

[Cite as *Risinger v. Kroger Co.*, 2010-Ohio-3271.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TAMMY K. RISINGER, ET AL.

Appellants

-vs-

THE KROGER COMPANY

Appellee

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Sheila G. Farmer, J.

Case No. 09CA129

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 09CV341

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

July 1, 2010

APPEARANCES:

For Appellants

For Appellee

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Farmer, J.

{¶1} Appellant, Tammy Risinger, was employed with appellee, The Kroger Company, from July 1980 to February 2007 as an Assistant Customer Service Coordinator. She left appellee's employ via termination for alleged fraudulent use of coupons.

{¶2} On February 28, 2007, appellant filed an application for unemployment compensation. On March 20, 2007, appellant was granted unemployment compensation as it was determined that she was discharged without just cause. Appellee appealed the decision which was affirmed. Appellee appealed again, and the matter was transferred to the Unemployment Compensation Review Commission.

{¶3} A hearing was held on October 5, 2007. By decision dated same date, appellant was denied unemployment compensation as it was determined that she was discharged for just cause. Appellant appealed the decision which was denied.

{¶4} Thereafter, appellant filed an appeal with the Court of Common Pleas of Richland County, Ohio. The trial court remanded the case to the Commission to determine two factual issues. A hearing was held on January 14, 2009, and a final decision was made on February 4, 2009, granting appellant unemployment compensation as she was terminated without just cause.

{¶5} On March 5, 2009, appellee filed an appeal with the Common Pleas Court. By decision filed October 7, 2009, the trial court found the Commission's decision was against the manifest weight of the evidence as appellant was terminated for just cause; therefore, she was not entitled to unemployment compensation.

{¶6} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶7} "THE COURT OF COMMON PLEAS, IN FINDING THAT THE DECISION OF THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, FAILED TO CORRECTLY APPLY THE STANDARD OF REVIEW."

II

{¶8} "THE COURT OF COMMON PLEAS FAILED TO FIND THAT THE DECISION OF THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION IS SUPPORTED BY EVIDENCE IN THE RECORD."

I, II

{¶9} Appellant claims the trial court erred in reversing the Commission's decision. Specifically, appellant claims the trial court used an incorrect standard of review and the Commission's decision was supported by the weight of the evidence. We disagree.

{¶10} R.C. 4141.282 governs unemployment compensation appeals to the court of common pleas. Subsection (H) states the following:

{¶11} "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."

{¶12} Our role in reviewing the trial court's decision is to determine whether the trial court appropriately applied the standard of unlawful, unreasonable or against the manifest weight of the evidence. *Tzangas, Plakas & Mannos v. Ohio Bureau of Employment Services*, 73 Ohio St.3d 694, 1995-Ohio-206. While we are not permitted to make factual findings or determine the credibility of witnesses, we have the duty to determine whether the commission's decision is supported by the evidence in the record. *Hall v. American Brake Shoe Co.* (1968), 13 Ohio St.2d 11; *Kilgore v. Board of Review* (1965), 2 Ohio App.2d 69. This same standard of review is shared by all reviewing courts, from common pleas courts to the Supreme Court of Ohio. We are to review the commission's decision sub judice and determine whether it is unlawful, unreasonable, or against the manifest weight of the evidence. We note a judgment supported by some competent, credible evidence will not be reversed as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279.

{¶13} Unemployment compensation can be denied if the claimant quit his/her job without just cause or was discharged for just cause. R.C. 4141.29(D)(2)(a). "Just cause" is defined as "that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act." *Irvine v. Unemployment Compensation Board* (1985), 19 Ohio St.3d 15, 17, quoting *Peyton v. Sun T.V.* (1975), 44 Ohio App.2d 10, 12. The *Irvine* court at 17 further stated "each case must be considered upon its particular merits." In reviewing such a determination, we are not permitted to reinterpret the facts or put our "spin" to the facts.

{¶14} In its judgment entry filed October 7, 2009, the trial court recited the appropriate standard of review and made an appropriate analysis of the Commission's decision:

{¶15} "Under Ohio Rev. Code § 4141.282 (H), this court must hear this appeal on the certified record provided by the Commission. This statute also provides that if the court finds the decision of the Commission to be unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse, vacate, or modify the decision, or it may remand the matter to the Commission.

{¶16} "In the decision that is the subject of this appeal, the Commission made a finding of fact that the coupons 'were issued to claimant or her daughter as part of a program for newborns for which they had registered online. These coupons were issued between the dates of December 11, 2006, and January 22, 2007. Claimant had in fact purchased Enfamil products on January 13, 15, 18, and 30, 2007 in sufficient quantities that the coupons could have been used had they been presented at the time of purchase.'

{¶17} "The Commission then explained that it was the store's common practice to allow customers and staff to redeem coupons after they had purchased items for which the coupons could have been used. The Commission then held that Ms. Risinger had substantiated her claims of Enfamil purchases made in January, 2007 and that the coupons she redeemed were issued on dates that would have allowed them to be used for the purchase of the Enfamil products in question. Accordingly, the Commission held Ms. Risinger was terminated without just cause and removed the suspension of her benefit rights.

{¶18} "Ms. Risinger's testimony and the supporting documentation clearly demonstrated that there were only two checks issued in her own name (one for \$5.00 and the other for \$4.00) and that those two checks had not been issued to her as of the date of her formula purchase on January 15, 2007. Furthermore, not one of the January formula purchases (whether of Ms. Risinger or of her daughter) was for the type of formula to which two of the coupons were limited. Consequently, the Commission's finding that Ms. Risinger had substantiated her claim that she had made sufficient prior purchases of Enfamil in January of 2007 to qualify to redeem the Enfamil coupons on February 19, 2007, is against the manifest weight of the evidence."

{¶19} Appellant argues she established that all of the coupons she redeemed were for purchases of Enfamil either purchased by her or her daughter. Appellant further argues appellee did not have a definite policy on redemption of coupons after the purchase of the product.

{¶20} Via the testimony of Joe Reinhard, appellee's store manager, It is undisputed that appellant was terminated as a result of her actions on February 19, 2007:

{¶21} "Q. Was there a particular incident that lead to her separation?

{¶22} "A. Yes, there was.

{¶23} "Q. Can you explain or just describe what occurred?

{¶24} "A. Certainly. On February 19th of this year, Ms. Risinger brought a series of coupons to the front desk and asked an office helper to put those coupon values onto a gift card. The coupons are a part of the exhibit on page ten of the handouts. She brought those to the front desk. And there were \$29 worth of Enfamil coupons. And

she asked that associate to put the cash value on a gift card. And then the gift card was taken from the front desk to the UScan in order to purchase items that were not at all associated with the Enfamil formula coupons." October 4, 2007 T. at 6-7.

{¶25} Mr. Reinhard explained the use of a gift card for exchange of store coupons is only permitted at the point of sale. Id. at 8. He opined "[t]o put a cash value of any coupon on a gift card, walk away and use it for any other merchandise would constitute fraud." Id. Mr. Reinhard explained appellant's actions violated appellee's policy on honesty and integrity, Rule 16:

{¶26} "16. Honesty and integrity are the basic policies of The Kroger Co. and its employees. This is reflected in the handling of money, product, supplies, company property and equipment, and the use of time while working. Dishonesty in any form will not be tolerated and shall be cause for immediate discharge, regardless of amount or length of service." Id. at 11; Integrity and Honesty Policy included within Commission's Record.

{¶27} The issue of dishonesty relied upon by appellee was that the gift card, which held the amounts from the redeemed coupons for Enfamil, was not used to purchase Enfamil, but other products, including a competitor's brand of baby formula, Similac.

{¶28} Following the October 4, 2007 hearing, the trial court remanded the issue to the Commission to determine the following:

{¶29} "This matter is remanded to the Commission for the limited purpose of addressing the factual issues of whether the alleged prior purchases of Enfamil were made and whether the coupons at issue had been obtained by Ms. Risinger prior to the

time of those purchases." See, Decision on Administrative Appeal filed September 17, 2008.

{¶30} A hearing on the remand was held on January 14, 2009. Numerous exhibits were presented relative to the Enfamil coupon program and the redemption of coupons and the purchases made by appellant and her daughter with appellee. Upon cross-examination, appellant admitted to not having the receipts for the dates she claimed she purchased the Enfamil:

{¶31} "Q. But you do not have the receipts that are issued by the Kroger Company verifying or confirming that you - that these purchases were made by you with your Kroger Plus card on the dates that are reflected, the dates of January 13, 15, 18 and 30. Is that correct? You don't have those receipts?

{¶32} "A. No, I do not have those receipts.

{¶33} "Q. Now, you testified in the earlier hearing that you made a purchase on the 30th, and among the documents - uh, January 30 of 2007 - among the documents you submitted today for the hearing officer to consider, you have nothing to reflect in the way of a purchase that you made on January 30, of Enfamil products. Is that correct?

{¶34} "A. Yes, that is correct.

{¶35} "****

{¶36} "Q. Ms. Risinger, um, if you'll look at Exhibit C and Exhibit D, um, and Exhibit G, these records, as you describe them, reflect purchases not that you made, but that your daughter made, correct?

{¶37} "A. B is my daughter, D is my daughter, F is my daughter, and G would be my daughter's yes.

{¶38} "Q. So, the only purchase that - the only document that reflects a purchase that you made is Exhibit E, correct?

{¶39} "A. Yes, that's all that I have right here, that I can see.

{¶40} "Q. Okay. And the purchase that you made appears on - appears to have been made on January 15 of 2007, correct?

{¶41} "A. Yes, that's what I show.

{¶42} "****

{¶43} "Q. But those checks - those two checks that you submitted as L - on pages L and M, the two that were issued in your name, hadn't been issued as of the time you made the purchase on January 15, correct?

{¶44} "A. Those purchases, yes, I did make.

{¶45} "Q. But those checks had not been issued as of the date of the purchase you claim you made on January 15, right?

{¶46} "A. Right. Those checks had not been issued to me as of yet; that correct.

{¶47} "Q. Right. So you couldn't have had them in your possession when you made the purchase on January 15 is all I'm saying.

{¶48} "A. No, I did not have those in my hand at that particular time, for those - no." January 14, 2008 T. at 22-23, 24, and 28, respectively.

{¶49} Appellant conceded that the exhibits demonstrated that both she and her daughter made purchases of Enfamil. Id. at 37.

{¶50} Joyce Lyle, a human resource employee for appellee, testified on the issue of coupon redemption for someone else's purchases:

{¶51} "Q. Okay. Um, now, is it - pursuant to Kroger policy, can you get credit on a coupon for somebody else's purchase? In other words, can I go into a Kroger store, uh, and ask for a credit to be applied on a gift card or apply to a discount on a purchase I'm making, uh, against a coupon that should have been used, or could have been used, by somebody else in a prior purchase?

{¶52} "****

{¶53} "Ms. Lyle: That would be no." Id. at 42-43.

{¶54} Ms. Lyle testified appellee pulled the purchase records from appellant's Kroger Plus card and determined there were no purchases of Enfamil on the claimed dates. Id. at 48-52.

{¶55} The Commission concluded from the evidence presented that appellant or her daughter made the purchases and therefore termination for "just cause" was not proven by appellee. However, the trial court found the evidence in the record to be substantially different and determined that "just cause" did exist.

{¶56} From our review of the evidence, we find the coupons redeemed in February and placed on the gift card were not all in appellant's name. We further find the claimed purchases of Enfamil were not all made by appellant. Given the stated policy by appellee's witnesses that redemption of coupons are to be done by the named beneficiary only, and because coupons were used improperly for non-qualifying Enfamil products, we find the trial court did not err in finding just cause.

{¶57} Assignments of Error I and II are denied.

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

By Farmer, J.

Gwin, P.J. and

Hoffman, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ William G. Hoffman

JUDGES

SGF/sg 616

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TAMMY K. RISINGER, ET AL.	:	
	:	
Appellants	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
THE KROGER COMPANY	:	
	:	
Appellee	:	CASE NO. 09CA129

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County, Ohio is affirmed. Costs to appellant Tammy Risinger.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ William G. Hoffman

JUDGES