

IN THE SUPREME COURT OF OHIO

MS. XAVIER ATKINS,
Appellant,

:
:

08-1927

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

vs.

DEPARTMENT OHIO JOB
AND FAMILY SERVICES

:

Court of Appeals
Case No. 08APE-03-182

Appellee

:

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT XAVIER S. ATKINS

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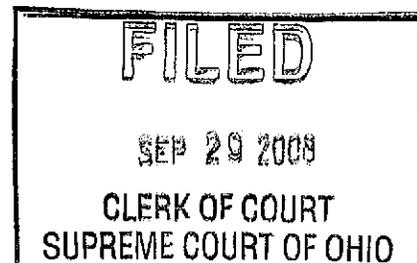


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**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This cause presents four critical issues: (1) physical danger and harm from a client & staff; and (2) owners and staff not complying with state regulation and policy; and (3) specific staff member that having a history being violent which resulted in a demotion prior to this recent incident; and Due Process was not a exercised for the Appellant.

The Appellant was denied the right to Due Process. The hearing officer didn't allow the plaintiff or witness to give relevant testimony in a timely fashion, before making her decision after the appeal of her initial decision. This is a direct violation of the Appellant's 5th Amendment

In this case, the courts disregarded the concern of physical danger and harm brought on by clients & staff, and owners. Some of these staff members have a history being violent with former clients which resulted in a demotion prior to this specified incident. A person shouldn't be expected to stay in a position and become harmed before quitting employment. *Reeves v. Board of Reviews (1954) (C.P.) 69 Ohio Laws Abs. 70. ORC 4141.29(D)(2)(a), a reasonable fear of one's personal safety is a proper reason for leaving one's employment, e.g., an employee cannot be expected to remain on the job until an actual physical assault takes place. A person's working conditions are so difficult, intolerable, or unpleasant that a reasonable person would feel compelled to resign. In re Fried (N.Y. Sup. Ct., App. Div., Aug. 5, 1976), Unemployment Ins. Rept. (CCH), Paragraph 10,530, at page 4622.* Allowing this same staff member to oversee/ supervise young children. In addition, staff, nor management complied with state regulation and policy which is the objective in providing a safe, healthy, cognitive developmental learning environment for the young children we provided a service for.

The decision of the court of appeals threatens the children's well being and the role of any acting administrator. The courts decision establishes an assumptions that business owners/management and staff doesn't have to follow State Day Care Licensing Regulations and Policy.

Along with influencing a hostile environment. That staff with anger management issues are allowed to violently confront their supervisor/manager without any reprimand.

This case involves substantial constitutional question. The court's decision offends not only the rights of the Appellant who is seeking fair Due Process. Also, that Appellant was expected to endure physical harm by another staff member while at their place of employment in addition to not being supported by upper management.

It is requested that this court must grant jurisdiction to hear the case and review the decision of the court of appeals.

STATEMENT OF THE FACTS

On December 18, 2005 Plaintiff became employed with the Mother's Helper Child Care Center as the administrator. Some of the plaintiff's duties as the administrator was as follows: observe and document staff interactions with the children/ clients/ partnerships/ and other staff. Conduct staff and parent meetings/ conferences. To mentor and collaborate with staff on classroom management, lesson planning, and implementing curriculum. Consult with partnerships on services and programs. To enforce center policy in addition to State Day Care Licensing Rules and Regulations. The main objective that Ms. Atkins focused on was, what was best for the children, using her resources, implementing them and overseeing daily operations if the center. Ms. Atkins didn't take the position just to become an administrator, she has been as advocate for young children over the years.

Throughout her employment, Ms. Atkins experienced continuous difficulty with her working environment, clients, supervisors, and staff.

Ms. Atkins took steps to discuss the incidents with the Keatons many times, but there was no resolution. Ms. Atkins felt that it was difficult to continue working in an atmosphere that included hostile, non-compliant clients, staff, and management. These were "intolerable working conditions", which made her feel compelled to resign.

Ms. Atkins filed a claim with the Unemployment Compensation on July 3, 2006. Several appeals took place along with two hearings with the Unemployment Compensation Review Commission. Ms. Atkins requested that a witness be subpoenaed and speak on her behalf and the hearing officer denied Ms. Atkins right to *Due Process*. The hearing officer made a decision on March 13, 2007 to award benefits, which were released to Ms. Atkins. A decision was made by the hearing officer in which she reversed her own decision to allow benefits. She then disallowed benefits 4 months after allowing them, ordered they be repaid, without giving Ms. Atkins an opportunity to be heard. This is in violation of Ms. Atkins's right to *Due Process*, a violation of her 4th Amendment.

Ms. Atkins filed an appeal with the Court of Appeals on March 6, 2008. For the duration of Ms. Atkins's employment, she made numerous changes to improve the learning environment for the benefit of the children and the business. She helped the owners of Mother's Helper obtain and secure a license that they were struggling to obtain prior to Ms. Atkins's arrival. . During this time, Ms. Atkins was consistently given a hard time by one of her supervisors, Willie Keaton. Anytime Ms. Atkins tried to make changes for the benefit of the company and children, whether they were things that were policy-based and State Regulated by Day Care Licensing, Willie Keaton would always reject her ideas and knowledge of childcare, undermining Ms. Atkins, until he had no other options. In addition to allowing staff to undermining Ms. Atkins.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

In December 2005 and January 2006, the Plaintiff experienced a situation with a staff member becoming hostile and threatening after being asked to leave the building (12/30/05 & 11/18/05). *Goldmeier v. Allstate Ins.*, 337 F.3d 629 (6th Cir. 2003). *Hafford v. Seidner* (1999) 183 F3d, 506,512 & *Wilson v. Firestone Tire & rubber Co.*, 932 F.2d 510,515 (6th Cir. 1991). A person shouldn't be expected to stay in a position and become harmed before quitting employment. *Reeves v. Board of Reviews* (1954) (C.P.) 69 *Ohio Laws Abs. 70*. This same employee had a habit of not showing up for work. A violation against center policy and State Licensing Regulations. Willie Keaton attended to the matter by asking the Plaintiff if she was sure that she didn't need this (Courtney Hopewood) and want to keep her on staff?

In February 2006, the Plaintiff observed and documented that center policy and State Licensing Regulations had been violated on a regular basis. Ms. Atkins spoke with staff and tried to model for them what was expected, but staff continued to violate the same policies and regulations. Ms. Atkins spoke to the employers, nothing was done. Ms. Atkins was being undermined. No administrative support was given to Ms. Atkins when she requested it. Some parents even wrote letters (2/15/06) to Ms. Atkins in regards to their concern about their children being in the care of some a staff member, Shanele Lyles's care (2/13/06, 2/15/06).

In March & April of 2006, a child named (T. Jordan) was being physically violent to staff and his

peers. Ms. Atkins documented it and spoke to Donna Keaton about it, she suggested that Ms. Atkins continue documenting (3/4/06-3-15-06). Ms. Atkins documented well over the amount that the Staff Handbook stated in order to give the child days off from school. There had been over eight child discipline forms that had been filled out by staff and Ms. Atkins. Lamont Keaton's response was that the child needs to be given one-on-one time (3/30/08). (This would separate the child from his teacher and class. It would not have been beneficial to him. Other incidents that Ms. Atkins experienced was staff insubordination, staff-initiated confrontations. All in direct violation of State Licensing Regulations and center policy.

ORC 4141.29(D)(2)(a), *a reasonable fear of one's personal safety is a proper reason for leaving one's employment, e.g., an employee cannot be expected to remain on the job until an actual physical assault takes place. In re Fried (N.Y. Sup. Ct., App. Div., Aug. 5, 1976), Unemployment Ins. Rept. (CCH), Paragraph 10,530, at page 4622.* Angie Cobb, was a staff member that confronted Ms. Atkins once she was asked by Ms. Atkins to comply with a request and policy (3/10/06). During a conversation with Donna Keaton previously, she stated to Ms. Atkins that Angie Cobb had actually had a history of physical altercations with clients before she had been demoted from Asst. Director to Head Start Teacher. Donna & Willie Keaton had both been aware of current situation and Ms. Atkins was not allowed to (discipline) follow through with what her duties would have allowed her to do. Which is stated in the handbook. Willie Keaton did not attend to the matter as Ms. Atkins requested that day, he postponed the meeting with them until the next week after asking, "is it an emergency, can it wait until next week?" No administrative support was given to Ms. Atkins when she requested it. As a result of this action, it was lack of support for the administrator, Ms. Atkins. His comment once they did meet a week later, with Angie Cobb was "that Angie Cobb had been an employee there for ten years and that we just had to learn to get along." This also falls under the **ORC 4141.29(D) (6) (D)**. "Discrimination Conduct." *Being treated differently that the other staff. W. Keaton April 2, Appeal. Pg 12 Paragraph 6. Taylor, Appellant v. Board of Review et al., Appellee 485 N.E.2d*

On March 13, 2006, two (2) staff members hadn't received coverage for a lunch break due to Willie Keaton not following through with his offer to recruit and bring over staff as he assured Ms. Atkins he would earlier that morning. Willie Keaton offered and agreed to bring staff over when Ms. Atkins told him two (2) teachers had called off that morning. Ms. Atkins can not be held responsible for Donna or Willie Keaton's failure to comply with State Regulations of providing coverage for staff when it's needed. Ms. Atkins made numerous attempts to obtain the staff she was promised by Willie Keaton. Ms. Atkins called the other centers to inquire if Willie Keaton had contacted them about picking up staff. No resolution was found. Willie Keaton didn't give Ms. Atkins other options the morning of because he wasn't accessible to speak with about options. He also stated that he was available and qualified (see Keaton 3-27-06 appeal pg 14, paragraph 3 & 4). Donna Keaton, his wife (the owner) was not only unsuccessful in reaching Willie Keaton, she didn't know where he was. Willie Keaton had no early childhood coursework or CDA credit hours that would enable him to fill-in, based on State Regulations. This made him unqualified and the cause for the center to be out-of-compliance. Based on the time, a small window of time may have permitted both staff to go on break at the same time and that would have still caused an out-of-compliance issue, again. There has to be two (2) staff in the infant room at all times if there are over 6 infants in the room. That day, there were more than 6 infants and not enough staff to cover without putting other classrooms out-of-compliance. Only staff is to cover their fellow staff members, it's not the administrator duty. Again, Ms. Atkins had limited autonomy throughout her employment, she can't be made to take control over the Keatons' failure to comply and follow through with bringing staff over correct this issue. Instead of admitting he didn't follow through, he screamed into the telephone, after I had spoken with Donna Keaton, that I was playing a "compliance game" with him. It was very strange that he act in that manner, when all I had done was comply with State Day Care Licensing. How could anyone conclude that Willie Keaton didn't act in an unreasonable manner?

Another staff member, Victoria Castile had a history of refusing and not complying with policy prior to Ms. Atkins's arrival. Mrs. Castile had been transferred to Ms. Atkins's location (previously)

because she didn't want to comply with the other administrator's instructions at one of the other Mother's Helper locations. Willie Keaton had made a threat while talking to me, when I brought a situation to his attention (an issue with Ms. Castile being insubordinate) that he was going to fire "someone" if he didn't get the truth after speaking with her. (3/14/06-4/6/06)

A person's working conditions are so difficult, intolerable, or unpleasant that a reasonable person would feel compelled to resign (which is categorized as "**constructive discharge**". *In re Fried (N.Y. Sup. Ct., App. Div., Aug. 5, 1976), Unemployment Ins. Rept. (CCH), Paragraph 10,530, at page 4622.*

There had been several occurrences with a parent, Ms. Byas was being hostile and being noncompliant whenever Ms. Atkins requested that she comply with policy and State Regulations (4/4/06, 4/5/06, 5/2/06). Ms. Byas continued to bring her young child to the center after being asked previously to keep her home until she brought a doctor's note stating the child was non-contagious. I discussed this with the Donna, Willie, and Lamont Keaton. Lamont stated this parent brought a note 5 days later (which he never confirmed the content), in the meantime bringing her child to the center exposing the other children and staff to what looked to be very contagious. She asked for a fax number, Ms. Atkins expressed to her that it wasn't working and that she may need unfortunately go to the doctor's office and bring it the center (as many other parents have had to do) so the child can come back. She became hostile, refusing to do so, she complained several times. Ms. Atkins again asked her to get it so the child could return, she wouldn't keep the child home and didn't present the appropriate documentation. The Keatons, who were Ms. Atkins supervisors gave no administrative support to Ms. Atkins when she asked.

Donna, Willie, Lamont Keaton did not attempt to assist Ms. Atkins with this issue and was made aware of what had transpired. Ms. Byas demanded to have the number, Ms. Atkins explained to her the fax didn't work and had been off and on improperly functioning for the last several weeks. Willie Keaton was aware that the fax machine wasn't working correctly and didn't replace it to avoid situations like this. Then Keatons had known that it hadn't worked several weeks prior. She became irate, Ms. Atkins told Ms. Byas that she couldn't talk to her while she was in the irate state she was in and Ms. Atkins walked to her

office. Ms. Byas went out side to her car; Ms. Atkins then brought out the phone number, as Ms. Byas was still on the property and had been for at least 20 additional minutes. Ms. Byas hadn't collected her children's belongings for the end of the day departure. Ms. Atkins left the fax number for Ms. Byas and went back to her office to avoid any further conflict , as Ms Byas had been very hostile toward Ms. Atkins and her child's teachers in previous situations when Ms. Atkins asked Ms. Byas to comply with policy and State Regulations. Willie Keaton made in reference to Ms. Atkins had options, but never discussed the "supposed" options with her. In addition, Willie Keaton was not available the morning of nor did he make himself accessible to speak with Ms. Atkins about options. Willie Keaton seemed to be making some contradicting statements in reference to this issue.

Ms. Atkins shared the outcome about the parent with the Donna Keaton on **May 8, 2006** and instead of being given administrative support, Ms. Atkins was faced with fits of rage and screaming over the telephone from Donna Keaton (**May 10, 2006**). Not giving Ms. Atkins a chance to speak before being hung up on by Donna Keaton. The next time Ms. Atkins heard from Donna Keaton, after attempting to call her was through a warning letter, including false accusations hand delivered by Willie Keaton 48 hours later. Donna, Keaton's deportment was neither rational nor professional. All of the above situations are a quit with just cause. "An ordinarily intelligent person" would quit employment. **ORC 4141.29(D)(2)(a)**.

After all of these repeated occurrences, Ms. Atkins felt compelled to resign (constructive discharge) as a result of all of the difficulty she faced from management, staff, and clients. Ms. Atkins felt that it was not a healthy, safe, positive, progressive, nurturing environment for children or professional and positive environment for adults. Ms. Atkins was never given the appropriate amount, if any, of support that she needed, she requested to have, and was reassured she would have support from both Donna & Willie Keaton. No one could be expected to be able to complete their daily objective / goals as administrator without proper support from the owners autonomy.

Even after Ms. Atkins resigned, Willie Keaton continued to cause Ms. Atkins distress. Ms. Atkins requested that her last paycheck be sent and Willie Keaton refused. This is an illegal act that violates the

Wage and Hour Law. Ms. Atkins had to obtain help from the Attorney General's Office just to get her last paycheck. Willie Keaton stated that he wanted to continue working with Ms. Atkins/would have. Willie Keaton's deponent was contradicting to what he has stated. This false statement was made on Pg. 5, Paragraph 2 of Willie Keaton's **April 2, 2007**. Is this a statement from someone who is rational and of sound mind? Willie Keaton clearly did not and would not have complied with Ms. Atkins's request if the investigator Mrs. Johnson, under the direction of Bob Kennedy, Chief hadn't intervened on Ms. Atkins's behalf. It was one month later that Ms. Atkins received her last paycheck (6/22/06). Willie Keaton clearly contradicted himself and was being dishonest in that statement he made of his appeal Pg.2 Paragraph 6. He made no attempt to rectify the situation with Ms. Atkins. If so Willie & Donna Keaton would not have had to have any interaction with the investigator for Wage and Hour, Mrs. Johnson. This is not an employer/person who a "ordinarily intelligent person" would be able to continue working for/under. **ORC 4141.29(D)(2)(a)**. When he did send Ms. Atkins's check, the appropriate taxes had not been taken out. Willie Keaton felt as though he didn't have to pay Ms. Atkins the appropriate compensation she was due. So because of that, Willie Keaton was instructed by Mrs. Johnson to resubmit the correct information and pay Ms. Atkins her wages. An "ordinarily intelligent person" would not try to keep a person's wages and say that they were willing to work with that same person. If Willie & Donna Keaton were people of character they wouldn't have expected Ms. Atkins to continue to subject herself to the unhealthy, intolerable, hostile work conditions. They would not have expected Ms. Atkins to act unethically, put her morals/beliefs aside for their convenience, if they were willing to continue the working relationship with Ms. Atkins. Donna & Willie Keaton's dishonesty, irrational behavior and unethical actions exemplifies a person who does not put children first nor conduct himself or herself in an appropriate, ethical, rational, professional manner. This type of employment would make a person feel compelled to resign. *In re Fried (N.Y. Sup. Ct., App. Div., Aug. 5, 1976), Unemployment Ins. Rept. (CCH), Paragraph 10,530, at page 4622*. A bad judgment call by the Keatons, when not having all the facts/ unreasonable, unwarranted reprimand was not Ms. Atkins's reason for quitting employment. It was an assumption made by the Keatons and ODJFS

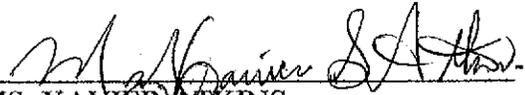
Review Commission . People receive unwarranted reprimands/ warnings on their jobs, it's not a reason to quit. Ms. Atkins felt compelled to quit as a result of the continuous negative occurrences, which included being physically and verbally threatened by a staff member who has a history of physical violence on the job, by continuously being exposed and faced with hostile clients, staff, and management who refused to follow/ comply with not only center policy but also State Regulated Rules and Policy for Child Care Licensing.

CONCLUSION

There is no evidence that was presented that the Plaintiff did not have "just cause" for quitting employment. There are numerous occurrences that exemplifies why Ms. Atkins did feel compelled to quit her employment due to the stress, lack of support from supervisors, discrimination, hostile staff, supervisors, and clients. The Plaintiff was not allowed *Due Process*. The Plaintiff asks that the court grant that the decision be reversed back to the hearing officer's initial decision to allow the Plaintiff's claim and benefits, voiding the order for Plaintiff to repay benefits.

For the reasons discussed above, this case involves matters of the public and great general interest and a substantial question. If the court does not grant her the allowed benefits, the Appellant requests that a new trial be set on the basis that the verdict/decision is not reversed. The appellant requests that this court accepts jurisdiction in this case so that the important issues will be reviewed on the merits.

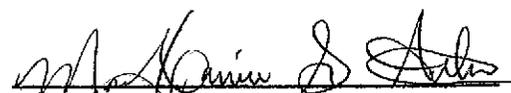
Respectfully submitted,



MS. XAVIER ATKINS
P. O. Box 360972
Columbus, Ohio 43236
APPELLANT

CERTIFICATE OF SERVICE

**A copy of the foregoing was served upon David Lefton/ODJFS – Defendant-Appellee,
on this day of September 29, 2008.**



MS. XAVIER ATKINS

APPELLANT

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

2008 AUG 14 PM 12:35

CLERK OF COURTS

Xavier Atkins,

Appellant-Appellant,

v.

Director, Ohio Department of Job &
Family Services et al.,

Appellees-Appellees.

No. 08AP-182
(C.P.C. No. 07CVF-08-10469)

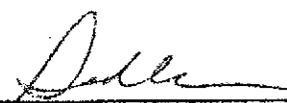
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on August 14, 2008, appellant's assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

SADLER, PETREE, and T. BRYANT, JJ.

By



Judge Lisa L. Sadler

T. BRYANT, J., retired of the Third Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Xavier Atkins,	:	
	:	
Appellant-Appellant,	:	
	:	
v.	:	No. 08AP-182
	:	(C.P.C. No. 07CVF-08-10469)
Director, Ohio Department of Job & Family Services et al.,	:	(REGULAR CALENDAR)
	:	
Appellees-Appellees.	:	
	:	

O P I N I O N

Rendered on August 14, 2008

Xavier Atkins, pro se.

Nancy H. Rogers, Attorney General, and *David E. Lefton*, for
appellee Ohio Department of Job & Family Services.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Xavier Atkins ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas, in which that court affirmed the order of the Unemployment Compensation Review Commission ("commission") denying appellant's application for unemployment compensation, after appellee (Helen Jones-Kelley),

Director, Ohio Department of Job & Family Services ("appellee"), denied appellant's application on the basis that she quit her employment without just cause.

{¶2} The record reveals that appellant was employed at a child care center called Mother's Helper from December 19, 2005 until she resigned her position on May 12, 2006. On July 3, 2006, appellant filed an application for unemployment compensation benefits with the Ohio Department of Job & Family Services ("ODJFS"). On July 21, 2006, ODJFS issued an order disallowing the application on the ground that appellant quit her job without just cause. On August 15, 2006, appellee affirmed the July 21, 2006 order disallowing appellant's application. Appellant appealed, and on November 17, 2006, the commission mailed a notice that appellee had transferred the case to the commission's jurisdiction and that the matter was set for hearing on December 6, 2006.

{¶3} On November 22, 2006, at appellant's request, the commission issued subpoenas to witnesses Rebecca S. Logan-Johnson ("Logan-Johnson") and Sheila James. Logan-Johnson is an investigator with the Ohio Department of Commerce, Division of Labor & Worker Safety, Bureau of Wage & Hour. Appellant identified Sheila James as a "consultant."

{¶4} On December 6, 2006, and March 9, 2007, a hearing officer conducted the scheduled hearing on appellant's application. On the first day, the hearing officer explained that the issue at the hearing was whether appellant quit her job with or without just cause. The December 6, 2006 transcript reveals that Logan-Johnson could not be present that day due to a death in her family. Appellant told the hearing officer that Sheila James would not be present, but that appellant wished to proceed without her. The hearing officer noted that the file contained a letter dated August 7, 2006, from Logan-

Johnson to "whom it may concern," in which Logan-Johnson states that she conducted an investigation into whether Mother's Helper had failed to pay certain wages that appellant had earned, and that the investigation was successfully concluded when Mother's Helper tendered the wages that were due. The hearing officer asked appellant whether she intended to present any testimony from Logan-Johnson regarding any facts beyond those detailed in the letter. Appellant said no, whereupon the hearing officer stated that Logan-Johnson's testimony would be cumulative because the letter was already part of the record. Appellant made no objection to this decision.

{¶5} At the conclusion of that day's hearing, the hearing officer stated, "I won't resubpoena the other two people as I indicated before . . . you indicated before, you didn't want to present Ms. James. And I already had the information from Ms. Rebecca Logan-Johnson. Any questions or comments about that?" Appellant replied, "I don't believe so at this time." (Dec. 6, 2006 Tr. at 34-35.) The hearing was scheduled to continue on March 9, 2007.

{¶6} On February 27, 2007, appellant submitted a request that the commission issue new subpoenas to Logan-Johnson, Florence Atkins ("Atkins"), who is appellant's mother, and Michelle Ludaway. On March 2, 2007, the commission issued a subpoena to Logan-Johnson. At the beginning of the hearing on March 9, 2007, appellant indicated that she intended to present the testimony of Logan-Johnson and Atkins, who were both present. (Michelle Ludaway was not present.)

{¶7} The hearing officer asked Logan-Johnson and Atkins to wait outside the hearing room and told them, "we may or may not get to you today, depending on how far we go." (Mar. 9, 2007 Tr. at 3.) Following the taking of appellant's testimony, the hearing

officer asked whether appellant intended to call Logan-Johnson to discuss anything other than the wage investigation. Appellant replied that she intended to have Logan-Johnson testify as to the witness' interaction with Mother's Helper representative Willie Keaton during the investigation. Appellant stated that she wanted Logan-Johnson to explain how "hostile," "unsupportive," and "uncompassionate"¹ Mr. Keaton is. The hearing officer determined that such testimony was not relevant to the issue whether appellant quit her employment without just cause.

{¶8} The hearing officer then inquired as to the purpose of Atkins' testimony. Appellant said that she intended for her mother to testify about "her [mother's] overview of the center as a whole. Her interaction with some of the staff members when she came to visit. Her dialogue with some of the staff members. And just what she observed as a whole." *Id.* at 40. The hearing officer inquired whether Atkins had worked at Mother's Helper, and appellant stated that she had not. The hearing officer ruled that Atkins' testimony would not be relevant to appellant's case. Appellant made no objection to this ruling.

{¶9} On March 13, 2007, the hearing officer mailed her decision, including findings of fact, in which she concluded that appellant quit her job with just cause, and the application for benefits should be allowed. Mother's Helper requested that the commission review the hearing officer's decision. The commission reviewed the file and, by decision mailed July 12, 2007, determined that appellant quit her job without just cause. Among its factual findings, the commission found that appellant had not been abused by her supervisors, she had quit her job despite the fact that continuing work was

¹ Mar. 9, 2007 Tr. at 40.

available to her, and she did not act reasonably in quitting her employment. On that basis, the commission reversed the hearing officer's decision, disallowed appellant's application, and declared an overpayment of benefits.

{¶10} Appellant appealed to the court of common pleas. Following briefing by both parties, the trial court affirmed the commission's decision on January 23, 2008, having determined that the commission's decision was not unlawful, unreasonable or against the manifest weight of the evidence. Appellant appealed and advances one assignment of error for our review, stated as follows:

The hearing officer agreed with ODJFS in allowing Plaintiff's unemployment benefits and ordered that the funds be released. Several months later after awarding benefits to the Plaintiff, the hearing officer then disallowed the award of benefits and ordered that they be repaid.

The hearing officer denied Plaintiff's right to have a character witness speak on her Plaintiff's behalf in the initial hearing. The Plaintiff was denied the right to Due Process. This is in direct violation of the Plaintiff's 4th Amendment.

The hearing officer did not provide an opportunity to the Plaintiff to give testimony in response to the employer's appeal in which she based her decision on.

{¶11} Appellant's assignment of error does not identify any particular error made by the trial court. However, because the scope of our review is identical to that of the trial court, we will interpret her assignment of error as arguing that the trial court erred in failing to find that the commission's determination was unlawful because it deprived appellant of her right to due process of law.

{¶12} "In determining an application for unemployment compensation, the commission considers whether an award of benefits will further the underlying purpose of

unemployment compensation: to provide financial assistance to those who become unemployed through no fault of their own." *Cottrell v. Dir., Ohio Dept. of Job & Family Servs.*, Franklin App. No. 05AP-798, 2006-Ohio-793, ¶5, citing *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 1995-Ohio-206, 653 N.E.2d 1207. "Under R.C. 4141.29, a party is entitled to unemployment compensation benefits if he or she quits with just cause or is discharged without just cause." *Moore v. Comparison Mkt., Inc.*, Summit App. No. 23255, 2006-Ohio-6382, ¶10. "The determination of whether just cause exists depends upon the factual circumstances of each case. Purely factual determinations are primarily within the province of the hearing officer and commission." *Cottrell*, supra, at ¶6, citing *Irvine v. Unemp. Comp. Bd. of Rev.* (1985), 19 Ohio St.3d 15, 17, 19 OBR 12, 482 N.E.2d 587.

{¶13} Upon appeal to the court of common pleas, "[t]he court shall hear the appeal on the certified record provided by the commission. If the court finds that the decision of the commission 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." R.C. 4141.282(H). In other words, the court's scope of review is limited. A court may not make factual determinations or substitute its judgment for that of the commission. *Irvine*, supra. Where the commission might reasonably decide either way, the court has no authority to upset the commission's decision. *Id.* While courts are not permitted to make factual findings or determine the credibility of witnesses, they have the duty to determine whether the record contains evidence to support the commission's decision. *Tzangas*,

supra. A reviewing court applies the same standard of review as the court of common pleas. *Id.*

{¶14} Here, by her single assignment of error, appellant argues that the commission denied her right to due process, guaranteed by the Fourteenth Amendment to the United States Constitution. Her brief is largely devoted to recitation of her factual allegations regarding her former job. Her argument pertaining to her assigned error is found on page 13 of her brief, where she states that "[t]wo Hearings were held with the hearing officer * * *. Neither time was Ms. Atkins's witness allowed to speak on her behalf." (Brief of Appellant, 13.)

{¶15} "[F]ederal law mandates that state unemployment programs provide an [o]pportunity for a fair hearing, before an impartial tribunal * * *. This statute has been interpreted to impose requirements which are the same as constitutional procedural due process requirements. Hence, any judicial analysis of the state's hearing procedures in this case must be conducted with a fundamental recognition that under the Fourteenth Amendment the cornerstone of due process, in the procedural sense, is the opportunity for a fair hearing." (Citations omitted.) *Henize v. Ohio Bur. of Emp. Servs.* (1986), 22 Ohio St.3d 213, 215, 22 OBR 364, 490 N.E.2d 585.

{¶16} "The principles of due process in administrative hearings shall be applied to all hearings conducted under the authority of the commission." R.C. 4141.281(C)(2). That subparagraph goes on to provide, "[i]n conducting hearings, all hearing officers shall control the conduct of the hearing, exclude irrelevant or cumulative evidence, and give weight to the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of serious affairs." Thus, it has been held that "[t]he hearing officer has

broad discretion in accepting and rejecting evidence and in conducting the hearing in general." *Bulatko v. Dir., Ohio Dept. of Job & Family Servs.*, Mahoning App. No. 07 MA 124, 2008-Ohio-1061, ¶11.

{¶17} "The hearing officer's discretion is tempered only to the extent that he must afford each party an opportunity to present evidence that provides insight into the very subject of the dispute." *Id.*, citing *Owens v. Admr., Ohio Bur. of Emp. Servs.* (1999), 135 Ohio App.3d 217, 220, 733 N.E.2d 628. "The key factor in deciding whether the hearing satisfied procedural due process is whether the claimant had the opportunity to present the facts which demonstrate that she was entitled to unemployment benefits." *Id.* at 12. See, also, *Gregg v. SBC Ameritech*, Franklin App. No. 03AP-429, 2004-Ohio-1061. This is because "[t]he object of the hearing is to ascertain the facts that may or may not entitle the claimant to unemployment benefits." *Bulatko*, at ¶11; *Owens*, at 220; *Simon v. Lake Geauga Printing Co.* (1982), 69 Ohio St.2d 41, 43, 23 O.O.3d 57, 430 N.E.2d 468.

{¶18} In the present case, appellant argues that the commission deprived her of due process of law by unlawfully preventing her from presenting the testimony of certain witnesses. However, review of the record reveals that appellant never argued in the trial court that the commission deprived her of due process. She presented no argument regarding the exclusion of any of her witnesses, instead focusing solely on her version of the facts surrounding her employment and her departure therefrom, and arguing that she did indeed have just cause to resign her position.

{¶19} As such, we need not consider her constitutional argument made for the first time here. "A fundamental rule of appellate review is that an appellate court will not consider any error that could have been, but was not, brought to the trial court's

attention." *Little Forest Med. Ctr. v. Ohio Civ. Rights Comm.* (1993), 91 Ohio App.3d 76, 80, 631 N.E.2d 1068, citing *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 210, 24 O.O.3d 316, 436 N.E.2d 1001. This is true even for constitutional arguments. "A party waives the right to appeal [an] issue that was in existence prior to or at time of trial if that party did not raise [the] issue at the appropriate time in [the] court below. As a result, constitutional rights may be lost as finally as any others by a failure to assert them at the proper time." (Citations omitted.) *Kimberly Entertainment Corp. v. Liquor Control Comm.* (Nov. 26, 1996), Franklin App. No. 96APE05-581, 1996 Ohio App. LEXIS 5313, at *5.

{¶20} We are mindful that appellant acted pro se in the proceedings below. Nevertheless, a pro se litigant "is held to the same rules, procedures and standards as those litigants represented by counsel and must accept the results of her own mistakes and errors." *Dailey v. R & J Commercial Contracting*, Franklin App. No. 01AP-1464, 2002-Ohio-4724, ¶17, quoting *Dornbirer v. Paul* (Aug. 19, 1997), Franklin App. No. 96APE11-1560, discretionary appeal not allowed, 80 Ohio St.3d 1476, 687 N.E.2d 472.

{¶21} In any case, we discern no due process violation in the record. Other than herself, appellant, at one time or another, intended to present the testimony of four individuals: (1) Logan-Johnson; (2) Sheila James; (3) Atkins; and (4) Michelle Ludaway.

{¶22} On the two occasions when the hearing officer informed her that Logan-Johnson's testimony would be excluded because it was cumulative of information that was already in the record, appellant failed to object. During the second day of the hearing, she objected to the hearing officer's exclusion of Logan-Johnson's testimony on relevancy grounds. But the hearing officer correctly concluded that Logan-Johnson's

testimony about what a "hostile," "unsupportive," and "uncompassionate"² person Mr. Keaton is, has no relevance to the issue of whether appellant quit her employment with just cause. Her allegations about the intolerable nature of her working conditions involved many fellow staff members and her supervisors, and did not center on Keaton.

{¶23} With respect to Sheila James, this witness failed to appear on the first day of the hearing, and appellant told the hearing officer that she wished to proceed without her testimony. With respect to Atkins' testimony, in light of the fact that Atkins never worked at Mother's Helper, and was proffered to testify as to her general observations while visiting the center and not to corroborate specific claims of abusive treatment, the hearing officer correctly concluded that Atkins' testimony was irrelevant to the issue whether appellant's decision to quit her job was justified.

{¶24} Finally, Michelle Ludaway never appeared at the hearing, and the hearing officer never excluded her testimony. In any case, "[a] reviewing court cannot rule upon the exclusion of evidence by the trial court unless the rejected evidence has been made a part of the transcript of proceedings or record." *Gregg*, supra, ¶20. Because appellant never proffered the substance of Michelle Ludaway's testimony, even if she had sought to introduce it, we would be unable to determine whether that testimony was properly excluded.

² See ¶7, supra.

{¶25} For all of the foregoing reasons, we overrule appellant's single assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

PETREE and T. BRYANT, JJ., concur.

T. BRYANT, J., retired of the Third Appellate District,
assigned to active duty under authority of Section 6(C), Article
IV, Ohio Constitution.
