

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Sandi Jo Turner,	:	
Appellant-Appellant,	:	
v.	:	No. 11AP-961
Mission Essential Personnel, LLC et al.,	:	(C.P.C. No. 11CVF-05-6415)
Appellees-Appellees.	:	(ACCELERATED CALENDAR)

D E C I S I O N

Rendered on November 27, 2012

Heidi L. Yurkiw, for appellant.

Susan M. Zawik, and *Mike Skawin*, for appellee Mission Essential Personnel, LLC.

Michael DeWine, Attorney General, and *Yvonne Tertel*, for appellee Ohio Department of Job and Family Services.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Appellant-appellant, Sandi Jo Turner ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas affirming a decision of the Unemployment Compensation Review Commission ("commission") upholding a determination by the director of the Ohio Department of Job and Family Services ("ODJFS"), denying appellant's application for unemployment benefits. For the reasons that follow, we reverse.

{¶ 2} Appellant worked for appellee-appellee, Mission Essential Personnel, LLC ("MEP"), from January 15, 2009 until she resigned on August 23, 2010. Appellant then

filed an application for determination of unemployment benefits on September 2, 2010. The director of ODJFS disallowed her application on the basis that appellant had resigned her position with MEP without just cause. Appellant sought reconsideration of this decision, whereupon the director upheld the initial determination. Appellant then timely appealed to the commission. A hearing officer for the commission conducted a hearing and rendered a decision upholding the director's determination, again finding that appellant had resigned her position with MEP without just cause. Appellant filed a request for further reconsideration before the commission, which declined to revisit the hearing officer's determination.

{¶ 3} Appellant then filed her appeal in the Franklin County Court of Common Pleas pursuant to R.C. 4141.282. The court of common pleas affirmed the decision of the commission, finding that appellant had not borne her burden of proof before the commission by presenting evidence that her resignation was undertaken with just cause as defined in R.C. 4141.29(D)(2)(a) and applicable cases.

{¶ 4} Appellant brings the following assignment of error on appeal:

1. The trial court erred in upholding the Ohio Unemployment Compensation Review Commission's finding that Appellant did not have just cause to quit her employment with Mission Essential Personnel LLP given the uncontroverted evidence that she was pressured to access classified military documents on WikiLeaks.org in contravention of the National Industrial Security Program Operating Manual procedures and a directive by Secretary of Defense Robert Gates, and in refusing to cooperate, was told that she was being demoted from her position as Corporate Director for MEP's National Industrial Security Program.

{¶ 5} The standard of review for appeal from a determination of the commission is the same before us as it is before the court of common pleas: the court must determine if the decision of the commission is unlawful, unreasonable, or against the manifest weight of the evidence. R.C. 4141.282(H); *Williams v. Ohio Dept. of Job & Family Servs.*, 129 Ohio St.3d 332, 2011-Ohio-2897, ¶ 20; *Moore v. Ohio Unemp. Comp. Rev. Comm.*, 10th Dist. No. 11AP-756, 2012-Ohio-1424, ¶ 19. The manifest weight standard referenced in the statute and in *Williams*, however, does not invite us to reweigh the evidence. In our review of the commission's determination, we do not make factual findings or determine

the credibility of the evidence. *Irvine v. Unemp. Comp. Bd. of Rev.*, 19 Ohio St.3d 15, 18 (1985). We must decide only whether the commission's decision is supported by the evidence in the record. When some competent, credible evidence supports the commission's decision, we must uphold the commission's determination. *Moore* at ¶ 20.

{¶ 6} Appellant's former employer, MEP, is a United States Department of Defense ("DOD") contractor providing translators and interpreters for the United States military and intelligence operations overseas. Because the nature of this work, MEP employees hold national security clearances, and both they and their employer must comply with the provisions in the National Industrial Security Program Operating Manual ("NISPOM") that govern handling and dissemination of classified information.

{¶ 7} During appellant's tenure with MEP, an organization known as WikiLeaks.org published on July 25, 2010 a large body of classified United States military documents related to the Iraq war. As part of the response to this compromised classified information, United States Secretary of Defense Robert Gates issued a memorandum announcing creation of a task force to review the classified documents on WikiLeaks.org, stating that the task force would be the "single D[O]D organization with authority and responsibility to conduct D[O]D review regarding this unauthorized disclosure." (R. Item 3, at 3-4.)

{¶ 8} On or about August 9, 2010, appellant's superior at MEP, Marc Peltier, directed her to review the classified documents on WikiLeaks.org and search for the names of any translators or interpreters associated with MEP. Appellant declined on the basis that MEP would thereby contravene the emerging government policy regarding access to the classified information. There followed a lengthy exchange of emails between appellant and Mr. Peltier in which he pressed her to access the WikiLeaks.org documents and she continued to resist and express her security concerns, including both the risk to her own security clearance and that of MEP as an organization. Mr. Peltier eventually bypassed appellant and demanded compliance from her subordinate staff. MEP subsequently informed appellant that she would be demoted. Appellant tendered her resignation on August 23, 2010, expressing in her resignation letter her frustration both at the company's contravention of what she understood to be the applicable DOD security guidelines, and the subsequent undermining of her authority with her own staff.

Approximately two months after appellant's resignation, MEP management issued a directive to staff essentially adopting appellant's position with respect to the WikiLeaks.org material: the company prohibited all employees from viewing, downloading, or transmitting the leaked documents.

{¶ 9} The sole issue before this court is whether the circumstances of appellant's separation from MEP entitled her to seek unemployment benefits. In order to collect unemployment benefits, an employee who resigns from employment bears the burden of proving that he or she resigned for just cause. R.C. 4141.29(D)(2)(a); *Underhill v. Unemp. Comp. Rev. Comm.*, 10th Dist. No. 10AP-617, 2011-Ohio-1598, ¶ 17-18; *Irvine* at 17. The term "just cause," in this context, is defined as " 'that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.' " *Id.* at 17, quoting *Peyton v. Sun T.V. & Appliances*, 44 Ohio App.3d 10, 12 (10th Dist.1975). A significant factor in assessing whether an employee resigned with just cause is the employee's fault in creating the situation that led to the resignation. *Stapleton v. Ohio Dept. of Job & Family Servs.*, 163 Ohio App.3d 14, 2005-Ohio-4473 (7th Dist.). In cases in which an employee encounters circumstances that might force resignation, the employee must first notify the employer of problems prior to resigning or risk a finding of resignation without just cause. *DiGiannantoni v. Wedgewater Animal Hosp., Inc.*, 109 Ohio App.3d 300 (10th Dist.1996). The purpose of such notice is to provide the employer an opportunity to resolve the conflict before the employee is forced to resign. *Id.* at 307. Notice to the employer, however, is not alone enough to establish just cause; the employer must have a realistic opportunity to correct the problem. *Underhill* at ¶ 19.

{¶ 10} MEP did not appear at the hearing before the commission. The hearing officer had before him only the documentary evidence presented by appellant and appellant's testimony, along with the testimony of an additional witness presented by appellant.

{¶ 11} The documentary evidence presented by appellant consisted of Secretary of Defense Gates' memorandum, a Washington Times newspaper article describing the response of the various military agencies to that memorandum, an extensive record of the email correspondence between appellant and Mr. Peltier concerning his request for access to WikiLeaks.org, excerpts from NISPOM, and a memo from Sunil Ramchand, Executive

Vice President and Chief of Staff of MEP, confirming on October 19, 2010 to MEP staff that the company would implement a policy prohibiting unauthorized viewing, downloading, or transmission of WikiLeaks.org information. This last memorandum announces that the company may take disciplinary action up to and including termination of employment for unauthorized access because of the risk to future security clearance eligibility for the company and its employees. The record also contains a copy of appellant's letter of resignation, and MEP's response accepting that resignation.

{¶ 12} Appellant also provided excerpts from NISPOM. Section 1-300, 1-302(B), 1-302(I), and 1-304 outlined the restrictions placed on government contractors when handling sensitive or restricted information, classified material, and the reporting requirements associated therewith. Section 1-304 provides that an employer shall "establish and apply a graduated scale of disciplinary actions in the event of employee violations or negligence. A statement of the administrative actions taken against an employee shall be included in a report to the [Cognizant Security Agency] when individual responsibility for a security violation can be determined and one or more of the following factors are evident: * * * The violation involved a deliberate disregard of security requirements." (R. Item 3, at 22.)

{¶ 13} Appellant also provided a document entitled "General Principles of NISPOM Compliance for Cleared Contractors" issued by the Defense Security Service ("DSS"). This document provides, inter alia, that "DSS considers deliberate or willful violations of NISPOM security requirements to be a matter of grave concern. Violations may result not only in the invalidation or revocation of the facility security clearance, but may also lead to the suspension or revocation of the responsible individual's personnel security clearance. Compelling business needs do not justify such behavior." (R. Item 3, at 26.)

{¶ 14} In addition to the above documents, the record contains the transcript of appellant's sworn oral testimony at the telephone hearing conducted by the hearing officer. In this testimony, appellant recounts her version of events leading up to her resignation. Appellant describes her job with MEP as supervising a department that cleared linguists for work with the DOD, particularly in Afghanistan and Iraq. The events leading up to her resignation began when Mr. Peltier, her direct supervisor and chief

operating officer of MEP, on August 9, 2010 instructed her to extract information from WikiLeaks.org documents in search of names of translators or linguists associated with MEP. His purpose was to notify such individuals that their identity had been revealed and security compromised. Appellant advised Mr. Peltier that this would be a security violation pursuant to the contents of Secretary of Defense Gates' memorandum. On August 12, 2010 Mr. Peltier then had a "temper tantrum" in front of her and various other department employees. (Tr. 8.) He continued to apply "relentless" pressure upon appellant to procure the information from WikiLeaks.org documents. (Tr. 8.) Appellant reported the incident to the deputy director of human resources for the company. (Tr. 8.) Mr. Peltier nonetheless continued to pressure appellant to obtain the information in a lengthy exchange of emails, in which appellant continued to advise Mr. Peltier and others within the company that the proposed access to WikiLeaks.org was in contravention of her interpretation of government policy and put at risk both her personal security clearance and that of the company.

{¶ 15} Appellant testified that, sometime after the "temper tantrum," Mr. Peltier took advantage of appellant's absence on a business trip to bypass her and have her employees access the classified information. Advised of this, appellant told her employees not to do so. Another confrontation occurred between appellant and Mr. Peltier over this issue, but Mr. Peltier continued to pressure her subordinates and other sources within the company to obtain the information. Appellant then submitted her resignation on August 23, 2010. Despite the letter from MEP acknowledging her resignation and giving it an effective date of August 30, 2010, appellant asserted that her last day of work was August 23, 2010, and she was not paid through August 30, 2010.

{¶ 16} Appellant also offered the testimony of Colleen Dugger. Ms. Dugger described herself as retired from DSS, where she held the position of branch chief during the events at issue here.¹ In that capacity Ms. Dugger coordinated security concerns with various DOD contractors, including MEP. She was acquainted with appellant through her contact with MEP. Ms. Dugger stated that she received a phone call in August 2010 from

¹ Ms. Dugger also described herself as working for the Defense Industrial Security Clearance Office. Her testimony does not clearly establish whether this is the specific division within DSS for which she worked or whether this is a separate, subsequent employer.

appellant seeking guidance over the WikiLeaks.org access. Ms. Dugger consulted the NISPOM and formed the opinion that a defense contractor proposing to access such documents would have to obtain clearance through the government contracting authority. In reference to this prohibition, Ms. Dugger testified "[n]obody can just go in and *change* a classified document." (Emphasis added.) (Tr. 15.) This last statement is emphasized here because it was given some significance in the hearing officer's analysis of the evidence and will be more fully examined below.

{¶ 17} After a review of the evidence in this case, it is tempting in this appeal to merely rely on MEP's October memorandum that implemented, after appellant's departure, the very policy position she advocated in her running dispute with Mr. Peltier that led to her resignation. However, it is neither necessary nor appropriate to grant appellant the advantage of hindsight in order to find that she resigned her position for just cause. We will instead focus our review upon the evidence that described the information available to appellant at the time she resigned.

{¶ 18} Peculiar to this case is the circumstance that MEP did not appear at the hearing, and the only evidence before the hearing officer was that presented by appellant through her own testimony, that of Ms. Dugger, and the submitted documents. This case, therefore, is unlike cases in which the hearing officer is called upon to resolve factual conflicts between opposing testimony. *See, e.g., Rubin v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 11AP-674, 2012-Ohio-1318. In the case before us, the hearing officer for the commission does not indicate in his decision that he discounted the credibility of either the documents or testimony presented by appellant. Instead, the hearing officer's determination, as does the decision of the court of common pleas, turns on the sufficiency of that evidence in establishing that appellant had just cause—i.e., what would be deemed by an ordinarily intelligent person as a justifiable reason—for her resignation from her employment with MEP.

{¶ 19} In particular, the hearing officer focused on the statement by Ms. Dugger that it would be a security violation to "change" a classified document. This last statement in Ms. Dugger's testimony is puzzling because the controversy as described by appellant involved merely accessing WikiLeaks.org's disseminated versions of the document on the website, not changing the documents themselves either on the website or in their original

form. The hearing officer noted this discrepancy and inquired whether the violation would be simply accessing the document or altering it. Ms. Dugger responded that "[appellant's] employer asked her to take some names out." (Tr. 16.) This appears to indicate some ambiguity regarding the original inquiry by appellant to Ms. Dugger, given that appellant testified that she had been asked to identify names, not delete them, from the Wikileaks.org documents. The hearing officer found that Ms. Dugger's testimony, on the basis of this ambiguity, did not fully support appellant's characterization of her security dilemma.

{¶ 20} However, the record also includes text (via various email forwardings) of emails from one Jared Whitley, an MEP subcontractor, to MEP personnel with the subject line "Wiki[L]eaks name *scrub*." (Emphasis added.) (R. Item 3, at 13.) The heading and content of these communications therefore also reflect similar imprecision regarding the object of the WikiLeaks.org inquiry ordered by Mr. Peltier. This would also indicate that the expectation had been that MEP would somehow attempt to remove names, rather than simply harvest them, from WikiLeaks.org documents. From these email exchanges it became apparent that Mr. Whitley himself was uncomfortable with the request to access WikiLeaks.org material. He eventually declined to pursue the matter on the basis that neither he nor his computer were secured for such a task. Based on the collective tenor of these items in the record, we find that any ambiguity contained in Ms. Dugger's testimony in no way lessens its value in determining the ethical dilemma confronting appellant at the time she decided to resign.

{¶ 21} The determination of just cause necessarily turns upon particular circumstances of employment. Here, appellant worked for an employer undertaking sensitive national security work under particularly stringent government guidelines designed to preserve and protect important confidential information. When told to access the WikiLeaks.org site, appellant made her case that this violated various security protocols through numerous emails both to her immediate superior and other individuals in her organization. Steadfast in her belief that not only her own security clearance but that of her employer would be compromised, she explained her position in repeated exchanges of correspondence with responsible individuals, giving her superiors every opportunity to re-examine the implications of their actions. She then consulted with Ms.

Dugger, an informed person in a responsible position with a relevant government agency, and received confirmation of her belief that access to the WikiLeaks.org documents was a potential, if not certain, breach of those security protocols expressed in the NISPOM.

{¶ 22} We expressly disagree with the hearing officer's determination that the record contains insufficient evidence to support the conclusion that appellant had no reasonable basis for her decision to resign. Beyond the ethical questions raised by Mr. Peltier's demands, the perceived threat to appellant's own security clearance alone would have given her just cause to leave her employment rather than lose this credential, which would have necessarily curtailed her ability to work in her field of experience and expertise. In light of the uncontroverted evidence presented in the record of the course of events leading to her resignation and the government regulatory context in which it occurred, we find that the commission erred in denying appellant's unemployment benefits on the basis that she did not have just cause for resignation.

{¶ 23} Appellant's sole assignment of error is sustained, and the judgment of the Franklin County Court of Common Pleas upholding the determination of the commission is reversed. This matter is remanded to the court of common pleas for further remand to the commission to enter a new order granting unemployment benefits to appellant.

*Judgment reversed;
cause remanded.*

TYACK and SADLER, JJ., concur.
