

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

CAROL S. KLEMENCIC

C.A. No. 25293

Appellant

v.

ROBINSON MEMORIAL HOSPITAL

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2009 07 5275

Appellee

DECISION AND JOURNAL ENTRY

Dated: October 20, 2010

WHITMORE, Judge.

{¶1} Plaintiff-Appellant, Carol Klemencic, appeals from the judgment of the Summit County Court of Common Pleas, affirming the Unemployment Compensation Review Commission’s determination that she was terminated for just cause. This Court affirms.

I

{¶2} Klemencic began working as an ultrasonographer at Robinson Memorial Hospital (“Robinson Memorial”) on September 1, 1997 and worked on a per diem basis until February 2007. Klemencic generally received positive evaluations of her work performance, but Robinson Memorial noted on several occasions that she failed to properly document procedures and struggled with her written communication skills. On February 11, 2007, Klemencic began working on a full-time basis. Thereafter, Robinson Memorial issued her multiple warnings, placed her on corrective probation, and ultimately discharged her on August 25, 2008. According to Klemencic, Robinson Memorial sought to discharge her after an incident that

occurred on February 10, 2007 and essentially created instances of misconduct so as to have a basis to terminate her. The February 10th incident involved the fetal demise of a patient's unborn fetus after a misdiagnosed placental abruption. According to Robinson Memorial, it discharged Klemencic due to a pattern of uncorrected behavior, including scheduling problems, poor oral and written communication skills, and difficulties with patient exams.

{¶3} After Robinson Memorial terminated Klemencic, she sought unemployment compensation. The Ohio Department of Job and Family Services (“ODJFS”) ultimately determined that Klemencic was eligible for unemployment benefits. Robinson Memorial appealed, and ODJFS transferred the matter to the Unemployment Compensation Review Commission (“UCRC”). After several procedural difficulties that have no bearing upon the outcome in this matter, a telephone hearing took place on May 6, 2009. Klemencic and Barbara Miley, the Manager of Radiology at Robinson Memorial, were the only ones who testified at the hearing. The hearing officer indicated, however, that Judy Mink, the Department Director, also “observed the hearing.” On June 17, 2009, the hearing officer issued a decision, concluding that Robinson Memorial terminated Klemencic for just cause.

{¶4} Klemencic appealed from the hearing officer's decision in the Summit County Court of Common Pleas. Klemencic, ODJFS, and Robinson Memorial all briefed the issue of whether Robinson Memorial terminated Klemencic for just cause. On February 18, 2010, the trial court affirmed the UCRC's decision, concluding that there was just cause for termination.

{¶5} Klemencic now appeals from the court's judgment and raises one assignment of error for our review.

II

Assignment of Error

“THE TRIAL COURT ERRED IN AFFIRMING THE [UCRC] WHERE ITS DECISION WAS NOT BASED ON COMPETENT, CREDIBLE EVIDENCE SUPPORTED BY HEARSAY, BUT WAS BASED ON HEARSAY.”

{¶6} In her sole assignment of error, Klemencic argues that the court erred by affirming the UCRC’s decision because that decision was based solely upon hearsay and not competent, credible evidence. We disagree.

{¶7} “This [C]ourt is required to focus on the decision of the UCRC, rather than that of the common pleas court, in unemployment compensation cases.” *Ro-Mai Industries, Inc. v. Weinberg*, 9th Dist. No. 23792, 2008-Ohio-301, at ¶7. “[A]n appellate court may only reverse an unemployment compensation eligibility decision by the [UCRC] if the decision is unlawful, unreasonable, or against the manifest weight of the evidence.” *Moore v. Comparison Market, Inc.*, 9th Dist. No. 23255, 2006-Ohio-6382, at ¶7, citing *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.* (1995), 73 Ohio St.3d 694, 696. When reviewing a UCRC decision, “[e]very reasonable presumption must be made in favor of the [decision] and the findings of facts [of the UCRC].” *Upton v. Rapid Mailing Servs.*, 9th Dist. No. 21714, 2004-Ohio-966, at ¶11, quoting *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19. “The resolution of factual questions is chiefly within the UCRC’s scope of review.” *Ro-Mai Industries, Inc.* at ¶8. “The fact that reasonable minds might reach different conclusions is not a basis for the reversal of the [UCRC’s] decision.” *Irvine v. State Unemp. Comp. Bd. of Review* (1985), 19 Ohio St.3d 15, 18.

{¶8} A party is entitled to unemployment benefits if he is terminated without just cause. R.C. 4141.29(D)(2)(a); *Upton v. Rapid Mailing Serv.*, 9th Dist. No. 21714, 2004-Ohio-966, at ¶13. “The claimant has the burden of proving her entitlement to unemployment

compensation benefits under this statutory provision[.]” *Irvine*, 19 Ohio St.3d at 17. Traditionally, in the statutory sense, “just cause” has been defined as ““that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.”” *Id.*, quoting *Peyton v. Sun T.V. & Appliances* (1975), 44 Ohio App.2d 10, 12. “The determination of whether an employer had just cause to terminate an employee is a factual question primarily within the province of [the] UCRC, and one that reviewing courts are precluded from inquiring into during these administrative appeals.” *Ro-Mai Industries, Inc.* at ¶9.

{¶9} “Ohio case law dictates that the Review Commission is permitted to consider hearsay testimony in making unemployment compensation decisions.” *Moore* at ¶13. Klemencic agrees that a hearing officer may rely upon hearsay when fashioning his decision, but argues that hearsay cannot be the only basis for a decision. Klemencic primarily relies upon *Taylor v. Board of Review* (1984), 20 Ohio App.3d 297, in support of her argument. In *Taylor*, the Eighth District held that “where the sworn testimony of a witness is contradicted only by hearsay evidence, to give credibility to the hearsay statement and to deny credibility to the claimant testifying in person is unreasonable.” *Taylor*, 20 Ohio App.3d at 299. Accord *Green v. Invacare Corp.* (May 26, 1993), 9th Dist. No. 92CA5451, at *1-2 (reversing where hearing officer’s decision rested “almost entirely on hearsay statements”). Klemencic, who testified on her own behalf, argues that the hearing officer erroneously discredited her sworn testimony in favor of hearsay evidence presented by Robinson Memorial. She avers that, disregarding the hearsay evidence, the record does not contain competent, credible evidence that Robinson Memorial terminated her for just cause.

{¶10} The hearing officer’s decision specifically provides that “[t]he decision of the Review Commission is based upon the entire record,” which includes both hearsay and non-

hearsay. The record consists of the testimony of Klemencic and Miley, Klemencic's immediate supervisor, and various documents that Robinson Memorial introduced into evidence. Miley testified that she supervised Klemencic over a period of eight years and that Klemencic had a pattern of "not finishing what she started[.]" According to Miley, Klemencic's problems escalated once she became a full-time employee. Miley testified that she would personally speak with Klemencic each time a problem occurred, but that Robinson Memorial did not begin to issue corrective action reports until the problems increased in frequency. Miley would retain a list of Klemencic's misconduct in a Microsoft Word document, as she did with all her employees, until she felt that a formal report was necessary. Before discharging Klemencic, Robinson Memorial issued her four corrective action reports dated October 25, 2007, April 18, 2008, May 5, 2008, and August 25, 2008. The reports referenced acts of misconduct dating from May 2007 until August 2008. Miley testified as to the content of the reports. When Klemencic received corrective action reports in May 2008 and August 2008, Miley's lists were attached as "supporting documentation." Miley responded affirmatively when asked whether Klemencic ever took "ownership or responsibility for any of it" during Miley's conversations with her. Miley also testified that it was ultimately her decision to discharge Klemencic.

{¶11} Klemencic testified that she never received a single negative evaluation during her history with Robinson Memorial and only started receiving complaints of misconduct after February 10, 2007. Yet, even Klemencic's 2006 Annual Performance Evaluation notes that: (1) Klemencic "is a bit weak in follow-through"; (2) her "[p]aperwork trail is often disorganized, making it difficult for staff to relieve her"; (3) "[t]here have been times [Klemencic] is on the schedule [and] has not come in" (sic); and (4) Klemencic "does not take criticism well." Klemencic testified that she believed she was terminated because she was outspoken about the

February 10, 2007 incident and that Robinson Memorial wanted to blame her for the incident. When cross-examined on the specific instances of misconduct contained in a May 5, 2008 corrective action report, Klemencic denied much of the report's contents. Robinson Memorial also introduced, however, a response that Klemencic wrote after she received the May 5th corrective action report. Klemencic's response begins with "I generally accept the statements contained in the Corrective Action Report[.]" The report noted Klemencic's "poor work performance," problems with documentation, difficulties with the scanning equipment, and issues with delaying patient exams.

{¶12} We do not agree with Klemencic's assertion that the corrective action reports were the only pieces of evidence in support of the hearing officer's determination that Robinson Memorial terminated her for just cause. Klemencic's 2006 Annual Performance Evaluation also contained negative comments about her attitude and work performance, despite her sworn testimony that she never received a negative evaluation before February 2007. Miley testified that Klemencic had a pattern of "not finishing what she started" and that she ultimately decided to terminate Klemencic because of the numerous complaints she received from radiologists and other employees. Miley further testified that she personally had conversations with Klemencic when misconduct issues arose and that Klemencic did, at times, accept responsibility for her actions. The May 5, 2008 corrective action report that Miley issued included a list from Miley of eleven separate instances of misconduct ranging from May 2007 through April 2008. Klemencic refused to accept responsibility for most of the cited acts of misconduct when she testified at the hearing. Yet, Klemencic's own written response to the May 5, 2008 corrective action report indicated that she generally accepted the statements contained in the report. As such, there were several pieces of evidence in the record that directly contradicted Klemencic's sworn testimony.

{¶13} The record reflects that the hearing officer properly considered the corrective action reports in conjunction with the other evidence in the record. See *Barilla v. Director, Ohio Dept. of Job & Family Servs.*, 9th Dist. No. 02CA008012, 2002-Ohio-5425, at ¶14 (concluding that hearing officer properly considered hearsay evidence in conjunction with other evidence, including business records, the claimant’s written forms, and the claimant’s own testimony). “An ordinarily intelligent person could find that [Robinson Memorial’s] decision to terminate [Klemencic] was justified[.]” *Myers v. Ohio Dept. of Job & Family Servs.*, 9th Dist. No. 09CA0024, 2009-Ohio-6023, at ¶9 (affirming just cause determination where human resources representative testified about claimant’s reported acts of misconduct). Therefore, Klemencic’s sole assignment of error lacks merit.

III

{¶14} Klemencic’s sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
MOORE, J.
CONCUR

APPEARANCES:

PATRICK J. PEROTTI, Attorney at Law, for Appellant.

RICHARD CORDRAY, Attorney General, and LORI WEISMAN, Assistant Attorney General, for Appellee.

KAREN D. ADINOLFI, Attorney at Law, for Appellee.