[Cite as *Underhill v. Unemp. Comp. Rev. Comm.*, 2011-Ohio-1598.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Robert S. Underhill,	:	
Appellant-Appellant,	:	
		No. 10AP-617
v.	:	(C.P.C. No. 09CVF08-12787)
Unemployment Compensation Review Commission et al.,	:	(REGULAR CALENDAR)
	:	
Appellees-Appellees.	:	

D E C I S I O N

Rendered on March 31, 2011

Robert S. Underhill, pro se.

Michael DeWine, Attorney General, and *Patria V. Hoskins*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Appellant, Robert S. Underhill, has filed an appeal from a judgment of the Franklin County Court of Common Pleas, in which the court affirmed the decision of the Unemployment Compensation Review Commission ("commission"), appellee.

{¶2} Appellant is hearing impaired in both ears. He was employed by Sears & Roebuck Co. ("Sears"), at its Great Indoors store at the Polaris Mall in Columbus, Ohio. His employment commenced in June 2002. On November 16, 2008, appellant engaged in an argument with another employee, Michael Fearnow. The argument regarded the

use of a certain cart, as well as appellant's belief that Fearnow had been making derogatory comments about him based upon his hearing impairment. Ryan Mason, a loss prevention supervisor, heard the argument and discussed the incident with appellant. Appellant's direct supervisor, Jane Edwards, was on medical leave at the time. Appellant was unhappy with Mason's handling of the situation and told Mason he was leaving. Mason told appellant that he needed management approval in order to leave work prior to the end of his work shift. Appellant told Mason he was not merely leaving but quitting. Appellant gathered personal items from his desk and locker, placed them in a box, and left the premises. Appellant was scheduled to work the following day, but he did not report to work and did not call off. He did apparently speak with someone at The Great Indoors on November 17, 2008, and a meeting was scheduled for the following day, November 18, 2008. At the meeting, Sears contended it terminated appellant as of November 17, 2008, due to his quitting his job and failing to report for work.

{¶3} On November 18, 2008, appellant filed for unemployment compensation benefits with the Ohio Department of Job and Family Services ("ODJFS"), appellee, and benefits were allowed on the basis that appellant had been discharged without just cause. Sears appealed, and ODJFS affirmed the initial determination on February 3, 2009. Sears appealed again, and the matter was referred to the commission for a hearing. After a hearing on May 18, 2009, the commission hearing officer reversed ODJFS's determination and found appellant had been discharged for just cause; thus, appellant was denied unemployment compensation benefits. The commission denied appellant's request for further review on August 5, 2009.

{¶4} Appellant appealed the commission's decision to the common pleas court on August 24, 2009. On June 11, 2010, the common pleas court affirmed the commission's decision. Appellant has appealed the judgment of the trial court. However, appellant, who is pro se, has not filed assignments of error. Instead, appellant lists numerous statements and/or findings from the court's decision and presents arguments as to why he believes those statements and/or findings were in error. We will construe each of these statements and/or findings as assignments of error and address them accordingly. Appellant asserts the following assignments of error:

> [I.] "*That absence does not mean that the hearing officer did not consider them in formulating his decision*."
>
> [II.] "*Appellant has offered that Sears did not follow its policy on unexcused absence* [sic]. *Upon full review of the hearing, the Court find* [sic] *no offer of such policy*[.]"
>
> [III.] "*Although Appellant was scheduled to work the next day, he failed to report. Appellant did contact the company the following day*[.]"
>
> [IV.] *The Judge's remark in paragraph #3 on Pg 6*.
>
> [V.] *As to applicable case precedent, the Court will start with the foundation that an employer has a right to expect an employee to remain in the workplace, et all* [sic].
>
> [VI.] "*A number of cases have determined that unauthorized departure from an employer's premises*[.]"
>
> [VII.] "*Under normal circumstances, 'employees who experience problems in their working conditions must make reasonable efforts to attempt to solve the problem before leaving their employment.' et al*[.]"

{¶5} In all of appellant's assignments of error, appellant contests the trial court's affirmance of the commission's decision. The scope of our review in unemployment

compensation appeals is quite limited. *Silkert v. Ohio Dept. of Job & Family Servs.*, 184 Ohio App.3d 78, 2009-Ohio-4399, ¶26, citing *Giles v. F & P Am. Mfg., Inc.*, 2d Dist. No. 2004-CA-36, 2005-Ohio-4833, ¶13. "All reviewing courts, including common pleas, courts of appeal, and the Supreme Court of Ohio, have the same review power and cannot make factual findings or determine witness credibility. * * * However, these courts 'do have the duty to determine whether the board's decision is supported by the evidence in the record.' " *Silkert* at ¶26, quoting *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.* (1995), 73 Ohio St.3d 694, 696.

{¶6} Pursuant to R.C. 4141.29, which establishes the requirements for eligibility for unemployment benefits, a claimant is not eligible for benefits if he is discharged for "just cause." R.C. 4141.29(D)(2)(a). An appellate court may reverse the commission's "just cause" determination only if it is unlawful, unreasonable, or against the manifest weight of the evidence. *Tzangas* at paragraph one of the syllabus. "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. Unemployment Comp. Bd. of Rev.* (1985), 19 Ohio St.3d 15, 17.

{¶7} "Each unemployment compensation case must be considered upon its particular merits in determining whether there was just cause for discharge." *Johnson v. Edgewood City School Dist. Bd. of Edn.*, 12th Dist. No. CA2008-11-278, 2010-Ohio-3135, ¶14, citing *Warrensville Heights v. Jennings* (1991), 58 Ohio St.3d 206, 207. The discharged employee bears the burden of persuasion to prove that he is entitled to unemployment compensation. *Silkert* at ¶36.

{¶8} 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. 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. Dir., Ohio Dept. of Job & Family Servs.*, 2d Dist. No. 20552, 2005-Ohio-1928, ¶43.

{¶9} In appellant's assignments of error, he takes issue with several findings by the trial court, which we will address in turn. Appellant states in his first assignment of error that the trial court erred when it found that the commission's failure to mention appellant's documentary evidence of prior harassment in its decision did not mean that the hearing officer did not consider them in formulating the decision. Appellant's actual arguments under this assignment of error are that he does not feel like he was able to adequately explain his case before the hearing officer; the hearing was restricted to the point he was unable to present evidence at all; the interpreter was not competent and made errors; and the hearing officer attempted to silence the interpreter. However, appellant cites to no evidence to support these contentions. The record from the

commission hearing shows no indication that the hearing was "too restricted," that the interpreter made any errors, or that the hearing officer attempted to impact the interpreter's job. Furthermore, if appellant desired to submit documentary evidence, he was free to do so. Appellant's claim that he was unable to do so because of his inexperience with the hearing procedure is not a proper ground for reversal. Therefore, appellant's first assignment of error is overruled.

{¶10} In his second assignment of error, appellant takes issue with the trial court's rejection of his argument that Sears did not follow its policy on unexcused absences based upon its finding that there was no offer of such policy by appellant at the commission hearing and no explanation as to how it would be applied to this case. Appellant attaches to his appellate brief an alleged excerpt from Sears's attendance policy. Appellant admits he did not present this evidence at the commission hearing and only recently obtained it in July 2010. He also admits that the policy was revised in 2007 or 2008, but he does not have a revised version. Regardless, we cannot accept new evidence at this stage of the proceedings and are unable to rely upon any evidence that is not part of the record before us. It is a basic proposition of appellate review that we cannot add matter to the record before us and decide this appeal based upon that new matter. *Barnett v. Ohio Adult Parole Auth.* (1998), 81 Ohio St.3d 385, 387. For these reasons, appellant's second assignment of error is overruled.

{¶11} In his third assignment of error, appellant takes issue with the trial court's statement that, "[a]lthough Appellant was scheduled to work the next day, he failed to report. Appellant did contact the company the following day and had a meeting with Ms. Lasher and the store manager, Andy Komaromy." Appellant asserts he did, in fact, speak

with Lasher at The Great Indoors on November 17, 2008, around noon, and they set up a meeting for November 18, 2008. It is unclear whether the trial court's use of the phrase "the following day" meant the day following "the next day," which would be November 18, 2008, or meant the day following the incident, which would have been November 17, 2008.

{¶12} In the record from ODJFS that was before the trial court, there are several pieces of evidence that indicate appellant spoke to management at The Great Indoors on November 17, 2008, and appellant testified at the commission hearing that he spoke with Lasher at approximately noon on November 17, 2008. Thus, if the trial court meant that appellant did not speak with anyone from The Great Indoors on November 17, 2008, the court was incorrect.

{¶13} However, the pertinent question is whether the trial court's factual statement, if in fact erroneous, was prejudicial and impacted its analysis. Appellant presents no argument or explanation why this statement was prejudicial. The statement was made during the factual summary of the case and was not referred to again in the legal analysis. Therefore, we find that, even if the trial court's statement was incorrect, the error was not prejudicial and did not affect the outcome of the case. For this reason, appellant's third assignment of error is overruled.

{¶14} We will address appellant's arguments in his fourth, fifth, sixth, and seventh assignments of error together, as the issues raised in each overlap. In his fourth assignment of error, appellant takes issue with the trial court's interpretation of certain statements appellant made in a June 8, 2009 letter to the commission. The statement cited by the trial court was "in my anger, [I] inadvertently said to him that I'm quitting*

ONLY TO GET HIM TO BACK OFF FROM ME." (Emphasis sic.) The trial court indicated this statement was relevant because appellant has maintained that he never quit his job. The trial court later concluded that the record contained substantial evidence to controvert appellant's contention that he did not "quit." Appellant argues that the trial court took his statement out of context; ignored the overall relevance of his compelling reasons to leave the job for the day under duress and for his personal safety; ignored the word "inadvertently"; and ignored the asterisk, which would have directed the court to a footnote that said "Mr. Mason simply misinterpreted my 'quitting' statement because he did not realize that he was in my personal space and I was already emotionally angry. Hence I said that only to get him to back off from me."

{¶15} Initially, appellant does not contest that he told Mason he was quitting. Several circumstances would support the inference that The Great Indoors could have justifiably believed appellant had quit. Appellant actually stated he was quitting, he packed some of his personal items from his desk and locker into a box, failed to report to work the next day, and failed to call in to inform his supervisors he would not be working that day. We find these actions indicative of a worker who has abandoned his employment, and Sears was not unreasonable in interpreting them in such a way.

{¶16} Appellant asks this court to consider he was extremely upset, angry, and under duress at the time of the incident; he was not in the best frame of mind; and he may have unintentionally said some words in an inarticulate manner, as he is human and prone to irrational actions or statements under duress. Insofar as appellant would like this court to ignore his statement that he quit because he was angry, emotional, upset, under duress, and inarticulate, we decline to do so. Although appellant claims his quitting was

"inadvertent," it appears that his quitting was intentional, albeit caused by his heightened emotional state at the time. In his brief, appellant states that he assumed he would "get his job back" via negotiation later under a calmer setting, which is also indicative of the fact that appellant meant he was quitting his job at the time he made the statement.

{¶17} Appellant also asserts under these assignments of error that the ongoing harassment issues, the hostile environment, and management's failure to address them were compelling enough to cause him to leave his shift for the day for personal safety reasons. Whether an employee who is discharged for failing to comply with the schedule has been discharged for "just cause" within the contemplation of R.C. 4141.29(D)(2)(a) is a question of fact that depends on the totality of the circumstances. *Schadek v. Admr. Ohio Bur. of Emp. Servs.* (June 15, 1990), 2d Dist. No. 11569. The law looks to the degree and nature of the employee's "fault." Id., citing *Angelkovski v. Buckeye Potato Chip Co.* (1983), 11 Ohio App.3d 159. The law also looks at the extent to which the employee has exhibited a disregard of his employee's interests. Id., citing *Sellers v. Bd. of Rev.* (1981), 1 Ohio App.3d 161. Unauthorized departure of the employer's premises and abandonment of the work duties assigned may constitute "just cause" in the absence of a compelling need demonstrated in the record. Id.

{¶18} However, an employee may quit for "just cause" and still be eligible for unemployment benefits. The claimant has the burden of proving the existence of just cause for quitting work. *Irvine* at 17. A reasonable fear for one's personal safety is a proper reason for leaving employment. *Village of Chesapeake v. Ellis* (Nov. 24, 1993), 4th Dist. No. 93 CA 3, citing *Taylor v. Bd. of Rev.* (1984), 20 Ohio App.3d 297. Just cause to quit and be eligible for unemployment benefits has also been found where an employee

has been subjected to verbal harassment. *DiGiannantoni v. Wedgewater Animal Hosp., Inc.* (1996), 109 Ohio App.3d 300. However, a mere perception by an employee that she has been subject to harassment does not constitute just cause for quitting employment. *Biles v. Ohio Bur. of Emp. Servs.* (1995), 107 Ohio App.3d 114, 122. A significant factor in determining just cause to resign is the employee's fault in creating the situation that led to resignation. *Stapleton v. Ohio Dept. of Job & Family Servs.*, 163 Ohio App.3d 14, 2005-Ohio-4473.

{¶19} Typically, an employee must first notify the employer of the problems prior to quitting, or they risk a finding that they quit without just cause. *DiGiannantoni* at 307. The purpose of notice is to give the employer an opportunity to solve the problem before the employee quits. Id. However, notice to the employer alone is not sufficient to establish just cause. Id. at 308. Merely notifying the employer of the problem, without giving the employer the opportunity to correct the problem, does not accomplish this goal. See, e.g., *Thake v. Unemployment Comp. Bd. of Rev.* (1990), 67 Ohio App.3d 503 (holding that, despite employee's initial notification to her employer of a health problem, employee did not possess just cause when she quit without informing the employer that its accommodations proved to be insufficient).

{¶20} In contrast, where an employee's initial complaints do not prompt the employer to change her working conditions, the employee may be relieved of her duty to further pursue internal remedies. *Krawczyszyn v. Ohio Bur. of Emp. Servs.* (1989), 54 Ohio App.3d 35, 37. Likewise, "an employee need not indefinitely subject herself to abusive conduct while waiting for her employer to respond." Id. Thus, although employees must make reasonable efforts to solve a problem before quitting, an employee

with a reasonable fear for his personal safety cannot be expected to remain on the job until an actual physical assault takes place. *Taylor* at 299.

{¶21} In the present case, appellant argues that he gave notices to his supervisors and management several times, verbally, and in writing, about the problems of harassment and hostile work environment toward him during his years of employment, but the behavior and problems persisted, forcing him to leave his workplace on the day in question. At the hearing, Ryan Mason, loss prevention supervisor for The Great Indoors, testified that, after the incident, appellant came into his office and said he had had several problems with Fearnow in the past. Mason told appellant that he would follow up with any issues he had with Fearnow, but appellant did not like that response and returned to his work area. Appellant never elaborated on his past issues with Fearnow, and Mason was not aware that there had been other issues between appellant and Fearnow. After several minutes, Mason went to appellant's work area to see if he had calmed down, and appellant was packing his personal items into a box. Mason told appellant that he would need manager's approval to leave for the day, and appellant told him he was quitting. Appellant then left work.

{¶22} Julie Lasher, operations manager for Sears, testified she was unaware of any problems between appellant and Fearnow, and appellant's direct supervisor had never informed her of any past problems.

{¶23} Appellant testified he had been having problems with Fearnow since Fearnow was hired in 2007. Fearnow would talk behind his back and make negative remarks about him, while taking advantage of appellant's deafness. He testified that he asked his supervisor, Jane Edwards, to talk to Fearnow about the problems. He also told

his boss, Jacob Goragimer, five or more times in one year about the problem, but appellant did not think Goragimer ever reported anything. Appellant also told another supervisor, Danny Reed, about his problem with Fearnow, and Fearnow's behavior changed for a short time. He also reported his problems with Fearnow to Shanna Christian in the human resources department around early 2008. Christian said she would talk to appellant's supervisor, but Fearnow's behavior did not change. When Fearnow's behavior continued, appellant reported the problem to Edwards in May 2008, and last reported them to her in October 2008. He admitted he had no documentation about his conversations with management regarding Fearnow before the incident in question.

{¶24} Appellant also testified that, while arguing with Fearnow during the incident at issue here, he felt threatened by Fearnow, and it looked like Fearnow was ready to fight. He told Mason right after the incident that he was tried of the harassment, discrimination, and negative reports about him. Mason told him they would talk when the manager arrived. Appellant said he did not care about the manager and did not want to talk to anyone. Appellant testified that Mason was physically intimidating and in his personal space and admitted he told Mason he was quitting. Mason left for a phone call and returned to say a manager was on the way. Appellant testified he cleared out several things from his locker and desk, but not all of his personal affects, and left before a manager arrived. Appellant said he contacted Edwards via e-mail on November 14, 2008, about Fearnow's behavior, but he knew she would not get the message until she arrived back from leave several days later. He said he never contacted the store manager or

Sears's toll free human resources number from November 14 through November 18, 2008, to voice his concerns about Fearnow.

{¶25} Included in the commission record are several e-mails from appellant to his superiors complaining of mistreatment at the hands of known and unknown perpetrators. Appellant did not submit these attachments during the oral hearing before the hearing officer, but he did submit them as attachments to his application to institute a further appeal of the decision of the hearing officer. Pursuant to Ohio Adm.Code 4146-25-01, a party filing a request for review to the review commission from a decision by a hearing officer may submit additional evidence if the party so states and sets forth a brief statement thereof. The content of some of the attached e-mails is as follows.

{¶26} In an August 24, 2005 e-mail to a supervisor, appellant complained that a different supervisor was picking on him, throwing food at him, and being disrespectful to him. The supervisor replied to appellant's e-mail the same day, requesting the names of witnesses who had seen the incident so that he could develop a solution to prevent it from happening again.

{¶27} In an August 25, 2005 e-mail to a human resources manager, appellant reiterated the complaint he made in the August 24, 2005 e-mail. The human resources manager replied the same day and suggested that appellant stop by her office to discuss the matter.

{¶28} On November 21, 2006, appellant sent an e-mail to a supervisor and to Edwards complaining that someone had dumped "garbage chutes" in his area, and it had happened a few times before. Appellant expressed that he was angry with this behavior.

Appellant also claimed that a supervisor was encouraging or allowing his mistreatment in order to get rid of appellant.

{¶29} In a November 21, 2007 e-mail to Edwards and Komaromy, the store manager, appellant complained that someone had dumped packing peanuts in his work area and glued a tape measure to a table. In response to appellant's November 21, 2007 e-mail, on November 28, 2007, Edwards sent an e-mail to Komaromy and Lasher indicating she needed them to find out who was "messing" with appellant because appellant did not find the behavior funny and was angry. Edwards asked for help finding out who was responsible and help getting the behavior to stop. On November 28, 2007, Lasher sent a reply e-mail to appellant indicating she and others were investigating the incident and the behavior was not acceptable.

{¶30} In a November 14, 2008 e-mail to Edwards, appellant complained that Fearnow had a hostile attitude toward him, talked negatively about him, and engaged in mean-spirited behavior toward him. Appellant testified that Edwards was on leave at the time he sent the e-mail, and he knew she would not receive it until she returned on November 18, 2008.

{¶31} What we must decide is whether an ordinarily intelligent person would have been justified in quitting his job under the circumstances facing appellant. In doing so, as explained above, we look at whether appellant had a reasonable fear for his personal safety, whether he was subjected to verbal harassment, whether he had any fault in bringing about the circumstances leading to his quitting, whether he first notified Sears of the problems prior to quitting, and whether he gave Sears an opportunity to solve the problem before quitting. As an initial matter, it is clear that appellant did raise his problems

with Fearnow and other employees to his supervisors on several occasions prior to the incident on November 16, 2008. The e-mails and appellant's testimony support such, and Sears does not contest appellant's claims in this regard.

{¶32} However, viewing the circumstances as a whole, other facts weigh more in favor of finding appellant voluntarily quit his job without just cause. From the e-mails appellant submitted, it is apparent that appellant's supervisors at Sears promptly responded to appellant's e-mails and indicated their desire to address his concerns. Appellant likewise testified that, on several occasions when he reported his problems with co-workers to his supervisors, they said they would investigate further. Although appellant claims that his supervisors never resolved the issues, the length of time between incidents reported in the e-mails suggests the problems appellant was having with other workers was sporadic and spread across three years.

{¶33} Furthermore, several of the conflicts between appellant and his co-workers detailed in the e-mails, such as someone dumping packaging peanuts, leaving crumbs, and putting "garbage chutes" in his work area, were general workplace complaints, and there is no proof that these actions were malicious, direct attacks against appellant. Also, several of the e-mails—both detailed and not detailed above—seem to involve personality conflicts rather than threats of physical violence, abusive conduct, or personal safety issues. In one e-mail not included above, a supervisor appellant complained about accused appellant of also picking on him and joking around. Appellant also admitted that he had been reprimanded for outbursts and other incidents involving other employees. Thus, much of the evidence appellant presented was either vague or unconvincing, and

we cannot find that appellant had a reasonable fear for his personal safety or was subjected to harassment that would induce a reasonable person to quit his job.

{¶34} As for appellant's actions on November 16, 2008, it is clear that appellant left his job without giving his supervisors an opportunity to resolve his particular problem that day. Mason told appellant that he had called another manager, and the manager was on the way to talk to appellant about the incident. Appellant told Mason he was not waiting, collected his personal items, and left the premises without giving the manager an opportunity to address the issue. In addition, although appellant raised his complaints regarding Fearnow in the November 14, 2008 e-mail to Edwards, appellant knew that Edwards would not get the e-mail until she arrived back from leave, and appellant did not contact any other supervisors on that day to give them an opportunity to address his issues with Fearnow. Therefore, because appellant did not give Sears an opportunity to correct the problem before he quit his job, he did not have just cause to quit on November 16, 2008. For all these reasons, we agree appellant abandoned his job, and Sears could have reasonably relied upon such in terminating appellant. Appellant's fourth, fifth, sixth, and seventh assignments of error are overruled.

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

Judgment affirmed.

KLATT and SADLER, JJ., concur.

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