

[Cite as *Kiehl v. Univ. Hosps. Health Sys. – Heather Hill, Inc.*, 2009-Ohio-5379.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92547

JEAN M. KIEHL

PLAINTIFF-APPELLANT

vs.

**UNIVERSITY HOSPITALS
HEALTH SYSTEM – HEATHER
HILL, INC., ET AL.**

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-664066

BEFORE: Stewart, J., Kilbane, P.J., and Sweeney, J.

RELEASED: October 8, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Appellant, Jean M. Kiehl, appeals the decision of the Cuyahoga County Court of Common Pleas affirming the decision of the Ohio Unemployment Review Commission (“commission”) finding that she was terminated for just cause and denying her claim for unemployment compensation. We affirm the decision of the trial court.

{¶ 2} Kiehl was employed by University Hospitals Health System – Heather Hill, Inc. (“hospital”) from August 2005 until December 2007. She was hired as a “hospital representative” and her primary responsibility was to market the hospital’s extended care services provided at two hospital facilities, the Liberty and the Dolan centers. Her duties included promoting those services internally through contacts and tours at the hospital, and externally through contacts and visits to other hospitals, doctor’s offices, senior citizen centers, and other areas where seniors might meet. The primary goal of Kiehl’s job was to increase the census at the two extended care facilities.

{¶ 3} On December 8, 2007, Kiehl was terminated from her job. She timely applied for unemployment compensation benefits. The Ohio Department of Job and Family Services (“ODJFS”), through its director, made an initial determination that Kiehl was terminated without just cause in connection with her job and approved Kiehl’s claim for benefits. The hospital appealed this decision. On February 4, 2008, ODJFS issued a redetermination and affirmed its initial determination.

{¶ 4} The hospital appealed the redetermination and the appeal was transferred to the commission. A hearing was held by telephone on May 5, 2008. In a decision dated May 16, 2008, the hearing officer reversed ODJFS's redetermination and found that Kiehl was discharged with just cause in connection with work. As a result, Kiehl's claim for unemployment compensation benefits was denied. The commission disallowed Kiehl's request for review of the hearing officer's decision.

{¶ 5} On appeal, the Cuyahoga County Court of Common Pleas affirmed the commission's decision. Kiehl timely filed this appeal and raises the following assignment of error for our review.

{¶ 6} "I. The trial court erred in finding that the Appellant was discharged for just cause."

{¶ 7} When seeking unemployment benefits, an applicant submits information to the ODJFS in support of his or her claim. The initial determination as to whether a discharged employee is entitled to unemployment compensation is made by the director of ODJFS. R.C. 4141.28(B). This determination is subject to an appeal to the commission for a hearing de novo. R.C. 4141.281(C)(1) and (3).

{¶ 8} A party who is dissatisfied with the final determination of the commission may appeal that decision to the appropriate court of common pleas, which shall hear the appeal on the record certified by the commission. R.C. 4141.282(H).

{¶ 9} On appeal to the common pleas court, "[i]f the court finds that the decision 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.” *Id.* On appeal to this court, we apply the same standard of review as the trial court. *Rodriguez v. Ohio Dept. of Job & Family Servs.*, 165 Ohio App.3d 546, 2006-Ohio-97.

{¶ 10} “[W]hile appellate courts are not permitted to make factual findings or to determine the credibility of witnesses, they do have the duty to determine whether the [commission’s] decision is supported by the evidence in the record.” *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.* (1995), 73 Ohio St.3d 694, 697. Accordingly, we are limited in our review to determining whether the decision is supported by the evidence in the record, and may reverse the commission’s decision only if it is unlawful, unreasonable, or against the manifest weight of the evidence. “The fact that reasonable minds might reach different conclusions is not a basis for the reversal of the [commission’s] decision.” *Irvine v. State Unemployment Comp. Bd.* (1985), 19 Ohio St.3d 15, 17.

{¶ 11} Pursuant to R.C. 4141.29(D)(2)(a), an employee is ineligible to receive unemployment compensation benefits if he or she was discharged for “just cause.” Just cause in this context has been defined as “that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.” *Tzangas*, 73 Ohio St.3d at 697. Fault on behalf of the employee is an essential component of a just cause termination. *Id.* If an employer has been reasonable in finding fault on behalf of an employee, then the employer may terminate the employee with just cause. *Id.* at 698.

{¶ 12} *Tzangas* sets out a four-prong test for finding the employee at fault and, therefore, discharged for good cause: that (1) the employee does not perform the required work; (2) the employer made known its expectations to 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 the employee was hired for the position. *Id.* at paragraph four of the syllabus.

{¶ 13} Kiehl challenges the commission's finding that she did not perform the required work and was thus terminated for just cause. Kiehl argues that the ODJFS's original determination was correct. She contends that she performed her work, the requirements of the job changed since the date she was hired, and that the hospital's expectations were unreasonable. She states she had satisfactory or better performance evaluations in the past and had received several performance related awards. She argues that she had no problems at work until the hospital hired Linda Marshall as her supervisor. Kiehl claims Marshall changed her job from that of a "marketing" position, as she was hired to do, to that of a "sales" position. She further claims that Marshall set unreasonable goals, failed to provide her with promised sales training sessions, and fired her before the sessions were to have been completed. Finally, Kiehl alleges that the real reason she was fired was her complaint to the hospital's integrity hotline.

{¶ 14} The hearing officer made the following factual findings. Kiehl was employed as a hospital representative. Her main charge was to market the hospital's two extended care services facilities both within the hospital and at external sites

including other hospitals, doctor's offices, senior citizen centers, and other areas where individuals requiring the hospital's services would meet. The goal of her position was to increase the census at the two facilities. In order to meet her target goal, Kiehl was given specific directives relating to external marketing. Kiehl had been lacking in that area. She was instructed to make additional calls to doctors' offices and hospitals and to set up meetings to promote the facilities. Additionally, Kiehl was instructed to fax the facility's vacancy list each week to the area hospitals. Kiehl failed to aggressively pursue external marketing efforts that resulted in her inability to meet the hospital's target census goals. While Kiehl had the ability to fax the census numbers on a weekly basis to area hospitals, she failed to obtain the necessary telephone numbers to complete the task.

{¶ 15} Based upon these facts, the hearing officer concluded that Kiehl was given reasonable directives as to how to improve her performance at work but did not follow the directives. He further found that Kiehl had the ability to follow the directions given, but failed to follow through. This failure to follow her employer's directives was sufficient fault to create just cause in connection with work for Kiehl's discharge.

{¶ 16} We have reviewed the record and conclude that the decision of the commission is supported by the evidence. The record shows that under Marshall's supervision, the quality and results of Kiehl's work failed to improve despite the fact that she was made aware of the need for improvement.

{¶ 17} Linda Marshall testified that she was hired as the hospital's director of marketing and new business development in August 2007. She stated that the

hospital became dissatisfied with Kiehl's performance because she was not improving the census in the programs. She met with her whole team in September 2007 and established a plan in order to meet the performance targets the hospital had placed upon them. She stated that she spoke with Kiehl on various occasions and then, on October 15, 2007 she met with Kiehl and put together some "goals of targets for census building and also for external marketing targets and miscellaneous other goals for internal things that she is to do."

{¶ 18} Kiehl was instructed to fax the facilities vacancy list to the area hospitals each week to advise them of the availability of apartments in the extended care facilities. Kiehl was also instructed to make additional external marketing calls to set up meetings with doctors and other hospitals to promote the hospital's programs and facilities. Marshall gave Kiehl a goal of, "at least 15 outreach calls per week, resulting in five additional inquiries, this means families inquiring as a result of her outreach or referral services, inquiring about our services." Marshall told Kiehl that her target goal was to increase the census in the programs by three in October and November, and by two in December. Marshall testified that she offered to coach Kiehl on sales techniques but that Kiehl would have to take the first step and set up a few appointments. She stated that in the two months before she was discharged, Kiehl did not set up a single outside appointment and failed to obtain the telephone numbers necessary to fax the vacancy list to all of the area hospitals.

{¶ 19} Kiehl admitted that she did not complete the tasks of faxing local hospitals or setting up external marketing appointments as instructed to meet her

target goals. Kiehl told the hearing officer that she began faxing the vacancy list to the five hospitals she had numbers for, but did not obtain additional numbers as instructed. She said she told Marshall that she had hoped the hospital liaisons would be able to get her the numbers because they were in the hospitals. As of the time she was terminated, she still had only the five fax numbers.

{¶ 20} Documentary evidence in the record includes the September 2007 business development plan established by Marshall that covered all of the employees under her supervision, including Kiehl. The plan outlined specific tasks for each employee to complete in order to accomplish stated goals. Nothing in the record suggests that the tasks assigned to Kiehl were unreasonable or that her job responsibilities changed substantially before she was terminated.

{¶ 21} The evidence also demonstrates that Kiehl was aware since the time of her hiring that her job was “marketing” the hospital’s extended care services. In her application for unemployment benefits, Kiehl described the requirements of her job as, “internal and external marketing for 2 Assisted Livings and for Outpatient Rehabilitation Program. Community events as well as working with local hospitals and Senior Centers. Daily phone contact and tours as well as written correspondence as needed.” In January 2007, Kiehl was given a performance evaluation that stated “focus more on external marketing” as one of Kiehl’s performance goals.

{¶ 22} As to Kiehl’s assertion that her “marketing position” was changed to a “sales position,” we note that by definition, marketing is synonymous with selling.

See *Firsdon v. Mid-American Natl. Bank* (Dec.13, 1996), Wood App. No. WD-96-009 (“The word ‘marketing’ is defined as ‘the act or process of selling or purchasing in a market.’ Webster’s Tenth Collegiate Dictionary (1996) 712. The verb ‘market’ is a synonym of the word ‘sell.’ Id.”). Also, in the original job posting from August 2005, the position description stated: “Assists the hospital in maximizing the utilization and generating additional revenue from inpatient and outpatient census.” The position requirements included: “A minimum of three years of medical sales or related experience, ideally including close contact with physicians. * * * Must demonstrate personal initiative, poise, confidence, willingness to accept challenges, and possess a proven hospital/sales background.” Therefore, Kiehl was aware from the beginning that the position was a sales position with the goal of increasing hospital revenue through improving census figures.

{¶ 23} There is no question that Marshall sought to change how Kiehl was performing her job duties. Marshall placed the focus on external marketing as a way of selling the hospital’s extended care services and filling the hospital’s facilities. She pushed Kiehl to perform more external marketing tasks. However, this change represented more of a shift in perspective, rather than a “substantial” change in duties as that term is used in *Tzangas*.

{¶ 24} Lastly, we note that the certified record in this case contains a copy of Kiehl’s request for review of the hearing officer’s decision filed pursuant to R.C. 4141.281. Attached to this request for review are documents that Kiehl failed to first submit to the hearing officer for consideration. These attachments include a copy of

the complaint from Kiehl's wrongful discharge civil action in federal court and documents purported to show "move-ins" and census figures for 2007 and 2008 for the Liberty facility. Kiehl cites to these documents as proof that the low census numbers relied on by Marshall were due to "financial reasons, medical reasons, and death" and not to Kiehl's lack of performance.

{¶ 25} Aside from the issue of whether these documents were properly before the commission or the court, we find these documents are immaterial to this appeal. The unrefuted evidence in the record demonstrates that over the course of two months, Kiehl failed to comply with the dictates of her supervisor. She did not make the weekly outreach calls as instructed; she failed to schedule even a single external marketing appointment with a doctor's office, senior center, or other location; and, she failed to take the necessary steps to add area hospitals to the facility vacancy fax list as instructed. Given this demonstrated lack of performance, any argument that the census figures would have gone down despite her performance is speculative.

{¶ 26} We find the review commission's decision was neither unreasonable nor unlawful, nor against the manifest weight of the evidence. From the record and the evidence, the commission could reasonably find that the hospital discharged Kiehl for just cause for failing to adequately perform her job of marketing the hospital's extended care services. Accordingly, appellant's sole assignment of error is overruled and the judgment of the trial court is affirmed.

It is ordered that appellees recover of appellant their 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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

MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
JAMES J. SWEENEY, J., CONCUR