

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

RICK TODD,	:	
	:	
Appellant,	:	Case No. 03CA2894
	:	
v.	:	
	:	<u>DECISION AND JUDGMENT ENTRY</u>
ADMINISTRATOR, OHIO	:	
DEPARTMENT OF JOB AND	:	
FAMILY SERVICES, et al.,	:	Released 4/20/04
	:	
Appellees.	:	

APPEARANCES:

Tammy L. Greenwald, Southeastern Ohio Legal Services, Portsmouth, Ohio, for Appellant Rick Todd.

Jim Petro, Attorney General, and Patria V. Hoskins, Assistant Attorney General, Columbus, Ohio, for Appellee Director, Ohio Department of Job and Family Services.

Harsha, J.

{¶1} Rick Todd appeals a judgment that affirmed the Unemployment Compensation Review Commission's finding that he quit his job at Mill's Pride, Inc. ("Mills Pride") without just cause and is therefore not entitled to unemployment benefits. Appellant argues that he did not intend to quit his employment and that he informed his employer that he was leaving due to illness. He also contends that the hearing officer's findings are erroneous because the hearing officer credited hearsay statements by the employer over Appellant's sworn testimony. We conclude that the hearing officer was free to disbelieve

Appellant's testimony and rely on admissible hearsay evidence in making his determination. Moreover, the employer presented sufficient evidence to establish that Appellant intended to quit his job by refusing to work in another department and leaving work without authorization, and that Appellant did not inform his employer that he was leaving due to illness. The Commission's denial of benefits to Appellant is not unlawful, unreasonable or against the manifest weight of the evidence. Therefore, we affirm the trial court's judgment.

{¶2} In February 2002, Appellant filed an application for unemployment compensation benefits. Appellee Director, Ohio Department of Job and Family Services ("ODJFS") denied the claim, finding that Appellant quit his employment without just cause and was not entitled to benefits. Appellant appealed this determination but Appellee affirmed its decision. Appellant appealed the re-determination decision and Appellee transferred jurisdiction to the Commission, which assigned the matter to a hearing officer.

{¶3} The hearing officer conducted a telephonic hearing during which Appellant and Chris Nourse, an employee relations representative at Mills Pride, testified. Appellant testified that Mills Pride hired him in August 1998 as a stacker, cutting foam in the foam department. Appellant was later diagnosed with hepatitis C and Mills Pride granted him permission under the Family Medical Leave Act ("FMLA") to leave work whenever he had a

doctor's appointment or became ill.

{¶4} Appellant testified that he normally works from 6 a.m. to 2 p.m. On February 6, 2002, he and his co-workers finished their work in the foam department around 10 a.m. and the "lead man," Mike Turner, instructed them to report to another building to assist a different department with its work. Appellant felt weak and informed Mr. Turner that he was sick and couldn't continue working that day. Mr. Turner informed Appellant that if he left work, he must turn in his time card - meaning he would no longer be employed by Mills Pride. Apparently, Mills Pride employees use their employer identification cards as their time cards and to enter and exit the premises. If an employee surrendered his time card, it would be tantamount to terminating his employment.

{¶5} Appellant testified that his supervisor, Mike Rowe, Sr., was unavailable and that Mr. Turner, as the lead man, is directly below Mr. Rowe in seniority. Therefore, Appellant did not attempt to ask anyone else for permission to leave work. Instead, Appellant turned in his time card and, along with his wife who was also a Mills Pride employee, left work. Appellant and his wife assumed that their departure caused their termination because Mr. Turner informed them that if they left, they were fired.

{¶6} Appellant testified that he did not file a grievance with the company regarding his separation because he "did not

know how to go about it." Appellant acknowledged that Mr. Turner did not instruct Appellant and his wife to leave, but said that if they left, it would constitute job abandonment. Appellant stated that no other employees witnessed his conversation with Mr. Turner and he never attempted to tell anyone at Mills Pride his version of the events.

{¶7} On cross-examination, Appellant testified that he did not feel well when he began work on February 6th and became more ill as the day progressed. Approximately a half hour before he left, before he even knew he would be asked to work in another department, Appellant informed Mr. Turner that he was not feeling well. Mr. Turner told him to sit down for a few minutes until he felt better. When he was instructed to report to the other department, Appellant again told Mr. Turner that he was ill and Mr. Turner told him that Mr. Rowe left instructions that everyone was to work in the other department that day. Appellant testified that the Mills Pride employees are usually allowed to leave work if the tasks in their own department are completed before the end of the shift.

{¶8} Appellant acknowledged that he did not report to the on-site medical department before leaving. Appellant stated that after he left, a co-worker informed him that Mr. Rowe stated that Appellant had quit. Appellant never spoke to Mr. Rowe or a human resources employee about the events of February 6th.

{¶9} Chris Nourse acknowledged that Appellant had FMLA

protection in case he became ill or had a doctor's appointment. Mr. Nourse testified that he spoke to Mr. Rowe and Mr. Turner and they indicated that they ran out of work in the foam department on February 6th. Often, employees assist in other areas when their help is needed. However, when Mr. Turner asked Appellant for this assistance, Appellant refused and walked out. Mr. Nourse believes that Appellant was protesting the assignment of additional tasks and that he either quit or was terminated for insubordination. Mr. Nourse testified that neither Mr. Rowe nor Mr. Turner indicated that Appellant said anything about being sick on February 6th.

{¶10} Mr. Nourse further testified that Mr. Turner did not have the authority to allow Appellant to leave because he is not a supervisor. To use FMLA time, Appellant was required to notify his supervisor, Mr. Rowe. Although Mr. Rowe was not present when these events occurred, he could have been paged or phoned since he was on the premises. Mr. Nourse testified that Appellant could also have reported to the Human Resources Department, which has an open door policy, or approached an area manager or another supervisor for permission to leave. Appellant could also have awaited Mr. Rowe's return prior to leaving. Mr. Nourse stated that employees resign by turning in their employment badges and Appellant knew the significance of this act.

{¶11} In his decision, the hearing officer found that Appellant had not mentioned to anyone that he was feeling ill on

the morning of February 6th. Rather, after he was instructed to work in another area, Appellant stated that he wanted to go home. Appellant failed to inform another supervisor that he was ill or to go to the on-site medical center or the Human Relations Department. The hearing officer further noted that Appellant presented no evidence that he was actually ill and did not go to the doctor after leaving work.

{¶12} The hearing officer concluded that Appellant "walked off the job without permission" and his voluntary surrender of his time card signified that he was quitting his employment. The hearing officer determined that Appellant quit work without just cause and was not entitled to unemployment compensation benefits, affirming Appellee's initial determination.

{¶13} After receiving the hearing officer's decision, Appellant requested a review by the Commission, which was disallowed. Appellant then filed an appeal with the Scioto County Court of Common Pleas, which affirmed the Commission's decision. Appellant timely appealed the trial court's judgment.

{¶14} In his sole assignment of error, Appellant asserts that the hearing officer's findings that he quit work without just cause and never told anyone he was sick are unlawful, unreasonable and against the manifest weight of the evidence.

{¶15} Unlike most administrative appeals where we employ an abuse of discretion standard, see *Lorain City School Dist. Bd. of Educ. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 260-

261, 533 N.E.2d 264, our review of an appeal from the decision of the Commission is identical to that of the Common Pleas Court. We must affirm the Commission's decision unless we find the decision to be unlawful, unreasonable, or against the manifest weight of the evidence. See R.C. 4141.28(N)(1); *Tzangas, Plakas & Mannos v. Ohio Bur. Of Emp. Serv.*, 73 Ohio St.3d 694, 696, 1995-Ohio-206, 653 N.E.2d 1207.

{¶16} In making this determination, we must give deference to the Commission in its role as finder of fact. We may not reverse the Commission's decision simply because "reasonable minds might reach different conclusions." On close questions, where the board might reasonably decide either way, we have no authority to upset the agency's decision. *Irvine v. Unemployment Comp. Bd. of Rev.* (1985), 19 Ohio St.3d 15, 18, 482 N.E.2d 587. Instead, our review is limited to determining whether the Commission's decision is unlawful, unreasonable or totally lacking in competent, credible evidence to support it. *Id.*

{¶17} R.C. 4141.29(D)(2)(a) provides that an individual may not obtain unemployment benefits if he "quit his work without just cause." Traditionally, just cause is that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act. *Irvine, supra*, at 17. The determination of just cause depends on the "unique factual considerations" of a particular case and is, therefore, primarily an issue for the trier of fact. *Id.*

{¶18} Relying on *Griffith v. Administrator* (Dec. 27, 1984), Cuyahoga App. No. 48301, Appellant argues that he did not quit his job at Mills Pride. Appellant submits that the key factor in determining whether an employee quit or was terminated from his employment is the employee's intent. Appellant contends the evidence demonstrates that he did not intend to surrender his employment at Mills Pride when he left the premises, but rather merely to stop working for that day.

{¶19} In *Griffith*, the Eighth District Court of Appeals affirmed the trial court's finding that the claimant did not voluntarily quit when he chose to leave his job in the face of a threat by his employer that if he left work the employer would consider it a resignation. The trial and appellate courts relied on several factors when making this determination: (1) the claimant had already completed a normal working day and most of his special overtime day when he left work; (2) the claimant attempted to report for work on the following day; (3) the claimant gave no indication that he intended to terminate his employment and simply acted to terminate his employment activity for that day; and (4) the claimant was a long term supervisory employee who reasonably believed he would be allowed to return to work despite the incident.

{¶20} Here, Appellant's own testimony could reasonably be construed to establish that he intended to quit when he left Mills Pride on February 6th. Appellant knew that turning in his

time card was the equivalent of terminating his employment but chose to do so rather than keeping his time card when he left. Appellant made no attempt to return to work, or to contact his supervisor or a Human Resources employee following his departure, nor did Appellant inquire about or follow the internal grievance process through which he could have regained employment at Mills Pride. Moreover, unlike the claimant in *Griffith*, Appellant left work in the middle of his shift, not near the end of the work day.

{¶21} We conclude that the Commission's determination that Appellant quit his employment is not unlawful, unreasonable or against the manifest weight of the evidence.

{¶22} Next, Appellant argues that the Commission's finding that Appellant did not inform Mr. Turner that he was ill is erroneous. Appellant argues that the hearing officer improperly relied upon the hearsay testimony of Mr. Nourse, rather than Appellant's sworn testimony, when concluding that Appellant left because he did not want to work in another department, rather than because he was ill.

{¶23} Appellant does not dispute that hearsay evidence is admissible in unemployment hearings under R.C. 4141.281(C)(2). However, Appellant argues that a hearing officer may not ignore the testimony of a claimant and instead base his decision solely on hearsay evidence from the employer. Appellant relies on, among other cases, *Taylor v. Bd. of Review* (1984), 20 Ohio App.3d

297, 485 N.E.2d 827, to support his position.

{¶24} In *Taylor*, the Eight District Court of Appeals held that it is unreasonable to give credibility to a hearsay statement and to deny credibility to the claimant testifying in person where the claimant's sworn testimony is contradicted only by the hearsay evidence. Several other courts have adopted the reasoning of *Taylor*. See, e.g., *Green v. Invacare Corp.* (May 26, 1993), Lorain App. No. 92CA5451; *Mason v. Administrator, Ohio Bur. of Employ. Serv.* (Apr. 7, 2000), Hamilton App. No. C-990573.

{¶25} However, in *Royster v. Board of Review* (Apr. 13, 1990), Scioto App. No. 89CA1826, we expressly declined to follow *Taylor*.

There, we noted that *Taylor's* rigid position conflicts with the Supreme Court's holding in *Simon v. Lake Geauga Printing Co.* (1982), 69 Ohio St.2d 41, 430 N.E.2d 468, that a referee's decision will be upheld even where that decision is based upon hearsay. We also noted that it is solely within the trier of fact's domain to assess witness credibility and the trier of fact is free to believe a witness completely, in part, or not at all.

Royster, supra. "To hold, as a matter of law, that the sworn testimony of a claimant must be given unquestioned credibility absent non-hearsay evidence to the contrary usurps the trier of fact's powers." *Id.*

{¶26} Appellant acknowledges our decision in *Royster* but nonetheless asks us not to follow its holding. We decline. We are required to give great deference to the hearing officer's

findings of fact and it would be inappropriate to disregard his findings simply because they are partially based on admissible hearsay testimony.

{¶27} Moreover, despite his claim to the contrary, we cannot conclude that the only evidence contradicting Appellant's testimony was the hearsay testimony. Mr. Nourse testified that Mr. Turner did not have the authority to allow Appellant to leave work under the FMLA because he was not a supervisor. Therefore, even assuming that Appellant informed Mr. Turner that he was leaving because he was ill, Appellant still "walked off the job" when he left work without first obtaining appropriate authorization. This amounts to misconduct punishable by immediate discharge according to the Mills Pride handbook. Finally, Appellant's own admission that he failed to contact a supervisor or anyone in the Human Resources Department either before leaving work or in the days following his departure from Mills Pride belies the fact that Appellant left due to illness.

{¶28} We conclude that the hearing officer was in the best position to weigh the credibility of the witnesses. While Mr. Turner's testimony would have been helpful, it was not necessary since hearsay evidence is admissible. The Commission's finding that Appellant quit his employment without just cause is not unlawful or unreasonable and there is some competent, credible evidence to support its finding.

{¶29} We overrule Appellant's sole assignment of error and

affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

Kline, P.J., concurs in judgment and opinion.
Evans, J., not participating.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and 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 Scioto County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Kline, P.J.: Concurs in Judgment and Opinion.
Evans, J.: Not Participating.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.