

[Cite as *White v. DKS Group Inc.*, 2009-Ohio-6329.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Rosalyn R. White, :
Appellant-Appellant, :
v. : No. 09AP-538
(C.P.C. No. 08CVF10-15454)
DKS Group Inc., Proteam Staffing et al., : (ACCELERATED CALENDAR)
Appellees-Appellees. :

D E C I S I O N

Rendered on December 3, 2009

The Isaac Firm, LLC, Kendall D. Isaac, and John J. Alastra,
for appellant.

Richard Cordray, Attorney General, and Patria V. Hoskins,
for appellee Director, Ohio Department of Job and Family
Services.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, P.J.

{¶1} Appellant, Rosalyn R. White ("White"), appeals the judgment of the Franklin County Court of Common Pleas. The trial court affirmed the decision of the Unemployment Compensation Review Commission ("commission"), which determined that White had been discharged from her job with appellee, DKS Group Inc., Proteam Staffing ("Proteam"), for just cause and, therefore, denied her unemployment benefits.

Because we conclude that the commission's decision was not unreasonable, unlawful or against the manifest weight of the evidence, we affirm.

{¶2} White worked for Proteam, which assigned her as a temporary employee with the Ohio Department of Health ("ODH"). White's supervisor at ODH notified Proteam that White had attendance issues and ODH did not wish to continue her placement. Because White's tardiness at ODH violated Proteam's internal policy, and she had been removed from prior assignments, Proteam terminated her employment on April 3, 2008.

{¶3} White filed for unemployment benefits, which were initially granted. Proteam appealed to the commission. A commission hearing officer held a hearing at which White and Amy Harkins, a Proteam representative, testified.

{¶4} Harkins testified that Proteam's policy provided that, if an employee was tardy three or more times in a 30-day period, then discipline, including termination, could result. Upon learning from ODH that White had attendance issues, and after reviewing White's ODH timesheets, Harkins concluded that White had violated the Proteam attendance policy. Before terminating White, however, Harkins also considered White's performance at other placements. Harkins testified that White had been placed on six assignments, and three had resulted in requests for her to be removed. She said those requests arose from "general work performance" issues. (Tr. 15.) Considering her tardiness at ODH and her prior removals, Proteam terminated White's employment.

{¶5} White testified that she had had only three or four prior assignments with Proteam. She had never been told of any attendance or work performance issues, and

she thought her temporary assignments had simply ended. In her view, her attendance at ODH complied with the department's unwritten flextime policy, which allowed employees some leeway to arrive late and then work late or through lunch to work a full eight hours. Although no one at ODH had given her specific permission to arrive late, her supervisor signed her timesheets. And when her supervisor brought the issue to her attention, she stopped using flextime. She conceded that her timesheets showed several days when she started work later than 7:45 a.m., her regular start time, and weeks when she worked fewer than 40 hours. She also conceded that she had "flexed" her time on more than three occasions in a 30-day period. (Tr. 40.)

{¶6} The commission hearing officer issued a decision, which found that White had been discharged for just cause and, therefore, was not entitled to unemployment benefits. White objected to the hearing officer's decision. The commission declined review.

{¶7} White appealed to the trial court. The court concluded that the commission's decision was not unlawful, unreasonable or against the manifest weight of the evidence. Accordingly, the trial court affirmed.

{¶8} White appealed to this court, and she raises the following assignments of error:

[I.] THE COURT[']S DECISION THAT [THE] COMMISSION DID NOT VIOLATE AP[P]ELLANT'S DUE PROCESS RIGHTS WAS UNREASONABLE

[II.] THE DECISION OF THE COMMON PLEAS COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶9} Our standard of review in this matter is the same as the trial court's standard of review. *Irvine v. State of Ohio, Unemployment Comp. Bd. of Rev.* (1985), 19 Ohio St.3d 15, 18. We may only reverse the commission's decision concerning unemployment compensation eligibility if it is unlawful, unreasonable or against the manifest weight of the evidence. *Tzangas, Plakas & Mannos v. Admr., Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 696, 1995-Ohio-206; *James v. State Unemployment Review Comm.*, 10th Dist. No. 08AP-76, 2009-Ohio-5120, ¶8. We may not make factual findings or weigh the credibility of witnesses. *Tzangas* at 696, citing *Irvine* at 18. Rather, our role is to determine whether evidence in the certified record supports the commission's decision. *James* at ¶8. If the evidence supports the commission's decision, then we may not substitute our judgment for that of the commission and must affirm. *Id.*

{¶10} Here, the commission denied White's application for unemployment benefits on the ground that she was discharged for "just cause" as provided in R.C. 4141.29(D)(2)(a). Under R.C. 4141.29, a party is entitled to unemployment compensation benefits if he or she quits with just cause or is discharged without just cause. See R.C. 4141.29(A) and (D)(2)(a). A claimant bears the burden to prove that he or she is entitled to unemployment compensation benefits under R.C. 4141.29. *Irvine* at 17, citing *Shannon v. Bur. of Unemployment Comp.* (1951), 155 Ohio St. 53, 59.

{¶11} The determination of what constitutes "just cause" within the context of unemployment compensation "necessarily depends upon the unique factual considerations of the particular case" and involves a concurrent analysis of the

legislative purpose of the Unemployment Compensation Act, R.C. 4141.01 to 4141.47 and 4141.99. *Irvine* at 17. Ohio courts have long recognized that the purpose of the Act is " 'to provide financial assistance to an individual who had worked, was able and willing to work, but was temporarily without employment through no fault or agreement of his own.' " *Id.*, quoting *Salzl v. Gibson Greeting Cards, Inc.* (1980), 61 Ohio St.2d 35, 39.

{¶12} In her first assignment of error, White contends that the commission's decision was unreasonable because the hearing officer conducted the hearing without the benefit of a purchase order White subpoenaed and documents White submitted. We disagree.

{¶13} At the beginning of the hearing, the hearing officer asked Amy Harkins if she had received White's subpoena for a purchase order. Harkins said that she had not received a subpoena. She also explained that Proteam does not keep purchase orders on file and, instead, just retains the purchase order number. The hearing officer then suggested that they proceed without the document. White's counsel did not object. Thereafter, through her testimony, White explained that, while working at ODH, she processed a purchase order for her assignment to continue with ODH for another three months.

{¶14} Having reviewed the hearing transcript, we cannot conclude that the hearing officer erred by proceeding without the purchase order. White's counsel did not object to proceeding without it, nor did he raise it in closing argument or ask the hearing officer to enforce the subpoena. In any event, we discern no negative impact. Harkins

testified that it was not available, and White testified about its contents. Any failure to produce the purchase order was not prejudicial to White.

{¶15} White also contends that the hearing officer failed to consider information she submitted to the commission for inclusion in the record. The submission included an e-mail exchange between White and Harkins after White was terminated. At the beginning of the hearing, White's counsel asked if the hearing officer had received information he had faxed to the hearing officer and mailed to Proteam. The parties described the information as timesheets. White's counsel did not ask about e-mails. During her testimony, White said that she sent e-mails to Amy Harkins after her termination. Neither she nor her counsel asked if the e-mails were part of the record.

{¶16} White contends that she suffered prejudice as a result of the hearing officer not considering the e-mails. Regardless of whether the e-mails themselves made it into the file and were part of the evidence the hearing officer considered, White testified about her exchange with Harkins. Furthermore, White's overall testimony was consistent with the contents of her e-mails to Harkins. Specifically, White described her discussions about flextime and transportation issues, she said that no one at ODH had ever indicated to her that she was being terminated because of attendance issues, and she said that no one at Proteam had ever notified her of problems with other assignments. White's counsel did not refer to the e-mails in questioning or in closing argument and did not ask if they were part of the record.

{¶17} We note, too, that the e-mails contained not only White's explanation of her work at ODH, but also Harkins' responses. Notably, Harkins' responses provide specific information about White's removal from prior assignments (twice from Cardinal

and once from a separate ODH assignment)—evidence White argues was otherwise missing and would have bolstered Proteam's position. Under these circumstances, we may only conclude that White suffered no prejudice from any failure to include them in the record.

{¶18} Finally, White contends that the hearing officer was biased against her, ruled unfairly or refused to consider evidence. The record contains no evidence to support these allegations.

{¶19} For all these reasons, we overrule White's first assignment of error.

{¶20} In her second assignment of error, White contends that the commission's decision is against the manifest weight of the evidence. We disagree.

{¶21} First, White argues that Proteam presented no evidence of performance issues with White's past assignments. To the contrary, Harkins testified that White had been removed from prior assignments for performance issues.

{¶22} White also argues, again, that she complied with ODH attendance policy. An e-mail to Proteam from her ODH supervisor, however, stated that White did not comply and had repeated attendance issues. White testified that she had transportation issues and sometimes could not arrive at 7:45 a.m., her regular start time. White's timesheets confirm that she arrived after 7:45 a.m. on numerous occasions. White's concession that she "flexed" her schedule more than three times in a 30-day period was enough to show that she violated the Proteam attendance policy. (Tr. 40.)

{¶23} We conclude that the commission's decision that White was terminated for just cause and not entitled to unemployment benefits was not against the manifest weight of the evidence. Accordingly, we overrule White's second assignment of error.

{¶24} In conclusion, we overrule White's first and second assignments of error. We affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and CONNOR, JJ., concur.
