

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

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| David A. Bennett, D.D.S., LTD.,                                 | : |   |
| Appellant-Appellant,  | : |   |
| v.  | : | No. 11AP-1029<br>(C.P.C. No. 11CVF-06-7163) |
| Director, Ohio Department of Job and<br>Family Services et al., | : | (REGULAR CALENDAR)                          |
| Appellees-Appellees.  | : |   |

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D E C I S I O N

Rendered on May 24, 2012

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*Duncan Simonette, Inc., Brian K. Duncan, and Bryan D. Thomas*, for appellant.

*Michael DeWine*, Attorney General, and *Patria V. Hoskins*, for appellee Director, Ohio Department of Job and Family Services.

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APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} David A. Bennett, D.D.S., LTD., appellant, has filed an appeal from the judgment of the Franklin County Court of Common Pleas, in which the court affirmed the decision of the Unemployment Compensation Review Commission ("commission"), a division of the Ohio Department of Job and Family Services ("ODJFS"), appellee. In its decision, the commission found Sherry Jo Roberts, appellee, was entitled to receive unemployment benefits.

{¶ 2} We will set forth a more detailed recitation of the facts in our analysis of appellant's assignments of error. On January 21, 2002, Roberts began working as a dental assistant for appellant, a dental office at which Dr. David A. Bennett practices. Appellant issued "report cards" to Roberts on February 4 and March 11, 2010, which addressed Roberts's poor attitude and performance issues. Roberts also received written warnings on March 11 and May 25, 2010, regarding deficient workplace performance. On July 6, 2010, appellant gave staff members tests regarding new workplace rules, and Roberts performed poorly.

{¶ 3} On July 30, 2010, appellant terminated Roberts's employment via a certified letter dated July 29, 2010, in which appellant indicated that it needed dependable and accountable employees, and it did not believe that continuing the employment relationship would be mutually beneficial.

{¶ 4} On August 13, 2010, Roberts filed an application for determination of benefits rights seeking unemployment compensation which was disallowed based upon a finding that Roberts was terminated with just cause. Roberts appealed the determination to the commission. After hearings were held, the commission hearing officer issued a decision on March 29, 2011, finding that Roberts was terminated without just cause, thereby making her eligible for unemployment compensation. Appellant filed a request for review of the commission's decision, which the commission denied on May 11, 2011. Appellant filed an appeal with the Franklin County Court of Common Pleas. On October 26, 2011, the common pleas court affirmed the commission's decision. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

[I.] THE TRIAL COURT ERRED WHEN IT FAILED TO VACATE THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION'S MAY 11, 2011 DECISION DENYING APPELLANT'S REQUEST FOR REVIEW.

[II.] THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT, BASED ON THE EVIDENCE IN THE RECORD, THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION'S MAY 11, 2011 DECISION WAS UNLAWFUL, UNREASONABLE, OR AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

[III.] THE TRIAL COURT ERRED WHEN IT FAILED TO VACATE THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION'S DECISION IN DETERMINING APPELLANT TERMINATED APPELLEE WITHOUT JUST CAUSE.

[IV.] THE TRIAL COURT ERRED WHEN IT FAILED TO VACATE THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION'S MAY 11, 2011 DECISION AS IT GOES AGAINST PUBLIC POLICY AND THE INTENTNION OF THE OHIO LEGISLATURE.

{¶ 5} In all of appellant's assignments of error, appellant contests the trial court's affirmance of the commission's decision. A trial court and an appellate court employ the same, well-established standard of review in unemployment compensation appeals: "[A] reviewing court may reverse the board's determination only if it is unlawful, unreasonable, or against the manifest weight of the evidence." *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 697 (1995); R.C. 4141.282(H). When a reviewing court (whether a trial or appellate court) applies this standard, it may not make factual findings or determine witness credibility. *Irvine v. State Unemployment Comp. Bd. of Rev.*, 19 Ohio St.3d 15, 18 (1985). Factual questions remain solely within the commission's province. *Tzangas* at 696. Thus, a reviewing court may not reverse the commission's decision simply because "reasonable minds might reach different conclusions." *Irvine* at 18. The focus of an appellate court when reviewing an unemployment compensation appeal is upon the commission's decision, not the trial court's decision. *Moore v. Comparison Mkt., Inc.*, 9th Dist. No. 23255, 2006-Ohio-6382, ¶ 8.

{¶ 6} The Unemployment Compensation Act " 'was intended to provide financial assistance to an individual who had worked, was able and willing to work, but was temporarily without employment through no fault or agreement of his own.' \* \* \* The Act does not exist to protect employees from themselves, but to protect them from economic forces over which they have no control. When an employee is at fault, he is no longer the victim of fortune's whims, but is instead directly responsible for his own predicament. Fault on the employee's part separates him from the Act's intent and the Act's protection. Thus, fault is essential to the unique chemistry of a just cause termination." *Tzangas* at

697-98, quoting *Irvine* at 17. Nevertheless, the unemployment compensation statutes must be liberally construed in favor of awarding benefits to the applicant. *Clark Cty. Bd. of Mental Retardation & Dev. Disabilities v. Griffin*, 2d Dist. No. 2006-CA-32, 2007-Ohio-1674, ¶ 10, citing R.C. 4141.46; *Ashwell v. Ohio Dept. of Job & Family Servs.*, 2d Dist. No. 20552, 2005-Ohio-1928, ¶ 43.

{¶ 7} We will address appellant's first, second, and third assignments of error together, as they are related. Appellant essentially argues in these assignments of error that the commission's determination was unlawful, unreasonable, or against the manifest weight of the evidence. The pertinent testimony before the commission hearing officer was as follows. Angela Barnes, who became appellant's clinical administrator in January 2010 testified that Roberts had been given multiple warnings prior to January 2010, but these were not written, and there were no employee files kept at the time. With regard to the February 4, 2010 report card, Barnes testified that the report card discussed Roberts's poor attitude, her negative response to workplace communications, her failure to be a team player, and her disrespect toward others. The February 4, 2010 report card also discussed the need for lab bills to be handled properly according to office protocol. Barnes was unable to recall specific items or situations to illustrate these criticisms.

{¶ 8} With regard to the March 11, 2010 report card, Barnes testified that it concerned Roberts's poor attitude. Barnes said she told Roberts to get some whitening trays prepared for a scheduled patient and Roberts replied that she would try to get them completed. In another situation, Barnes told Roberts there was a schedule change, and Roberts asked why she needed to know. In another situation demonstrating her failure to be a team player, a patient was waiting for hygiene, but Roberts told the hygienist that she did not have time to clean her room, even though Roberts did not have a patient at the time. Barnes also stated that Roberts did not follow protocols for several morning meetings in February 2010, and she also failed to set up trays properly and turn in supply and procedure lists. Roberts never wrote any responses on the report cards when she was given them. Barnes stated that, after Roberts was given the report cards, Roberts never verbally responded to any of the criticisms.

{¶ 9} With regard to the March 11, 2010 written warning, Barnes testified Roberts received it because she failed to turn in procedure lists and a tray setup sheet, as well as

her failure to be a team player. Barnes said she requested the supply list on January 12, 2010, and it was due on February 2, 2010. Roberts had told her she did not have time to complete the supply list and, after Barnes extended the deadline to February 16, 2010, Roberts told her that the list was still not completed. Further, Barnes asked for the procedure list and tray set up at a February 4, 2010 meeting but Roberts never completed them. Also, other employees complained about Roberts's attitude, and Roberts failed to make any changes. As a consequence of Roberts's poor performance in these respects, appellant did not pay Roberts a March 2010 bonus.

{¶ 10} With regard to the May 25, 2010 written warning, Barnes testified that an Invisalign case had been available at the lab for three weeks but Roberts failed to notify the patient contrary to office protocol. The same thing had happened on two prior occasions, and Roberts had been warned. Barnes stated that, as the lead assistant, it was Roberts's duty to notify Barnes when a case arrived.

{¶ 11} With regard to the July 6, 2010 office-wide protocol tests, Barnes testified that Roberts scored very, very low on them. Barnes stated that a procedure and protocol handbook was given to all employees in January 2010. The tests related to the procedures and protocols for clinical work, front desk work, and cell phones.

{¶ 12} Barnes stated that, within one week of Roberts's termination, appellant hired a replacement who made the same wage as Roberts.

{¶ 13} Roberts also testified at the commission hearing before the hearing officer. Roberts testified that she did not agree with what Barnes wrote on the report cards and told Barnes such. Roberts did not believe her performance had changed during the last six months of employment, as compared to the prior seven or eight years. With regard to the July 6, 2010 tests on office procedure and protocol, Roberts testified that the majority of the questions covered front desk issues where she did not work.

{¶ 14} Roberts stated that, after she received her first report card, Barnes told her to look for another job which Barnes denied in her testimony. She also testified that Barnes told her she did not like her. Roberts also stated that Barnes told her that she was going to treat Roberts badly because Roberts had treated Barnes badly when she was training her. Roberts was too hard on her, Barnes told her, and Barnes said she cried a lot during her training as a result. However, Roberts believed they got along fine. As far as

being a team player, Roberts testified that she would come to the office after regular hours to meet repair people, assist if there was an emergency patient who came in after regular hours, and shop for the office during her off hours. In 2010, Dr. Bennett told her that the practice was having financial difficulties, and he did not know whether he would be able to make payroll.

{¶ 15} With regard to the March 2010 written warning, Roberts testified that she thought it was unjustified. She testified that she tried to complete the procedure and supply lists, but there was not enough time for her to do so. She said she was no longer allowed to come in on weekends, and completing the lists involved writing down hundreds of items and a multitude of suppliers. She said she worked on the lists when she had free time at work but she never fully completed them.

{¶ 16} With regard to the May 2010 written warning, Roberts stated that she informed the front desk that the Invisalign case had been delivered. She said she completed the proper protocol, except she failed to hand Dr. Bennett a chart regarding the case but she spoke to him about it. She said she otherwise performed all work required of her by asking Dr. Bennett various questions about the case, writing the information down on a "yellow card," telling the front desk workers about the case, and setting the chart on the counter for the front desk workers to handle. She also said that she and another co-worker, Gina, were both responsible for Invisalign cases at that point, so the cases were not only her responsibility. She wrote down on the written-warning sheet that she would try to do better in the future, but she also thought that being sent home that day without pay was unwarranted.

{¶ 17} Based upon Barnes's testimony, appellant argues that it terminated Roberts's employment with just cause due to her rapidly declining performance. Appellant contends that the record shows Roberts had ample time to make changes but she never showed a commitment to remedying her behavior and following applicable office policies. The hearing officer found that there was no evidence appellant had given Roberts any warnings concerning her work performance prior to February 2010, and the evidence failed to establish that Roberts was guilty of sufficient fault or misconduct during the last four months of her employment to warrant disqualification for unemployment benefits. Although the hearing officer acknowledged that Roberts received two written

warnings, he also found that Roberts credibly testified that she was not guilty of improper conduct. Thus, the hearing officer concluded that appellant discharged Roberts without just cause in connection with work.

{¶ 18} We cannot find the commission's determination was unlawful, unreasonable, or against the manifest weight of the evidence. Our standard of review is critical to our analysis of appellant's present arguments. Appellant's arguments turn almost exclusively on witness credibility, as both parties presented conflicting evidence regarding whether Roberts's poor work performance was actually the cause of her termination. Appellant points to the two unfavorable report cards, two written warnings, and Roberts's poor performance on the tests to support its claim that Roberts was terminated for just cause. In response, Roberts testified that she believed the complaints in the report cards were unjustified; she was terminated because Barnes simply disliked her, the financial condition of the practice was deteriorating, and she only performed poorly on the portions of the test unrelated to her own job duties.

{¶ 19} There being significant evidence to support both parties' arguments, a determination by the commission in favor of either party could have been lawful, reasonable, and based upon sufficient weight. Under these circumstances, the hearing officer's ultimate conclusion hinged on witness credibility. In this respect, the hearing officer specifically found that Roberts's testimony that she was not guilty of misconduct was more credible. The hearing officer apparently did not believe Barnes's unsupported testimony about any unwritten warnings prior to her arrival in January 2010, and he believed Roberts was discharged for reasons unconnected to her own fault or work performance. As explained above, this court does not determine witness credibility but must rely upon the commission's credible determinations. *See Irvine* at 18. Given the hearing officer's credibility determination, as well as Roberts's testimony denying any misconduct and offering explanations for the criticisms in the reports cards, the written warnings, and the failed tests, we cannot find the commission's decision was unlawful, unreasonable, or against the manifest weight of the evidence. Therefore, appellant's first, second, and third assignments of error are overruled.

{¶ 20} Appellant argues in its fourth assignment of error that the trial court erred when it failed to vacate the commission's decision because it goes against public policy

and the intention of the Ohio legislature. In support, appellant cites *Irvine* in which the court stated that the determination of just cause must be analyzed in conjunction with the purpose of the unemployment compensation "to enable unfortunate employees, who become and remain *involuntarily* unemployed by adverse business and industrial conditions, to subsist on a reasonably decent level \* \* \* in keeping with the humanitarian and enlightened concepts of this modern day." (Emphasis sic.) *Id.* at 17, citing *Leach v. Republic Steel Corp.*, 176 Ohio St. 221, 223 (1964). Appellant contends that Roberts does not need unemployment benefits to survive, and there is no evidence that she has been forced to remain unemployed or has been harmed by her unemployment. Appellant further urges that Roberts's termination and any "short-lived" unemployment were not the result of adverse business conditions; thus, providing unemployment benefits here would be manifestly against public policy.

{¶ 21} We find appellant's argument unavailing. There is no evidence in the record as to whether Roberts needs unemployment benefits to "survive," she has suffered "harm" or her unemployment was "short-lived." Regardless, "need" and "harm" are not prerequisites to receiving unemployment benefits. Furthermore, given our determination above that Roberts was terminated without just cause, unemployment benefits here are consistent with the intent to provide financial assistance to Roberts, who had worked, was able and willing to work, but was without employment through no fault of her own. *See Irvine* at 17. For these reasons, appellant's fourth assignment of error is overruled.

{¶ 22} Accordingly, appellant's four assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

KLATT and CONNOR, JJ., concur.

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