

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

SHUNA CHEN,	:	
	:	
Plaintiff-Appellant,	:	CASE NO. CA2011-04-026
	:	
- vs -	:	<u>OPINION</u>
	:	3/12/2012
	:	
OHIO DEPARTMENT OF JOB	:	
& FAMILY SERVICES, et al.,	:	
	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2010CVF1338

Shuna Chen, 5223 Terrace Trace Court, Milford, Ohio 45150, plaintiff-appellant, pro se

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PIPER, J.

{¶ 1} Plaintiff-appellant, Shuna Chen, appeals pro se a decision of the Clermont County Court of Common Pleas affirming the Unemployment Compensation Review Commission's determination that she is not entitled to unemployment benefits.

{¶ 2} Chen was employed by defendant-appellee, Cincinnati Children's Hospital Medical Center (Children's), from August 3, 2008 to November 30, 2009. She was initially hired as a Student Lab Assistant; on April 26, 2009, she was hired as a Research Assistant 3. Once hired as a Research Assistant 3, Chen was placed on a six-month probationary period. If she did not successfully complete her probationary period, her employment would be terminated. Chen's supervisor during her 2008-2009 employment with Children's was Dr. Dao Pan.

{¶ 3} Sometime between October 30 and November 5, 2009, Dr. Pan gave Chen her six-month evaluation. Dr. Pan informed Chen she had not met 4 out of 20 listed criteria (efficiency and productivity, proactivity in finding solutions, understanding the goals of experiments, and data analysis skills). Four areas for improvement were also identified: communicating with others in a constructive, professional manner; problem-solving ability; better understanding the purpose of the experiments she was performing; and improving data analysis skills. Chen's probationary period was extended an additional 90 days.

{¶ 4} Chen refused to sign the evaluation and took a copy home. She returned it on November 10, signed but with several comments. Specifically, Chen wrote that the four problems and the four areas for improvement identified by Dr. Pan were all "lies," Dr. Pan's comments were "utterly untrue," and the evaluation was not based on facts. Chen also stated her belief the negative evaluation was in retaliation for Chen's refusal to execute an order from Dr. Pan in September 2009. Chen claimed she refused to execute the order because it violated Children's rules.

{¶ 5} Dr. Pan testified that Chen's performance worsened after the evaluation. In particular, the two had a disagreement over Dr. Pan's suggestion that Chen take two days off the week of Thanksgiving to compensate her for working on weekends. On November 24, 2009, Dr. Pan emailed Chen telling her to take off November 25 and 27. Chen declined the

offer, stating it was too late for her to make travel plans; further, the two days were not adequate compensation for the weekends worked. The disagreement continued on November 25, both over the phone, during which Chen raised her voice and hung up on Dr. Pan, and by emails.

{¶ 6} On November 30, 2009, Dr. Pan gave Chen a second evaluation (it was dated November 25). This time, Chen had not met 13 out of 19 listed criteria, including: failure to contribute to a positive work environment; communication issues with others; difficulty in improving due to negative attitude; failure to communicate with others professionally or constructively; and failure to assume responsibility for development in this role. Chen refused to sign the evaluation. She was terminated that day for failing to successfully complete her probationary period.

{¶ 7} Chen filed an application for unemployment benefits. The Ohio Department of Job and Family Services (ODJFS), through its director, determined that Chen was terminated without just cause in connection with work and approved Chen's claim for benefits. Children's appealed the decision. On March 19, 2010, ODJFS issued a redetermination and affirmed its initial determination. Children's appealed the redetermination and the case was transferred to the Unemployment Compensation Review Commission (commission).

{¶ 8} On April 21, 2010, a hearing officer conducted a hearing by telephone. Chen (represented by her husband), Dr. Pan, and two other witnesses testified. The hearing officer reversed ODJFS's redetermination and found that Chen was discharged with just cause in connection with work. Chen was ordered to repay any benefits received. The commission subsequently disallowed Chen's request for review of the hearing officer's decision.

{¶ 9} Chen appealed the decision to the Clermont County Court of Common Pleas pursuant to R.C. 4141.282. On March 9, 2011, the common pleas court affirmed the

commission's decision and the denial of benefits. The common pleas court found that the commission's determination, that Chen was properly discharged for just cause, was not unlawful, unreasonable, or against the manifest weight of the evidence.

{¶ 10} Chen appeals, raising three assignments of error.

{¶ 11} Assignment of Error No. 1:

{¶ 12} THE HEARING OFFICER ERRED IN NOT APPLYING THE TZANGAS TEST TO THIS CLAIMED UNSUITABILITY CASE AND IN MAKING THE DECISION AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 13} Chen argues that the hearing officer erred in not applying the unsuitability test set forth in *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Serv.*, 73 Ohio St.3d 694 (1995). Chen asserts that because (1) Children's has from the very beginning of the proceedings claimed she was discharged because she was unsuitable for the job, and (2) ODJFS twice applied the *Tzangas* test in its determinations, the hearing officer was required to apply the *Tzangas* test.

{¶ 14} R.C. 4141.29(D)(2)(a) provides in relevant part that an individual is not entitled to receive unemployment benefits if that individual "has been discharged for just cause in connection with the individual's work * * *." "Traditionally, just cause, in the statutory sense, is that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act." *Irvine v. Unemp. Comp. Bd. of Review*, 19 Ohio St.3d 15, 17 (1985), quoting *Peyton v. Sun T.V.*, 44 Ohio App.2d 10, 12 (1975).

{¶ 15} A just cause determination must also be consistent with the legislative purpose underlying the Unemployment Compensation Act: to provide financial assistance to individuals who are involuntarily unemployed through no fault or agreement of their own. *Tzangas*, 73 Ohio St.3d at 697. "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." *Id.* at 697-698. Hence, just cause, under the Unemployment Compensation Act, is predicated upon employee fault. *Id.* at 698.

{¶ 16} In *Tzangas*, the supreme court addressed whether a law firm employee's unsuitability to perform the work required by the firm "constituted fault for which the firm may have discharged her for just cause." *Id.* at 698. The supreme court held that an employee's inability to perform a job constitutes fault on the employee's behalf, and that "[u]nsuitability for a position constitutes fault sufficient to support a just cause termination." *Id.* The court then set forth the following four-prong test at 698-699:

An employer may properly find an employee unsuitable for the required work, and thus to be at fault, when: (1) the employee does not perform the required work, (2) the employer made known its expectations of the employee at the time of hiring, (3) the expectations were reasonable, and (4) the requirements of the job did not change since the date of the original hiring for that particular position.

{¶ 17} In unemployment-compensation appeals, a common pleas court and an appellate court use the same, well-established standard of review: reviewing courts may reverse just cause determinations only "if they are unlawful, unreasonable, or against the manifest weight of the evidence." *Tzangas*, 73 Ohio St.3d at 696. Reviewing courts are not permitted to make factual findings or determine the credibility of witnesses. *Id.* Factual questions remain solely within the commission's province. *Id.* at 697. "The fact that reasonable minds might reach different conclusions is not a basis for the reversal of the [commission's] decision." *Irvine*, 19 Ohio St.3d 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." *Goodrich v. Ohio Unemp. Comp. Rev. Comm*, 10th Dist. No. 11AP-473, 2012-Ohio-467, ¶ 5.

{¶ 18} We find that the hearing officer did not err in not applying the *Tzangas* test.

R.C. 4141.281(C)(3) provides that once the commission assigns an appeal for a hearing by a hearing officer, "[t]he hearings shall be de novo, except that the [ODJFS's] file pertaining to a case shall be included in the record to be considered." Further, an employee's unsuitability for his or her work or position is only one, but not the only, manifestation of "fault" that can support a just cause termination. See *Dublin v. Clark*, 10th Dist. Nos. 05AP-431 and 05AP-450, 2005-Ohio-5926. We also note that many of our decisions addressing discharge with just cause have cited *Tzangas* without applying its four-prong test. See *Lippert v. Lumpkin*, 12th Dist. No. CA2010-01-004, 2010-Ohio-5809; *Warren Cty. Aud. v. Sexton*, 12th Dist. No. CA2006-10-124, 2007-Ohio-7081; *Bruce v. Hayes*, 12th Dist. No. CA2003-05-020, 2004-Ohio-2903.

{¶ 19} We now turn to the commission's determination that Children's properly discharged Chen for just cause in connection with work. The commission, through its hearing officer, found that:

[Chen] knew that she had to successfully complete her probation period in order to remain working for the employer. She had worked in the lab as a Lab Assistant prior to being hired as a Research Assistant, and was aware of what was expected of her as a Research Assistant. [Chen] continually had difficulties in working with her co-workers and in dealing with Dr. Pan. She did not accept criticism or coaching from Dr. Pan, instead telling her why her assessment of [Chen's] performance was wrong. When given days off over the Thanksgiving holiday, [Chen] refused to take them off, and instead argued with Dr. Pan over being "forced" to take off lighter work days. The employer has shown that they had good reason to believe that [Chen's] attitude and performance would not improve, and that it had actually gotten worse since her initial evaluation. They have shown that [Chen] was discharged for just cause.

{¶ 20} Chen's first evaluation listed four areas in need of improvement, including communicating with others in a constructive, professional manner, and understanding the purpose of the experiments she was performing. During the hearing, Dr. Pan testified that it was difficult to communicate and collaborate with Chen because Chen was unable to accept

criticism and suggestions, had trouble taking responsibility for her mistakes, and when confronted with an issue, would typically blame others. For example, after Chen used an incorrect solution and ended up destroying the results of a seven-month experiment, Chen refused to accept responsibility, instead blaming others for not telling her which solution to use. While the incident happened the month she became a Research Assistant 3, her reaction was typical. Dr. Pan further testified that when confronted with an issue, Chen would produce a large amount of related and unrelated written documentation to show she was not accountable for the mistake(s).

{¶ 21} Dr. Pan also identified two instances during which Chen exhibited difficulty working with her peers. One instance involved Chen working with Erin, an undergraduate student. After issues arose between the two, Chen asked to work on the project by herself rather than with Erin. Later on, during a staff meeting with Dr. Pan and co-workers, a date discrepancy became an issue between Chen and Erin. Chen repeatedly stated she was right and that Erin was wrong. As a result of the confrontation, Erin was visibly upset during and after the meeting. The other instance involved Darin, a research co-worker who was assigned by Dr. Pan to supervise Chen's daily work. Soon, Darin complained to Dr. Pan that he could not "function efficiently" because Chen was constantly interrupting him and asking the same questions repeatedly.

{¶ 22} With regard to Chen's inability to accept criticism and suggestions, Dr. Pan described how, when confronted with her failure to use an important control in an experiment, Chen became very upset with Dr. Pan and raised her voice so much it disrupted someone outside of Dr. Pan's office.

{¶ 23} For her part, Chen denied having difficulties working with her co-workers. With regard to Erin, Chen testified that apart from "one brief unhappy moment" when Erin interrupted her to ask her a question, there were no issues between the two of them and that

they had collaborated many times without incident. With regard to Darin, Chen testified (1) he supervised her only when she was a Student Lab Assistant, (2) in the Fall of 2008, he upset her when he told her she was the slowest in the lab, and (3) he was unhappy with her when she refused to follow an order from Dr. Pan in September 2009 because she believed the order violated Children's rules. As for destroying the results of a seven-month experiment, Chen testified she was unfairly blamed for using the incorrect solution when Dr. Pan and Darin had too misread the label on the buffer. Further, she was hired as a Research Assistant 3 shortly thereafter, despite her mistake.

{¶ 24} Chen also testified she believed her first evaluation was negative and she was ultimately terminated because she refused to follow two orders from Dr. Pan in September 2009. Chen stated she refused to execute the orders because they violated Children's rules. Chen further stated she did not agree with her evaluations and/or Dr. Pan's testimony as none of it was true.

{¶ 25} Chen's conduct did not improve after the first evaluation but instead worsened. When Chen eventually returned the evaluation on November 10, 2009, it included comments that the problems identified by Dr. Pan were all lies, Dr. Pan's comments were untrue, and the evaluation was not based on facts. It also included Chen's opinion she was 99 percent right. During the week of Thanksgiving, Dr. Pan's suggestion that Chen take two days off as compensation for working on weekends was not well received by Chen who refused to take the days off. The disagreement led Chen to raise her voice and hang up on Dr. Pan during a telephone call. Dr. Pan also testified that following the first evaluation, her staff complained they could not work due to several outbursts in the lab involving Chen.

{¶ 26} Based on Chen's negative attitude which affected the work environment, her belief there was no need for her to improve, and her failure to show any improvement after the probationary period was extended, Dr. Pan found that Chen had not met 13 listed criteria,

and thus had failed to pass her probationary period.

{¶ 27} Although Dr. Pan and Chen both testified, the hearing officer clearly found Dr. Pan's testimony credible. Upon reviewing the record, we find that ample evidence was presented to support the commission's determination that Children's terminated Chen for just cause. Specifically, there is evidence that Chen was argumentative, uncooperative, unwilling to accept criticism and suggestions, and that her behavior created a negative work environment.

{¶ 28} In light of the foregoing, we agree with the common pleas court's determination that the commission's decision was not unlawful, unreasonable, or against the manifest weight of the evidence that Chen was discharged for just cause and thus, was not entitled to unemployment benefits. The common pleas court did not err in affirming the commission's decision. Chen's first assignment of error is overruled.

{¶ 29} Assignment of Error No. 2:

{¶ 30} THE HEARING OFFICER ERRED IN ABUSING HER DISCRETION IN FINDING FACTS AND IN REASONING WHEN MAKING THE DECISION.

{¶ 31} Chen argues that the hearing officer improperly based her decision solely on Dr. Pan's testimony and hearsay evidence, and not on Chen's testimony and evidence. Chen also argues that the hearing officer wrongly based her decision on four "boggy and unconvincing stories" testified to by Dr. Pan that either happened before she was hired as a Research Assistant 3 or were greatly exaggerated. Chen also refers to three other "stories" testified to by Dr. Pan.

{¶ 32} The record shows that Chen did not argue this second assignment of error in her brief to the common pleas court. It is well-established that a party cannot raise new issues or legal theories for the first time on appeal. *Lay v. Chamberlain*, 12th Dist. No. CA99-11-030, 2000 WL 1819060, *10 (Dec. 11, 2000). Failure to raise an issue before the trial

court results in the waiver of that issue for appellate purposes. *State v. Awan*, 22 Ohio St.3d 120 (1986), syllabus. Chen nevertheless asserts she argued the issues in her reply brief to the common pleas court.

{¶ 33} When reviewing administrative determinations of eligibility for unemployment benefits, a common pleas court sits in an appellate capacity. *Barilla v. Ohio Dept. of Job & Family Serv.*, 9th Dist. No. 02CA008012, 2002-Ohio-5425, ¶ 40; *Koons v. Bd. of Review*, 9th Dist. No. 12348, 1986 WL 4646, *4 (Apr. 16, 1986). Thus, the Rules of Appellate Procedure apply. See *Kertes Enterprises, Inc. v. South Euclid*, 8th Dist. No. 50221, 1986 WL 2669 (Feb. 27, 1986). It is well-established that a reply brief is merely an opportunity to reply to the brief of the appellee. App.R. 16(C); *Sheppard v. Mack*, 68 Ohio App.2d 95, 97 (1980) fn. 1. A reply brief may not be used by an appellant to raise new assignments of error, or new issues for review. *Baker v. Meijer Stores Ltd. Partnership*, 12th Dist. No. CA2008-11-136, 2009-Ohio-4681, ¶ 17.

{¶ 34} In light of the foregoing, we will not consider the arguments raised by Chen in her second assignment of error. The assignment of error is accordingly overruled.

{¶ 35} Assignment of Error No. 3:

{¶ 36} THE HEARING OFFICER ERRED IN NOT FACILITATING A FAIR HEARING.

{¶ 37} Chen argues that she did not receive a fair hearing because the hearing officer did not provide her with an interpreter at the hearing, allowed an unfiled document to be used as evidence, and did not issue subpoenas for four documents.

{¶ 38} A hearing officer has broad discretion in conducting the hearing in general. *Deidrick v. Best Buy Stores, LP*, 3rd Dist. No. 5-10-32, 2011-Ohio-1999, ¶ 16, citing *Owens v. Ohio Bur. of Emp. Serv.*, 135 Ohio App.3d 217 (1999).

{¶ 39} With regard to the interpreter issue, the record shows that prior to the hearing, Chen asked three times in writing that her husband be allowed to be her representative and

interpreter at the hearing, or in the alternative, that she be provided with an interpreter. The commission allowed Chen's husband to be her representative at the hearing, but not her interpreter. Chen did not have an interpreter at the hearing. During the hearing, Chen's husband questioned Chen, Dr. Pan, and the other two witnesses.

{¶ 40} Chen, a native of China, asserts that due to her "limited English skill and lack of an interpreter, [she] did not understand, testify, and refute much of what the Employer said." Chen states that the several instances of "inaudible" in her testimony support her assertion.

{¶ 41} The fact that there were several instances of "inaudible" during her testimony does not necessarily mean Chen did not understand the other witnesses' testimony or that she was unable to fully express herself. The record shows that Chen understood the questions asked of her and her answers were responsive to the questions asked. Further, the hearing officer told Chen she understood everything Chen said and that Chen was doing fine. Like the common pleas court, this court was able to understand Chen's testimony, even if her grammar was not always perfect. In addition, Chen submitted a large number of documents and her hearing testimony is consistent with the written materials she submitted. In light of the foregoing, we find the lack of an interpreter did not deprive Chen of a fair hearing.

{¶ 42} Chen next alleges that the hearing officer improperly allowed Children's to use "Document C," an unfiled document, as evidence during the hearing. The record shows that while questioning Dr. Pan about Chen's first evaluation, a Children's representative referred to Document C as follows: "I would like to look at * * * the first evaluation you gave her, dated October 30th. Dr. Pan there is an addendum to that evaluation where you list several, or name several areas that you felt that Ms. Chen needed improvements? It's labeled Document C in our packet, do you have that?" (Dr. Pan's responses omitted.) The Children's representative then proceeded to ask Dr. Pan about two incidents listed in the

addendum.

{¶ 43} A review of the record shows that Chen's first evaluation and its addendum were both in the file at the time of the hearing and were part of the certified record. In fact, the addendum is in the record multiple times. Further, a copy of both documents was given to Chen before the hearing. The fact the addendum was labeled by the Children's representative as Document C in the materials used by Dr. Pan during the hearing does not necessarily mean this was the way it was labeled in the record before the hearing officer. Additionally, Chen indirectly referred to the addendum when she testified about the incidents listed in the addendum. Thus, contrary to Chen's assertion, the hearing officer did not allow an unfiled document to be used as evidence at the hearing.

{¶ 44} Finally, Chen argues she was deprived of a fair hearing because the commission failed to issue subpoenas for several documents requested by Chen.

{¶ 45} The telephone hearing took place on April 21, 2010 (a Wednesday). On April 12, 2010, Chen requested the commission to subpoena three Children's employees and a copy of her personnel file. All four subpoenas were issued on April 14. On April 15 (a Thursday), Chen requested the commission to subpoena four additional documents: the addendum to her first evaluation (because the copy she had was blurred); genotyping lab notes taken by Chen between April and November 2009; "Mice Repeated Habituation Testing Data Record" recorded by Chen and two other employees between February and November 2009; and Dr. Pan's "Animal Use Protocols." The commission did not issue the subpoenas for the four additional documents.

{¶ 46} Ohio Adm.Code 4146-15-01 provides:

Upon the request of an interested party, or upon its own motion and within its discretion, the review commission or a hearing officer may, at any time, issue subpoenas to compel the attendance and testimony of witnesses and production of books, accounts, papers, records and documents at any hearing. If an

interested party desires the issuance of subpoenas in order to compel the attendance of witnesses or the production of evidence at a scheduled hearing, the party's request should be filed with the review commission at least five calendar days in advance of the date of the hearing in order to allow sufficient time for preparation and service of the subpoenas. In the event that the number of subpoenas requested by any party appears to be unreasonable, the review commission may require a showing of necessity therefor, and, in the absence of such showing, only three subpoenas will be issued.

{¶ 47} The information packet mailed to Chen before the hearing notified her that (1) a request for subpoenas should be made as soon as possible, (2) the request must be received by the commission at least five calendar days prior to the hearing to allow sufficient time for service, and (3) "[i]f the subject of any subpoena appears to be unreasonable, the Commission may require a showing of necessity for [the] request. Without a showing of necessity, only three subpoenas will be issued."

{¶ 48} We agree with the common pleas court that Chen's second request for subpoenas was not timely made as there were not enough working days between her Thursday request and the Wednesday hearing for the subpoenas to be issued and the documents to be produced. As the common pleas court aptly stated, "The Commission cannot be blamed for Ms. Chen's failure to include these documents as part of the original subpoena request." As stated earlier, the addendum was in the record multiple times. In addition, Chen did not attempt to proffer into the record what the four documents would have tended to prove. *Harrison v. Penn Traffic Co.*, 10th Dist. No. 04AP-728, 2005-Ohio-638, ¶ 24. "A reviewing court cannot rule upon the exclusion of evidence unless the evidence has been made part of the record by proffering it." *Id.* We find no error in the commission's failure to issue subpoenas for the four additional documents requested by Chen.

{¶ 49} In light of all of the foregoing, we find that Chen was not deprived of a fair hearing. Chen's third assignment of error is overruled.

{¶ 50} Judgment affirmed.

POWELL, P.J. and RINGLAND, J., concur.