

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KAREN P. ZELLNER	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff - Appellant	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
DIRECTOR, OHIO DEPARTMENT	:	Case No. 14CA26
OF JOB AND FAMILY SERVICES	:	
	:	
And	:	<u>OPINION</u>
	:	
SIGNATURE HEALTH SERVICES-	:	
MANSFIELD, LLC,	:	
	:	
Defendants – Appellees	:	

CHARACTER OF PROCEEDING: Appeal from the Richland County Court of Common Pleas, Case No. 13-CV-0380 R

JUDGMENT: Affirmed

DATE OF JUDGMENT: October 15, 2014

APPEARANCES:

For Plaintiff-Appellant

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[Cite as *Zellner v. Ohio Dept. of Job & Family Servs.*, 2014-Ohio-4662.]

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Baldwin, J.

{¶1} Plaintiff-appellant Karen Zellner appeals from the February 27, 2014 Decision of the Richland County Court of Common Pleas affirming the March 7, 2013 Decision of the Unemployment Compensation Review Commission finding that plaintiff-appellant was discharged for just cause.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant Karen Zellner was employed as a licensed practical nurse for appellee Signature Health Services Mansfield LLC from September 30, 2003 through August 12, 2010. Appellee Signature Health Services provided skilled home health care. As part of her duties, appellant traveled between patient's houses providing services to them.

{¶3} On August 12, 2010, appellant was issued a Notice of Termination. The notice stated that appellant was being discharged for unprofessional conduct towards supervisors, poor documentation and failure to follow through and for failing to maintain professional boundaries with patients.

{¶4} Appellant filed an Application for Determination of Benefit Rights which was allowed for a benefit year beginning date of January 24, 2010. On September 30, 2010, appellee Director of Ohio Job and Family Services issued a Redetermination holding that appellant was eligible for unemployment benefits because she had been terminated without just cause by appellee Signature Health Services.

{¶5} Appellee Signature Health appealed the Redetermination. Appellant's file was then transferred to the Unemployment Compensation Review Commission.

Hearings were held before Hearing Officer Valerie Roller on November 23, 2010, December 13, 2010 and January 27, 2011.

{¶6} Pursuant to a Decision issued on March 10, 2011, Hearing Officer Roller reversed the September 30, 2010 Redetermination, finding that appellant was discharged for just cause in connection with her work. The Hearing Officer ordered appellant to repay \$5,646.00 in benefits to the Ohio Department of Job and Family Services. Appellant's request for review of the decision was disallowed.

{¶7} Appellant then filed an administrative appeal in the Richland County Court of Common Pleas. The Richland County Court of Common Pleas, in a December 6, 2011 Decision, found that appellant had been denied the opportunity to present any witnesses except for one, Diana Fuller, and that the Hearing Officer had disallowed the testimony of most of appellant's witnesses as duplicative of appellant's own testimony while at least part of the testimony would have been non-duplicative. The trial court found that appellant "was denied her full panoply of due process rights and was denied a fair hearing". The trial court reversed the March 10, 2011 Decision of the Unemployment Compensation Review Commission and remanded the matter for a new hearing.

{¶8} A hearing before Hearing Officer Jeffrey Schaffner was held on May 29, 2012. In a Decision of March 7, 2013, the Hearing Officer affirmed the Director's Redetermination issued on March 10, 2011 and found that appellant was discharged for just cause in connection with her work based upon unprofessional conduct and improper documentation. Appellant was ordered to repay \$5,646.00.

{¶9} Appellant then appealed again to the Richland County Court of Common Pleas. As memorialized in a Decision filed on February 27, 2014, the trial court affirmed the March 7, 2013 Decision of the Unemployment Compensation Review Commission.

{¶10} Appellant now raises the following assignments of error on appeal:

{¶11} I. THE COURT OF COMMON PLEAS ERRED BY AFFIRMING THE DECISION OF THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION BECAUSE THE COMMISSION REFUSED TO HEAR ZELLNER'S WITNESS TESTIMONY IN VIOLATION OF DUE PROCESS.

{¶12} II. THE COURT OF COMMON PLEAS ERRED BY AFFIRMING THE DECISION OF THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION BECAUSE THE COMMISSION'S DECISION WAS UNREASONABLE, ARBITRARY, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

I

{¶13} Appellant, in her first assignment of error, argues that she was denied a fair hearing because two of her witnesses were not permitted to testify at the May 29, 2012 hearing.

{¶14} The principles of due process in administrative hearings apply to all hearings conducted under the authority of the commission. R.C. 4141.281(C)(2). The key factor in deciding whether a hearing satisfies procedural due process is whether the claimant had the opportunity to present the facts that demonstrate he or she was entitled to unemployment benefits. *Howard v. Electronic Classroom of Tomorrow*, 10th Dist. No. 11AP-159, 2011-Ohio-6059 at ¶ 15, citing *Atkins v. Ohio Dept. Of Job & Family Servs.*, 10th Dist. No. 08AP-182, 2008-Ohio-4109, 2008 WL 3522452, ¶ 17.

This is because “ [t]he object of the hearing is to ascertain the facts that may or may not entitle the claimant to unemployment benefits.’ ” *Id.*, quoting 955 *Bulatko v. Ohio Dept. Of Job & Family Servs.*, 7th Dist. Mahoning No. 07 MA 124, 2008-Ohio-1061, ¶ 11.

{¶15} While R.C. 4141.281(C)(2) requires that commission hearings satisfy due process principles, it also provides that “[i]n conducting hearings, all hearing officers shall control the conduct of the hearing, exclude irrelevant and 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.” Thus, “[t]he hearing officer has broad discretion in accepting and rejecting evidence and in conducting the hearing in general.’ ” *Howard* at ¶ 16, quoting *Bulatko* at ¶ 11. “The hearing officer’s discretion is tempered only to the extent that he must afford each party an opportunity to present evidence that provides insight into the very subject of the dispute.” *Howard* at ¶ 16, citing *Owens v. Ohio Bur. of Emp. Servs.*, 135 Ohio App.3d 217, 220, 733 N.E.2d 628 (1st Dist.1999).

{¶16} In the case sub judice, appellant sought to have three witnesses testify on her behalf. These witnesses were Becky Gordon, Deanna Fuller and Norma Hopkins. Appellant’s counsel indicated that Gordon would testify that she was told to keep her time in 30 minute increments and was not disciplined for doing so. The Hearing Officer permitted Gordon to testify and she did so.

{¶17} When asked what Deanna Fuller would testify to, appellant’s counsel stated that Fuller was the daughter of a client who was the subject of an alleged medication error. Appellant was alleged to have told the client that she did not want the client to die due to the possible error, but appellant denied this. Appellant’s counsel

indicated that Fuller would testify that appellant never said that she did not want the client to die. When asked by the Hearing Officer if Fuller was in the home with the client at the time, appellant's counsel stated that she was not but was in Arizona at the time, but that she talked to her mother every day. When the Hearing Officer asked appellant's counsel what Norma Hopkins would testify to, he indicated that "she will testify that she served as a witness in an unemployment hearing in June 2010¹ and sustained similar retaliation from Signature." Transcript of May 29, 2012 hearing at 73. The Hearing Officer stated that he was not going to call Hopkins because her testimony would not be relevant and that while he was not going to call Fuller, he was permitting appellant to proffer her testimony that appellant never said "I don't want you to die" to her mother.

{¶18} We find that appellant was not denied due process. The Hearing Officer permitted Gordon to testify and allowed appellant to proffer Fuller's testimony. As noted by the court in *Bulatko, supra at paragraph 12*, "[c]ase law provides some guidance for determining whether the procedures used at a hearing were fair. For example, a hearing officer may properly prevent the parties from calling witnesses, as long as the hearing officer allows the parties to proffer what those witnesses would have said. See *Powell v. Brown Pub. Co., Inc.*, 3d Dist. No. 10-03-03, 2003-Ohio-2566 (No due process violation if party proffers);..." As for Hopkins' testimony, we find that her testimony that she was retaliated against by appellee Signature after testifying on behalf of appellant at a prior unemployment hearing was not relevant as to whether or not appellant was discharged for just cause for unprofessional conduct and poor documentation.

{¶19} Appellant's first assignment of error is, therefore, overruled.

¹ Appellant had sought supplemental benefits, alleging that her hours had been reduced.

II

{¶20} Appellant, in her second assignment of error, argues that the trial court erred in affirming the decision of the Unemployment Review Commission because the Commission's decision was unreasonable, arbitrary, and against the manifest weight of the evidence.

{¶21} The appellate court has a limited standard of review in an unemployment compensation case. An appellate court may reverse a board's decision only if the decision is unlawful, unreasonable, or against the manifest weight of the evidence. *Bonanno v. Ohio Dept. of Job & Family Servs.*, 5th Dist. Tuscarawas No.2012 AP 02 0011, 2012–Ohio–5167, ¶ 14 citing *Tzangas, Plakas, & Mannos v. Administrator, Ohio Bureau of Employment Services*, 73 Ohio St.3d 694, 695, 1995–Ohio–206, 653 N.E.2d 1207, citing *Irvine v. Unemp. Comp. Bd. of Review*, 19 Ohio St.3d 15, 17–18, 482 N.E.2d 587 (1985). An appellate court may not make factual findings or determine the credibility of the witnesses; rather, it is required to make a determination as to whether the board's decision is supported by the evidence on the record. *Id.* The hearing officer as fact finder is in the best position to judge the credibility of the witnesses. *Bonanno*, at ¶ 14 citing *Shaffer–Goggin v. Unemployment Compensation Review Commission*, 5th Dist. Richland No. 03–CA–2, 2003–Ohio–6907, ¶ 26. We are required to focus on the decision of the commission, rather than that of the trial court. *Hartless v. Ohio Dept. of Job & Family Servs.*, 4th Dist. Pickaway No. 10CA27, 2011–Ohio–1374, ¶ 14 quoting *Klemencic v. Robinson Memorial Hosp.*, 9th Dist. Summit No. 25293, 2010–Ohio–5108, ¶ 7.

{¶22} A reviewing court is not permitted to make factual findings, determine the credibility of witnesses, or substitute its judgment for that of the commission. *Bonanno*, at ¶ 15. Where the commission might reasonably decide either way, the courts have no authority to upset the Unemployment Compensation Review Commission's decision. *Id.* citing *Irvine, supra* at 17–18. “Every reasonable presumption must be made in favor of the [decision] and the findings of facts [of the Review Commission].” *Bonanno*, at ¶ 15 citing *Ro–Mai Industries, Inc. v. Weinberg*, 176 Ohio App.3d 151, 2008–Ohio–301, 891 N.E.2d 348, ¶ 7 (9th Dist.), quoting *Karches v. Cincinnati*, 38 Ohio St.3d 12, 19, 526 N.E.2d 1350 (1988).

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

{¶24} “(D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:

{¶25} (2) For the duration of the individual's unemployment if the director finds that: ...(a) The individual quit work without just cause or has been discharged for just cause in connection with the individual's work, * * *.”

{¶26} An employee discharged from employment for just cause is ineligible to receive unemployment benefits. 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, supra* at 17; *Tzangas, supra* at 697. 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. Not every fault or mistake,

however, is grounds for termination. *Stark Area Regional Transit Auth v. Ohio Dept. of Job & Family Servs.*, 187 Ohio App.3d 413, 2010–Ohio–2142, 932 N.E.2d 396, ¶ 21 (5th Dist.). “The determination of whether just cause exists depends upon the unique factual considerations of [each] particular case.” *Irvine, supra* at 17. In determining whether just cause exists, the Unemployment Compensation Review Commission must consider whether granting benefits would serve the underlying purpose of employment compensation: providing financial assistance to individuals who become unemployed through no fault of their own. *Hartless, supra* at ¶ 15 citing *Tzangas, supra* at 697.

{¶27} In the case sub judice, appellant was discharged for a number of reasons, including improper documentation and unprofessional conduct. The Hearing Officer, in his decision, stated, in relevant part, as follows:

{¶28} “The facts establish the claimant was discharged with just cause in connection with work. The employer has established that at least two of the reasons for her discharge occurred. These were the unprofessional behavior where she left meetings [in June and August of 2010] prior to being excused and without permission, and the claimant’s failure to document properly. Claimant, by her own admission, knew that the documentation was incorrect. The fact that she claims that she was taught to document in the manner she had for her period of employment does not relieve her of her responsibility to keep accurate documentation.

{¶29} “When the totality of the evidence is reviewed, there is sufficient fault on the claimant’s part to create just cause in connection with work for her discharge. She was discharged for just cause in connection with work. Claimant’s benefits are suspended.”

{¶30} At the May 29, 2012 hearing, Debra Locke, the Corporate Clinical Director for Signature Health Services, testified that appellant did not document her time accurately. She testified that appellant's "documentation was 30 minutes on the dot for every visit that she made and they were consecutive...No time for travel..." Transcript of May 29, 2012 hearing at 14. She testified that appellant should have been documenting her travel times and her visit times so that there was a "real time accurate record" of what she did on each day. Transcript of May 29, 2012 hearing at 15. She also testified that it was indicated in their policy that things should be done in real time. Locke further testified that appellant frequently would walk out of meeting that they were having with her and was warned for this alleged insubordination.

{¶31} Teresa Wilkins, appellee Signature's Executive Director, testified that a seminar on documentation was given prior to appellant's termination and that appellant had attended the same. When asked, she testified that weekly visit logs were to be documented in real time. When Wilkins was asked about the unprofessional conduct towards supervisors that was listed as a reason for appellant's termination, the following testimony was adduced:

{¶32} Q: Now do you know what this unprofessional conduct towards supervisors that is listed on her reason for termination, what that was?

{¶33} A: Yes.

{¶34} Q: And can you describe what this behavior or conduct was?

{¶35} A: We do several meetings before that when we had to do investigations or discuss with her some of her performance issues. Uh she would

normally become confrontational. She would leave the meetings abruptly um even being advised to stay, she would leave.

{¶36} Q: Did she say why she was leaving?

{¶37} A: Um one meeting you know she said we can you know we was gonna uh, one meeting she uh said she was leaving, we can do what we want to do. We axed (sic) her, she was axed (sic) to stay by the executive director while she called the owner and she decided to leave.

{¶38} Q: Do you know when that meeting was?

{¶39} A: That was the meeting on August 9.

{¶40} Q: Why were you calling the owner?

{¶41} A: The executive director was calling the owner because again we was having uh several performance issues or other issues with her regarding her professionalism and respect towards supervisors, so the executive was calling the owner to get the advisement as to how he would want that to be handled.

{¶42} Q: Now prior to this discharge, did she get any warnings about her professional behavior?

{¶43} A: Yes.

{¶44} Transcript of May 29, 2012 hearing at 29-30.

{¶45} Appellant testified that she was taught in 2003 to document her visits in 30 minute increments back to back. She indicated that if she was in a visit for 15 minutes, she documented 30 minutes and that if she were there for an hour, she still documented 30 minutes. When asked, appellant admitted that the documents were not accurate and that she did not record travel time between her visits. She admitted that in her nursing

training, she was told that she had to keep accurate notes in real time because “it is a legal document and I have to document legal.” Transcript of May 29, 2012 hearing at 49. She also testified that she had been told during her October 2009 yearly review that her documentation needed to improve and that, in May of 2010, she was advised that documentation had to be supportive of what was going on in the home and that the company was preparing to do audits of documentation.

{¶46} At the hearing, appellant was questioned about her alleged unprofessional conduct towards supervisors. She admitted that she walked out of meetings before she was told that she could go. The following is an excerpt from appellant’s testimony:

{¶47} Q: Any meeting?

{¶48} A: When it was an investigation, I tried my best to give them all the information they needed. I tried to go by policy and procedure. When I felt that it was going into more of a harassment than an investigation, I just took it that the meeting was over and I dismissed myself because I did not want to go into harassment.

{¶49} Q: All right, did you tell them that you feel you were being harassed?

{¶50} A: Yes I did.

{¶51} Q: Did you ask them to stop?

{¶52} A: Yes I did.

{¶53} Q: But you still thought you had the ability to say meeting’s over, I’m leaving?

{¶54} A: Um it wasn’t a control issue at that point, I just knew how I felt inside and I felt that I was being harassed instead of it being an investigation where they

hear my side of the story. They were more accusing, accusatory towards me and harassing me and I felt that I, the meeting was over at that point.

{¶55} Transcript of May 29, 2012 hearing at 51. Appellant testified that she walked out of a meeting on August 9, 2010 because she thought that she was being harassed and that she walked out of a meeting on June 29, 2010 because she could not answer any more questions.

{¶56} Based on the foregoing, we find that the trial court did not err in affirming the decision of the Unemployment Compensation Review Commission. The decision was not unlawful, unreasonable, or against the manifest weight of the evidence.

{¶57} Appellant's second assignment of error is, thereof, overruled.

{¶58} Accordingly, the judgment of the Richland County Court of Common Pleas is affirmed.

By: Baldwin, J.

Gwin, P.J. and

Delaney, J. concur.