues. Over the next several weeks after commencing

employment, appellant had several oral conversations and e-mail communications with the management at St. Vincent relating to her salary, the requirement that only she and one other teacher "clock-in" to work using a hand scanner, and St. Vincent's failure to offer professional development training (also referred to as continuing education units, or "CEUs"). Appellant had a meeting with the school's management on March 9, 2011, at which appellant voiced her concerns. Appellant did not work the following day but returned to work on March 11, 2011, and announced she was resigning. Appellant e-mailed a letter of resignation later that same day.

{¶ 3} On June 30, 2011, appellant filed an application for determination of benefits, seeking unemployment compensation beginning July 4, 2011. On August 12, 2011, the ODJFS director issued a re-determination that denied her application. Appellant appealed the re-determination, and the matter was transferred to the commission.

{¶ 4} After a hearing was held, the commission hearing officer mailed a decision on October 7, 2011, finding that appellant quit her employment without just cause, thereby making her ineligible for unemployment compensation. Appellant filed a request for review with the commission, which was disallowed.

{¶ 5} Appellant filed an appeal with the Franklin County Court of Common Pleas. On March 6, 2012, the common pleas court affirmed the commission's decision. Appellant appeals the judgment of the common pleas court, asserting the following assignment of error:

THE APPELLEE-U.C. REVIEW COMMISSION'S DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN DENYING APPELLANT'S CLAIM FOR BENEFITS AND FINDING THAT APPELLANT VOLUNTARILY "QUIT" HER EMPLOYMENT AS OPPOSED TO BEING CONSTRUCTIVELY DISCHARGED.

{¶ 6} In appellant's sole assignment of error, appellant contests the trial court's affirmance of the commission's decision. A trial court and an appellate court employ the same, well-established standard of review in unemployment compensation appeals: "[A] reviewing court may reverse the board's determination only if it is unlawful, unreasonable, or against the manifest weight of the evidence." *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 697 (1995); R.C. 4141.282(H). When a

reviewing court (whether a trial or appellate court) applies this standard, it may not make factual findings or determine witness credibility. *Irvine v. State Unemployment Comp. Bd. of Rev.*, 19 Ohio St.3d 15, 18 (1985). Factual questions remain solely within the commission's province. *Tzangas* at 696. Thus, a reviewing court may not reverse the commission's decision simply because "reasonable minds might reach different conclusions." *Irvine* at 18. The focus of an appellate court when reviewing an unemployment compensation appeal is upon the commission's decision, not the trial court's decision. *Moore v. Comparison Mkt., Inc.*, 9th Dist. No. 23255, 2006-Ohio-6382, ¶ 8. In determining whether a commission's decision is or is not supported by the manifest weight of the evidence, this court applies the civil manifest weight of the evidence standard set forth in *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, (1978), syllabus, which holds: "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence."

{¶ 7} Ohio Revised Code Section 4141.29 establishes the eligibility requirements for unemployment benefits. A claimant is ineligible if she quits her job without "just cause." R.C. 4141.29(D)(2)(a). Thus, the issue before us is whether appellant had just cause to quit her job with St. Vincent. "Traditionally, just cause, in the statutory sense, is that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act." *Irvine* at 17. "The determination of just cause depends upon the 'unique factual considerations' of a particular case and is therefore primarily an issue for the trier of fact (i.e., the bureau and the commission)." *Barney v. GNC Corp.*, 2d Dist. No. 2001-CA-129, 2002-Ohio-4687, ¶ 13, quoting *Irvine* at 17. "The fact that reasonable minds might reach different conclusions is not a basis for the reversal of the board's decision." *Id.*, quoting *Irvine* at 18. In conducting our review, we bear in mind that the unemployment compensation statutes should be construed liberally in favor of the applicant. *Clark Cty. Bd. of Mental Retardation & Dev. Disabilities v. Griffin*, 2d Dist. No. 2006-CA-32, 2007-Ohio-1674, ¶ 10.

{¶ 8} Appellant argues that she quit her job based upon just cause for three reasons: (1) her salary was below what was promised or expected, (2) she was required to

clock-in via a hand scanner when no other employees were required to do so, and (3) she was told that St. Vincent offered professional development training when it did not.

{¶ 9} With regard to appellant's contention that she had just cause to quit her job because her salary was lower than expected, she contends that her salary was set without consideration of her past years of teaching. She testified that, when she went to the school to get fingerprinted at the commencement of her employment on January 31, 2011, the human resources consultant, Jewell Hatchett, told her that her prior years of teaching experience were not accounted for in calculating her starting salary because she did not include these prior years on her application. Appellant told Hatchett that she had indicated her prior experience on her resume and in her three interviews, and Hatchett told her she would look into the matter. Hatchett then asked appellant whether she still wanted to accept the teaching position, and appellant stated she did. Appellant testified that she followed up on the salary issue in a February 14, 2011 e-mail but the issue was never resolved.

{¶ 10} We find appellant's salary dispute did not provide just cause for her to resign her position. Appellant's salary of "\$31,561.488 (sic) per year" was indicated clearly in the offer letter on January 28, 2011, and appellant accepted the terms of the offer letter by signing it on January 31, 2011. If appellant had a dispute about her salary or desired to negotiate the amount, she should have done so prior to signing the offer letter and commencing employment. Furthermore, appellant testified that, by the time she met with Shawn Holt, the executive director of St. Vincent, on March 9, 2011, she "had resolved that I would accept the reduced salary that they told me. * * * I just went with that." Similarly, appellant stated in her July 22, 2011 letter submitted to the commission that, although she was very disappointed about the salary at the time, she "was just so happy to have a job and some benefits." This evidence that appellant had acquiesced to the salary she had been offered is inconsistent with her present claim that the low salary amount forced her to quit on March 11, 2011. It is also important to note that the offer letter contained the following explicit disclaimer:

This letter forms the complete and exclusive statement of employment between you and the agency. These employment terms supersede any other agreements, understandings,

promises, or communications, written or oral, by or on behalf of the agency.

This letter may not be modified or amended [ex]cept by a written agreement signed by a representative of the agency.

Therefore, any representations made during the interview process or immediately prior to her acceptance of employment did not supplant the salary terms in her offer letter. Thus, St. Vincent was under no duty to raise appellant's salary, and its failure to do so could not provide appellant a justifiable reason to quit her job. *See Scanlon v. Admr., Ohio Bur. of Emp. Servs.*, 11th Dist. No. 96-T-5452 (Oct. 18, 1996) (there exists no just cause to quit job when employer was under no obligation to raise employee's salary; a dispute with an employer regarding a raise is not a justifiable reason to quit one's job). Since there was competent and credible evidence to support the commission's conclusion that appellant quit her job without just cause, we cannot hold that decision to be unlawful or against the manifest weight of the evidence. Accordingly, because appellant clearly was informed of her starting salary, agreed to the terms in the offer letter, and commenced her employment before clarifying the issue, her resignation based upon her salary being lower than expected was not based upon a justifiable reason.

{¶ 11} Appellant next argues that she quit her job for just cause because she was required to clock-in via a hand scanner when no other employees were required to do so. Appellant testified that, during a meeting with Hatchett and Rajeana Haynes, the vice-president of clinical operations, during the week of February 21 through 25, 2011, Haynes seemed annoyed that she was bringing up the issue of professional development and moved the conversation to appellant being late one day due to a nosebleed. Haynes then told her that she would be required to clock-in on the hand scanner. When appellant questioned her why she was being singled out, Haynes said the other kindergarten teacher would clock-in too. Appellant contends Haynes' requirement that she clock-in was in retaliation for appellant seeking answers about her salary and professional development. Appellant also sent Haynes an e-mail on March 3, 2011 and met with her on March 8, 2011 regarding the selective clock-in requirement, and Haynes set up a meeting with Hatchett, Holt, and appellant for the following day. Before the meeting, appellant claims she discovered that the other kindergarten teacher was never required to similarly clock-

in. Appellant testified that, at the meeting, Holt told her that he did not owe her any explanations, and if she did not believe the job was a good fit for her, she could find employment elsewhere. Appellant testified that she took the next day off from work because she was so distraught about the meeting and her job, and she resigned on March 11, 2011 based upon the misrepresentations and lies she had been told about the benefits she would receive.

{¶ 12} "When an employee's resignation revolves around a breach of company policy, the policy must either be unfair or administered unfairly for the employee to claim the resignation was for just cause." *Porreca v. Miners & Mechanics Sav. & Trust Co.*, 7th Dist. No. 94-J-60 (Apr. 2, 1996), citing *In re Claim of Fetzer v. Ohio Bur. of Unemployment Comp.*, 6th Dist. No. L-93-055 (Nov. 5, 1993), citing *Harp v. Admr., Bur. of Unemployment Comp.*, 12 Ohio Misc. 34 (1967). "In determining whether a policy is fair, a court should look to whether the employee received notice of the policy, whether the policy could be understood by the average person, whether there is a rational basis for the policy, and whether the policy instituted by the employer was applied to some individuals and not to others." *Id.*, citing *Shaffer v. Am. Sickle Cell Anemia Assn.*, 8th Dist. No. 50127 (June 12, 1986).

{¶ 13} In the present case, appellant clearly received notice that she was going to be required to clock-in, the policy could be understood by the average person, and St. Vincent presented a rational basis for the policy. However, appellant contends that it was unfair because the clock-in requirement was applied only to her and not others. We initially note that appellant failed to present any evidence outside of her own testimony that no other employees were required to clock-in. Notwithstanding, although appellant claims St. Vincent required her to clock-in as retaliation for her questioning human resources about its failure to offer professional development, there is simply no evidence to support appellant's allegations. It is just as likely that she was required to clock-in due to her tardiness one day, which would provide a rational basis for the requirement. Although appellant may contend that the tardiness reason was a pretext for punishing her for asking too many questions, there is no evidence to support her contention. We do not find St. Vincent's requirement that appellant clock-in to be so onerous or so unfair that it would have provided an ordinarily intelligent person with a justifiable reason to quit.

Therefore, we find St. Vincent's requirement that appellant clock-in to work every day did not provide just cause for appellant to quit her job.

{¶ 14} Appellant also contends that she quit her job for just cause because St. Vincent misled her about offering professional development to its teachers. She claims that, during her three job interviews with St. Vincent, representatives told her that St. Vincent offered professional development but another teacher told her after she began employment that this was not true. Appellant testified that a few days after she started working, she scheduled an appointment with Hatchett and Haynes concerning professional development. She met with them during the week of February 21 through 25, 2011, and Haynes seemed annoyed that appellant was bringing up the issue. However, appellant said the issue was never discussed because the conversation turned to whether appellant had been late for work one day, at which point Haynes told appellant she would be required to clock-in.

{¶ 15} We agree with the commission that the alleged lack of professional development did not provide a reasonable justification for resigning. Initially, there is nothing in the record regarding precisely what St. Vincent representatives stated to appellant during her interviews. Furthermore, the record is even in dispute as to whether St. Vincent did, in fact, offer professional development. Appellant presented her own testimony that other teachers told her no professional development was offered and pointed to the fact-finding document St. Vincent submitted to the commission that indicated there was no professional development plan. However, Melanie Nye, who started as St. Vincent's director of human resources four months after appellant quit, testified that St. Vincent offered professional development to all employees throughout the 2011 year, and she possessed a running log showing the CEUs that had been offered to employees from January through August 2011. Nye speculated that the reason appellant did not believe professional development was offered was because no on-site classes were offered during the one and one-half months that appellant was employed. Nye further speculated that St. Vincent's fact-finding document submitted to the commission indicated there was no professional development plan because there are no specific personal plans put together for any individual employee, but they do offer programs off and on throughout the year to assist employees in obtaining CEUs. Importantly, appellant

never testified that anyone from St. Vincent's staff ever told her that professional development was not offered. Appellant testified that professional development was never discussed during the meeting with Hatchett and Haynes because they began discussing another matter.

{¶ 16} Notwithstanding, even if St. Vincent did not offer professional development, the offer letter appellant signed specifically provided that the terms in the letter constituted the complete terms of their agreement, and no oral representations were binding. Therefore, any reliance appellant placed on any alleged representations during the interviews was not reasonable. Although appellant complains that the portion of the letter indicating that she would be contacted by human resources to discuss "other ancillary benefits" within 30 days of her hiring was vague as to what these additional benefits were, appellant admitted at the hearing that she did not voice her concerns about the vagueness of the offer letter until she had commenced her employment. There is also nothing in the record that the parties thought or believed that "other ancillary benefits" included professional development. Accordingly, for all of these reasons, we find St. Vincent's alleged representations regarding professional development did not provide a justifiable reason for appellant to resign.

{¶ 17} In addition, appellant argues that she was constructively discharged from her employment. However, constructive discharge is a legal principle frequently applied to employment discrimination cases. *King v. State Farm Mut. Auto Ins. Co.*, 112 Ohio App.3d 664, 669 (6th Dist.1996), citing *Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578 (1996). In a civil case involving an allegation of "constructive discharge," the focus is on the intent of the employer and whether the employer acted wrongfully. *Id.*, citing *Mauzy* at paragraph one of the syllabus. On the other hand, a statutory administrative proceeding under R.C. Chapter 4141 centers on "just cause" and the conduct of the employee. *Id.* citing *Morris v. Ohio Bur. of Emp. Servs.*, 90 Ohio App.3d 295 (10th Dist.1993). Thus, the legal theories have different elements, and constructive discharge is inapplicable in an administrative unemployment compensation proceeding. *Id.* See also *Scarnati v. Ohio Dept. of Mental Health*, 10th Dist. No. 94API01-102 (Aug. 11, 1994) (the test of "just cause" for unemployment compensation purposes is different from that required for the tort of constructive discharge); *Hoeflich v. Admr., Ohio Bur. of Emp. Servs.*, 5th Dist. No.

88CA000023 (Dec. 27, 1988) (constructive discharge applies to discrimination cases and not a "just cause" determination in an R.C. 4141 unemployment compensation case). For the foregoing reasons, we find the commission's determination was not unlawful, unreasonable or against the manifest weight of the evidence. Appellant's assignment of error is overruled.

{¶ 18} Accordingly, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT J., concurs.
TYACK, J., dissents.

TYACK, J., dissenting.

{¶ 19} I respectfully disagree with portions of the majority opinion and, therefore, dissent.

{¶ 20} I believe Ms. Mustafa's own testimony, if believed, was sufficient to demonstrate that she was singled out for special treatment with regard to hand scanning. I am concerned that the majority opinion implies that she needed to subpoena every other teacher at the school to testify that they were not required to clock-in via this method or the evidence to support her allegation would be deemed lacking.

{¶ 21} Teachers are professionals and deserve to be treated as such. I am aware of no other school or school district which requires its professionals to clock-in using a hand scanner.

{¶ 22} Further, the timing of when the requirement was imposed certainly could lead to the conclusion that her complaints about the failure to give her credit for a block of her teaching experience (and her accompanying reduction in pay) plus the failure to provide the promised continuing education units ("CEUs") resulted in the unprofessional treatment regarding the hand scanning.

{¶ 23} The largest problem, for me, is the failure of St. Vincent's Family Centers, Inc. ("St. Vincent's") to provide the promised CEUs. The record is clear that Ms. Mustafa was told CEUs would be provided. The record is also clear that St. Vincent's had no

professional development plan and offered no on-site opportunities for CEUs during the winter of 2011. No one can dispute that Ms. Mustafa complained about this.

{¶ 24} Melanie Nye, the new human resources director for St. Vincent's, claimed no personal knowledge of any of the facts at issue. Instead, she testified based on "company records." She took the position of Director of Human Resources in July 2011, months after Ms. Mustafa left the school. Nye had not worked for the school before taking the HR position. Nye never talked to Ms. Mustafa, so Nye testified solely based, at most, on the claims of others as to what occurred. The only pertinent documentation Nye had when she testified at the hearing to determine if Ms. Mustafa was entitled to unemployment compensation, was the email Ms. Mustafa sent on the day she resigned. In the email, Ms. Mustafa complained about the way she had been treated by the management at St. Vincent's and the precise issues discussed here.

{¶ 25} Nye could offer no explanation as to why Ms. Mustafa was promised CEUs and then provided none. Nye testified that "professional development is offered to our employees" but did not claim it was offered by St. Vincent's, as opposed to an outside entity. She also did not claim that St. Vincent's paid for the professional development. She only claimed St. Vincent's kept a log she had of what CEUs had been attended by or credited to employees. Most or all of the log was apparently created by someone else, since Nye was not employed by St. Vincent's for almost all the time covered by the log.

{¶ 26} Teachers are required to attend continuing education and achieve a certain number of units of continuing education or lose their license to teach. Ms. Mustafa had only a matter of months to acquire additional education units or lose her license. St. Vincent's clearly offered help in that effort as an incentive for Ms. Mustafa to take the pay it offered and then St. Vincent's provided no help.

{¶ 27} In short, Ms. Mustafa had just cause to leave her employment with St. Vincent's. St. Vincent's really offered no testimony to disprove Ms. Mustafa's testimony, sending as a witness to the unemployment compensation hearing only a new human resources director with no personal knowledge of what happened and only the one pertinent document, Ms. Mustafa's email explaining why she was no longer going to be an employee of St. Vincent's.

{¶ 28} Nothing approaching the manifest weight of the evidence was submitted on behalf of St. Vincent's. Finding that a professional teacher should be allowed to be treated unprofessionally is not reasonable. Finding that an employer should be allowed to promise a higher salary and ancillary benefits and then reduce the salary at the last minute and renege on a significant ancillary benefit which jeopardizes the professional's license to teach is not reasonable.

{¶ 29} I would find that Sheri Mustafa had just cause to end her employment with St. Vincent's. Since the majority of this panel affirms a different conclusion, I respectfully dissent.
