

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Kelly J. Houser,	:	
Appellant-Appellant,	:	
v.	:	
Director, Ohio Department of	:	No. 10AP-116
Job and Family Services et al.,	:	(C.P.C. No. 09CVF-06-8821)
Appellees-Appellees.	:	(REGULAR CALENDAR)
	:	

D E C I S I O N

Rendered on March 31, 2011

Bailey Cavalieri LLC, and Dane Stinson, for appellant.

Michael DeWine, Attorney General, and *David E. Lefton*, for appellee Director, Ohio Department of Job and Family Services; *Kelly E. Drushel*, for appellee Group Management Services.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Appellant, Kelly J. Houser ("claimant" or "employee"), appeals the judgment of the Franklin County Court of Common Pleas, which affirmed the decision of the Unemployment Compensation Review Commission ("commission" or "UCRC") reversing the allowance of claimant's application for unemployment compensation benefits.

{¶2} The record reveals the following facts. On November 5, 2007, Group Management Services, Inc. ("GMS" or "employer") hired claimant as a sales representative. He received one week's worth of training, which he perceived as adequate. At the time claimant was hired, the expectations of the position were made known to him. Specifically, sales representatives were expected to reach certain levels of call activity and sales quotas. With regard to the expected call activity, claimant was to make 50 calls to potential customers each day, or 250 calls per week. Based upon these calls, he was expected to schedule and conduct appointments for five new prospective clients each week. Finally, he was expected to present 1.5 sales proposals per week, or seven per month. With regard to the expected sales quotas, claimant was to sign up 25 new employees per quarter, or earn at least \$25,000 in administration fees per quarter.

{¶3} During claimant's first eight weeks on the job, he averaged 159 calls to potential customers each week and 1.25 appointments each week. During the first quarter of 2008, claimant averaged 182 calls per week and 3.77 first appointments per week. At the end of this quarter, claimant's direct supervisor, Dominic Dolariva, met with him to discuss the need for increases to his call activity. During the second quarter of 2008, claimant averaged 200 calls per week and 2.38 first appointments per week. At the end of the second quarter, claimant met with Dolariva and the Vice President of Sales, Tim Austin. During this meeting, they discussed the need for claimant to meet the expectations of his position and the potential for discharge in the event of a failure. They established an action plan and provided claimant with the third quarter to meet the expectations. During the third quarter of 2008, Dolariva was demoted from a sales manager to a sales representative. With regard to claimant's call activity during the third

quarter, he averaged 222 calls per week and 2.93 appointments per week. Because he failed to meet the expectations of his position, while other sales representatives did, claimant was discharged.

{¶4} Thereafter, claimant applied for unemployment compensation benefits. On October 22, 2008, the Ohio Department of Job and Family Services ("ODJFS") allowed the claim after finding that claimant was discharged without just cause. On October 28, 2008, GMS sought redetermination. On November 19, 2008, the ODJFS affirmed its original allowance. On November 26, 2008, GMS appealed to the commission. The matter came before the commission for a telephonic hearing on January 26, 2009.

{¶5} On January 30, 2009, a district hearing officer of the commission rendered a decision disallowing claimant's application after finding that GMS discharged him with just cause. On February 19, 2009, claimant sought further review, which the commission granted. Upon further review, the commission denied the allowance of claimant's application for benefits. Claimant appealed to the Franklin County Court of Common Pleas, which affirmed the denial. Claimant has timely appealed and raises four assignments of error for our review:

ASSIGNMENT OF ERROR NO. 1

The UCRC'S Determination that Appellant's Discharge for Failing to Improve Productivity was Justified is Unreasonable Considering that the Employer Removed Appellant's Sales Manager for the Entire Third Quarter and, Thus, Removed the Established Means for Appellant to Obtain and Maintain Sales Quotas.

ASSIGNMENT OF ERROR NO. 2

The UCRC violated R.C. 4141.218(C)(2) by Failing to Provide the Reasoning for its Conclusion that the Removal of Appellant's Sales Manager Did Not Render Appellant's Discharge Unreasonable.

ASSIGNMENT OF ERROR NO. 3

The UCRC Erred in Applying the *Tzangas* Standards in this Proceeding.

ASSIGNMENT OF ERROR NO. 4

The UCRC Erred in Failing to Consider Appellant's Statements in the Director's File in Violation of R.C. 4141.281(C)(3); and the Common Pleas Court Erred by Failing to Consider this Assignment of Error.

{¶6} In appellant's assignments of error, he challenges the denial of unemployment compensation benefits by the commission and the affirmance of the court of common pleas. R.C. 4141.282 governs unemployment compensation appeals to the court of common pleas. *Gallagher v. Alliance Hospitality Mgt.*, 5th Dist. No. 2009CA00164, 2010-Ohio-1882. More specifically, the statute provides:

The court shall hear the appeal on the certified record provided by the commission. If the court finds that the decision of the commission was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse, vacate, or modify the decision, or remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission.

R.C. 4141.282(H).

{¶7} This is the standard of review for unemployment compensation appeals, regardless of the level of appellate review. *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 696, 1995-Ohio-206. In reviewing commission decisions, a court is not permitted to make factual findings or reach credibility determinations. *Id.* citing *Irvine v. Unemployment Comp. Bd. of Review* (1985), 19 Ohio St.3d 15, 18. Similarly, it may not substitute its judgment on such issues for that of the commission. *McCarthy v. Connectronics Corp.*, 183 Ohio App.3d 248, 2009-Ohio-3392,

¶16, citing *Irvine* at 18. Instead, a court must "determine whether the [commission's] decision is supported by the evidence in the record." *Id.* Therefore, the focus of the analysis is on the commission's decision, "rather than that of the common pleas court." *Carter v. Univ. of Toledo*, 6th Dist. No. L-07-1260, 2008-Ohio-1958, ¶12, citing *Markovich v. Employers Unity, Inc.*, 9th Dist. No. 21826, 2004-Ohio-4193, ¶10, citing *Barilla v. Director, Ohio Dept. of Job & Family Servs.*, 9th Dist. No. 02CA008012, 2002-Ohio-5425, ¶6. Judgments supported by some competent, credible evidence on the essential elements of the controversy may not be reversed as being against the manifest weight of the evidence. *Carter* at ¶12, citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus.

{¶8} A claimant must carry the burden of proving his entitlement to unemployment compensation benefits. *Irvine* at 17, citing *Shannon v. Bur. of Unemployment Comp.* (1951), 155 Ohio St. 53; see also *Entler v. Ohio Dept. of Transp.*, 2d Dist. No. 2010 CA 52, 2011-Ohio-240, ¶23, citing *Silkert v. Ohio Dept. of Job & Family Servs.*, 184 Ohio App.3d 78, 2009-Ohio-4399, ¶36. The analysis begins by considering the eligibility requirements for receiving unemployment compensation benefits. More specifically, R.C. 4141.29(D)(2)(a) provides that a claimant is ineligible to receive such benefits if he is discharged for "just cause in connection with the individual's work[.]" "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; see also *Tzangas* at 697. The determination of whether there is just cause for discharge depends upon the factual circumstances of each individual case. *Johnson v. Edgewood City School Dist. Bd. of Edn.*, 12th Dist. No. CA2008-11-278, 2010-Ohio-3135, ¶14, citing

City of Warrensville Heights v. Jennings (1991), 58 Ohio St.3d 206, 207. Therefore, a just cause determination is primarily an issue to be resolved by the trier of fact. *Stark Area Regional Transit Auth. v. Director, Ohio Dept. of Job & Family Servs.*, 187 Ohio App.3d 413, 417, 2010-Ohio-2142, citing *Irvine* at 17.

{¶9} A just cause discharge requires some degree of fault on behalf of the employee. *Tzangas* at paragraph two of the syllabus. Fault may be established by demonstrating that an employee was unsuitable for the position from which he was discharged. *Id.* at paragraph three of the syllabus.

An employer may properly find an employee unsuitable for the required work, and thus to be at fault, when: (1) the employee does not perform the required work, (2) the employer made known its expectations of the employee at the time of hiring, (3) the expectations were reasonable, and (4) the requirements of the job did not change substantially since the date of the original hiring for that particular position.

Id. at paragraph four of the syllabus.

{¶10} In this matter, the commission found that claimant failed to meet the requirements of the position. It further found that claimant was advised of the requirements of the position and represented that he could fulfill those requirements at the time he was hired. The commission referenced the testimony of GMS's representative, which demonstrated that other employees met the requirements for sales representatives. Therefore, the commission found that the requirements of the position were reasonable. Finally, it found that the requirements had not changed since the date claimant was hired. As a result, the commission concluded that claimant was unsuitable for the position, such that claimant was discharged for just cause.

{¶11} As an initial matter, claimant argues that the commission erred by overlooking the threshold issue, which is: whether there was just cause for discharge. Claimant notes that the commission instead jumped straight to the issue of unsuitability. However, as the aforementioned rules of law demonstrate, reaching a determination on the issue of unsuitability answers the very question of whether there was just cause for discharge. See *McCarthy* at ¶15 (generally holding that one way to prove just cause is to show unsuitability, or "the inability to perform one's job," under *Tzangas*). After finding that claimant was unsuitable for the position, the commission concluded that there was just cause for the discharge. There was no error by the commission in this regard.

{¶12} Claimant's first two assignments of error reference the fact that GMS's sales manager was demoted to a sales representative during the third quarter of 2008. Claimant argues that the sales manager was the means through which he could have improved his productivity and met the requirements of his position. He therefore argues that it was unreasonable to warn him of a potential discharge if his productivity did not improve and then remove the means available to improve such productivity.

{¶13} Consideration of this fact, and claimant's first two assignments of error in general, would require this court to revisit the credibility determinations and factual findings already reached by the commission. We have no authority to do so in this case at this juncture. Despite claimant's misrepresentation to the contrary, nowhere does the record indicate that claimant was told, at the time of his hire, that a sales manager would assist him in fulfilling the expectations of his position. Instead, the evidence showed only that the office would have a sales manager, and that sales manager had weekly discussions with sales representatives about productivity.

{¶14} The commission was entitled to provide whatever evidentiary weight it deemed appropriate to the fact that claimant's sales manager was demoted to a sales representative during the third quarter of 2008. In this same regard, the commission also had the authority to consider the testimony demonstrating that claimant failed to meet the expectations of his position, both before and after the sales manager was demoted. It also had the authority to consider the evidence demonstrating that other employees met expectations on call activity and quotas. While claimant attempts to challenge the support underlying this testimony, again, it is the function of the commission, and not this court, to weigh the credibility of such testimony and reach factual findings. *Tzangas* at 696, citing *Irvine* at 18.

{¶15} All of this competent credible evidence exists in the record. Further, we may not substitute our judgment for that of the commission. *McCarthy* at ¶16, citing *Irvine* at 18. As a result, with regard to claimant's first and second assignments of error, we find that the commission's decision is not unlawful, unreasonable, or against the manifest weight of the evidence. Accordingly, we overrule claimant's first and second assignments of error.

{¶16} In his third assignment of error, claimant argues that the commission failed to properly apply *Tzangas*. First, he challenges the commission's finding that he failed to meet the requirements of the position. He argues that the commission was required to reach findings as to each way claimant failed to meet the requirements of his position. He challenges GMS's use of weekly averages of claimant's call activity to demonstrate he failed to meet the expectations on call activity. He argues that GMS should have been required to provide a breakdown of each and every time he failed to meet an expectation.

He offers no legal authority supporting these positions. Further, during the testimony of GMS's representative, the following exchange occurred:

HEARING OFFICER: Did [claimant] fail to meet some of [the expectations], or did he fail to meet all of them?

TIM AUSTIN: Failed to meet all of them.

(Tr. 6.) Additionally, claimant engaged in the following exchange:

HEARING OFFICER: Did you quit your job, or were you discharged?

[CLAIMANT]: I was discharged.

HEARING OFFICER: Did the employer tell you why?

[CLAIMANT]: That I didn't meet the expectations.

HEARING OFFICER: Did he indicate which expectations you failed to meet?

[CLAIMANT]: The expectations he was referring to, the 250 calls per week, the five new appointments per week – uh, yeah, per week – and also the 1.5 proposals per week.

(Tr. 10.)

{¶17} If claimant sought more detail in regards to a breakdown of his specific failures, then he certainly could have developed the record in this regard. The contentions in claimant's third assignment of error challenge the relative weight of the evidence supporting the commission's decision. Based upon our limited review, we reject claimant's challenge to the commission's finding on the first element of *Tzangas*.

{¶18} Claimant next challenges the commission's finding that the requirements of his position were reasonable, or the third element of *Tzangas*. More specifically, he argues that the expectations on call activities and sales quotas should have been

deemed unreasonable because of the poor state of the economy. He argues that GMS's evidence showing that other employees met these expectations fails to establish the third element required under *Tzangas*.

{¶19} Again, however, claimant's argument merely challenges the weight of the evidence, which the commission clearly accepted as being sufficient to support its unsuitability determination. Again, the testimony showed that other employees met expectations. Claimant acknowledged that he was properly trained and believed he could meet the expectations at the time of hire. Because we may not substitute our judgment for that of the commission on such evidentiary issues, we reject claimant's argument regarding the third element of *Tzangas*. *McCarthy* at ¶16, citing *Irvine* at 18. Additionally, because we have rejected the arguments supporting claimant's third assignment of error, we overrule the same.

{¶20} In his fourth assignment of error, claimant argues that the commission failed to consider portions of the ODJFS's file. He challenges the portion of the commission's decision providing that "[claimant] presented no evidence in the hearing in this matter to suggest that the requirements were not in fact attainable or reasonable." He argues that such evidence was provided to ODJFS and cites to R.C. 4141.281(C) in support of his argument that the commission was required to consider the entire ODJFS file, rather than just the evidence offered at the hearing.

{¶21} An appellate court must presume the regularity of administrative proceedings. *Moritz v. Bd. of Review, Ohio Bur. of Emp. Servs.* (June 11, 1992), 8th Dist. No. 62883, citing *Ostrander v. Parker-Fallis Insulation Co.* (1972), 29 Ohio St.2d 72; see also *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199 (no evidence that

tribunal failed to consider all of the evidence prior to rendering its decision). Simply because the commission indicated in its decision that claimant failed to present evidence during the hearing does not mean it did not consider the entire file. Claimant's contention does not overcome the presumption of the regularity of the commission's proceedings. We therefore overrule claimant's fourth assignment of error.

{¶22} Based upon the foregoing, we find that the decision of the UCRC to deny unemployment compensation benefits was not unlawful, unreasonable, or against the manifest weight of the evidence. Accordingly, we find that the Franklin County Court of Common Pleas did not err in affirming the denial. We therefore overrule claimant's four assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and TYACK, JJ., concur.
