[Cite as *Ohio Assn. of Pub. School Emp. v. Ohio Dept. of Job & Family Servs.*, 2012-Ohio-6210.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ohio Association of Public School Employees (OAPSE)/AFSCME Local 4, AFL-CIO,	:	
Appellant-Appellant,	:	No. 12AP-81 (C.P.C. No. 11CVF-6-8144)
v.	:	(ACCELERATED CALENDAR)
State of Ohio, Department of Job and Family Services et al.,	:	
Appellees-Appellees.	:	

D E C I S I O N

Rendered on December 28, 2012

Thomas C. Drabick, Jr., for appellant.

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

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} This is an appeal by appellant, Ohio Association of Public School Employees, AFSCME Local 4, AFL-CIO, from a judgment of the Franklin County Court of Common Pleas affirming a decision of appellee, Unemployment Compensation Review Commission ("commission"), a division of appellee, the Ohio Department of Job & Family Services ("ODJFS"), disallowing appellant's request for a review of a determination by the commission's hearing officer that claimant, Mary Caldwell, was discharged by appellant without just cause.

{¶ 2} Claimant worked for appellant as a union field representative from October 14, 1996 until her discharge on September 24, 2010. Following her discharge, claimant filed an application for unemployment compensation benefits, which was denied by ODJFS. Claimant then sought further review of her denial. On November 19, 2010, the director of ODJFS issued a re-determination, holding that claimant was discharged by appellant for just cause. On December 10, 2010, claimant appealed the re-determination, and ODJFS transferred the case to the commission.

{¶ 3} On March 23, 2011, a hearing was conducted before a hearing officer of the commission. On April 11, 2011, the commission's hearing officer issued a decision reversing the director's re-determination, finding that claimant was discharged without just cause. On April 29, 2011, appellant filed a request with the commission for a review of the hearing officer's decision. On June 2, 2011, the commission issued a decision disallowing the request for a review.

{¶ 4} Appellant filed a notice of appeal with the trial court from the decision of the commission. On November 22, 2011, the trial court issued a decision affirming the commission's decision.

{¶ 5} On appeal, appellant sets forth the following assignment of error for this court's review:

> THE COURT OF COMMON PLEAS ERRED WHEN IT FAILED TO REVERSE OR VACATE THE DECISION OF THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION (UCRC) WHEN THE UCRC DECISION WAS UNLAWFUL, UNREASONABLE, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 6} Under its single assignment of error, appellant asserts that the trial court erred in failing to reverse or vacate the decision of the commission. Appellant argues that it presented the trial court with multiple reasons why the decision of the commission was unlawful, unreasonable, or against the manifest weight of the evidence.

{¶ 7} Pursuant to R.C. 4141.282(H), if a common pleas court, in considering an appeal on the certified record provided by the commission, "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." Similarly, an appellate

court "may reverse a decision of the Unemployment Compensation Review Commission only if the decision is unlawful, unreasonable, or against the manifest weight of the evidence." *Lorain Cty. Aud. v. Ohio Unemp. Comp. Rev. Comm.*, 113 Ohio St.3d 124, 2007-Ohio-1247, ¶ 9, citing R.C. 4141.282(H); *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694 (1995), paragraph one of the syllabus. A reviewing court is "not permitted to make factual findings or to determine the credibility of witnesses," and "[t]he fact that reasonable minds might reach different conclusions" is not a basis for reversing the commission's decision. *Irvine v. Unemp. Comp. Bd. of Rev.*, 19 Ohio St.3d 15, 18.

{¶ 8} Pursuant to R.C. 4141.29(D)(2)(a), an individual is not eligible for unemployment compensation benefits if he or she has been "discharged for just cause in connection with the individual's work." The term "just cause" has been defined as " 'that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.' " *Irvine* at 17, quoting *Peyton v. Sun T.V.*, 44 Ohio App.2d 10, 12 (10th Dist.1975). Further, "[f]ault on an employee's part is an essential component of a just-cause determination." *Williams v. Ohio Dept. of Job & Family Servs.*, 129 Ohio St.3d 332, 2011-Ohio-2897, ¶ 24.

{¶ 9} The issue before this court is not whether claimant was wrongfully terminated, but rather whether she is entitled to unemployment compensation because appellant terminated her "without just cause as defined within the unemployment context." *Case W. Res. Univ. v. Statt*, 8th Dist. No. 97159, 2012-Ohio-1055, ¶ 13.

{¶ 10} Appellant asserts that the evidence before the commission supported a finding that claimant was terminated for just cause. Appellant argues claimant received forewarning of the consequences of continued poor work performance and that, following a written warning, her work performance failed to improve, resulting in local unions requesting her removal. Appellant also contends there was evidence claimant turned in falsified reports regarding her attendance at local union meetings, and that she waived her appearance at a termination hearing on September 24, 2010. Finally, appellant argues that, despite the hearing officer's recognition that there had been complaints from local unions regarding claimant's work performance, the hearing officer failed to properly find just cause for termination.

{¶ 11} As noted under the facts, claimant began her employment with appellant on October 14, 1996 as a field representative, and her date of separation from appellant was September 24, 2010. On May 28, 2009, claimant was presented with a letter from her employer. Gary Martin, appellant's associate director, testified that the letter was a written summary of a meeting that took place between claimant and her immediate supervisor, Harold Palmer; during that meeting, the issue "at the forefront" was a request from Mount Vernon City Schools, Local 470, that claimant be removed for lack of attention in representing the school. According to Martin, the purpose of that letter was to let claimant "know that * * * we could no longer tolerate these kinds of requests from locals coming in * * * due to their dissatisfaction of the services that she was * * * assigned to deliver." Martin testified that, subsequent to the May 28, 2009 letter, other local unions complained about claimant's job performance. More specifically, Martin stated that in 2010 four different "locals" requested claimant's discharge. Martin also testified that another local union filed a petition for decertification, which Martin attributed to claimant's poor work performance.

{¶ 12} Claimant testified that, prior to September 20, 2010, she was unaware of any complaints by locals with respect to her services. She stated that her supervisor had never addressed such concerns with her, and that no complaints had been documented or placed in her personnel file. With respect to the letter she received on May 28, 2009, claimant testified she was told by her supervisor, Palmer, that the letter "was not discipline." Claimant further testified that she completed her area reports in a timely manner, and that she did not receive any written warnings prior to her termination.

{¶ 13} As noted by the commission hearing officer, the terms and conditions of claimant's employment were governed by a collective bargaining agreement ("CBA") between appellant and The School Employees Services Union. Article 20 of the CBA addresses the issue of personnel files. Article 20.02 states that "[e]mployees shall have the opportunity to read any material before it is placed in the employee's file." Article 20.03 states in part: "All derogatory material in the personnel file shall be signed by the employee or it is not considered valid." Pursuant to Article 20.04, the employee "shall have the opportunity to reply to any derogatory material in a written statement to be attached to the file copy."

{¶ 14} Article 21 of the CBA addresses disciplinary action. Pursuant to Article 21.01, employees may be "disciplined or discharged for just cause," and actions taken by the employer "may be contested as a grievance, including arbitration." Article 21.02 states that "[t]he principles of progressive corrective action shall be followed." According to Article 21.03, "no employee shall be disciplined until a meeting with the employee's immediate supervisor is concluded," and the employer is required to notify the union of the meeting 72 hours in advance. Pursuant to Article 21.05, "[d]ischarge and suspension grievances shall be introduced directly to the 2nd step of the Grievance Procedure." Article 22 of the CBA sets forth grievance procedures, including a three-step grievance process.

{¶ 15} The commission hearing officer made findings that, prior to September 20, 2010, claimant "did not receive any formal corrective action in accordance with the terms of the collective bargaining agreement." Rather, "[t]he only form of discipline that claimant received was a letter, dated May 28, 2009, that stated that if there were any other requests from locals for her removal, OAPSE would no longer be able to justify her employment with OAPSE." The hearing officer noted that claimant "was not given an opportunity to sign this letter or provide comments, and was not given an opportunity to grieve this letter in the manner that she would have had an opportunity to grieve discipline administered in accordance with the terms of the collective bargaining agreement."

{¶ 16} The hearing officer further noted that claimant attended a pre-disciplinary hearing on September 24, 2010. The hearing was not conducted, however, because appellant's associate director, Martin, "felt that one of claimant's witnesses was being disruptive to the point that an orderly hearing could not be held."

{¶ 17} Based upon the hearing evidence presented, the hearing officer held that "claimant did not receive progressive discipline that was administered in accordance with the collective bargaining agreement that governed the terms and conditions of her employment with OAPSE." The hearing officer further determined that the evidence presented did "not establish that the complaints of the locals were the result of gross neglect of duty or misconduct on the part of the claimant to warrant the termination of her employment absent progressive discipline, particularly considering the fact that the

claimant had been employed by OAPSE for nearly fourteen years." The hearing officer thus concluded that claimant was discharged by appellant without just cause.

{¶ 18} The trial court, observing that "only one noted disciplinary warning was evidenced in her years of employment until her termination was decided," held that the record supported the hearing officer's determination that claimant did not receive progressive discipline in accordance with the CBA. Upon review, we agree.

{¶ 19} The sole disciplinary warning referenced by the trial court was the May 28, 2009 letter handed to claimant by her supervisor. As noted under the facts, that letter was a summary of a meeting between claimant and her supervisor. According to claimant, her supervisor informed her that the letter "was not discipline." On cross-examination, Martin acknowledged that the May 28, 2009 letter was not a final warning, but rather a summary of the meeting that had taken place, and he was not aware that claimant had signed the letter. Martin stated he "wasn't the person who * * * was at the meeting with her so I can't say if she was offered to sign the letter." During cross-examination, the following exchange took place between counsel and Martin:

> Q: And each of these complaints were documented and placed in her file?
>
> A: No, not,
>
> Q: And she * * * signed, it was signed by her?
>
> A: No.

(March 23, 2011, Tr. 21.)

{¶ 20} Martin also acknowledged that the five most recent complaints "that led up to her termination * * * had not been placed in her file up to that point because we were continuing to gather information leading up to that hearing." When asked whether any documentation of complaints by locals had been placed in claimant's personnel file, Martin responded: "No, that's my recollection that they were not."

{¶ 21} It has been observed that "[p]rogressive disciplinary systems create expectations on which employees rely," and "[f]airness requires an employee not be subject to more severe discipline than that provided for by company policy." *Mullen v. O.B.E.S.*, 8th Dist. No. 49891 (Jan. 16, 1986). Ohio appellate courts have "generally concluded that where a company bypasses its progressive disciplinary system and

terminates an employee, that employee's discharge is without cause for unemployment compensation purposes." *Peterson v. Dir., Ohio Dept. of Job & Family Servs.*, 4th Dist. 03CA2738, 2004-Ohio-2030, ¶ 20. *See also Apex Paper Box Co. v. Admr., Ohio Bur. of Employment Serv.*, 8th Dist. No. 77423 (May 11, 2000) ("an employer's failure to follow the disciplinary procedure set out in the work rules does not constitute just cause for termination"); *Pickett v. Unemp. Comp. Bd. of Rev.*, 55 Ohio App.3d 68, 70 (8thDist.1989) (Despite employer's contention that employee could be discharged summarily because he had previously been discharged, "there is nothing in the record to justify ignoring the progressive discipline requirement"); *Interstate Brands Corp. v. Cogar*, 8th Dist. No. 48704 (June 13, 1985) (Unemployment Compensation Board of Review could reasonably have concluded that employer's bypass of progressive disciplinary system was too severe under the facts, and therefore, the discharge of employee was without just cause).

{¶ 22} In the present case, as found by the hearing officer, the only form of discipline claimant received was the May 28, 2009 letter. The hearing officer further found that claimant was not given the opportunity to sign the letter or to go through the grievance process as provided for in the CBA. Upon review, there was evidence in the record to support the commission's determination that appellant did not follow the disciplinary procedures as set forth under the CBA.

{¶ 23} Appellant also argues there was credible evidence that claimant was discharged because of complaints by locals. The hearing record, however, contained conflicting evidence on this issue. Claimant denied she was aware of complaints by locals, testifying that the first time she became aware of such complaints was on September 20, 2010. The trial court, in considering the testimony of Martin and claimant on this issue, noted there was "no evidence that the claimant was ever offered corrective instruction nor was there any documented evidence of the complaints by the various locals or evidence other than Martin's opinion evidence as to the basis of the complaints." The trial court also observed that neither of claimant's immediate supervisors testified at the hearing. The court concluded that, while the discharge of claimant was predicated upon her inability to service any other locals, based upon the number that had rejected her as their

representative, the "Hearing Officer was entitled to reject this statement as unsupported by the evidence."

{¶ 24} As found by the trial court, the record does not contain any documented evidence of complaints by locals, nor were any such complaints part of claimant's personnel file. Further, claimant testified that she was unaware of any complaints until four days prior to her discharge. Martin acknowledged during direct examination that he was unable to "speak for her Supervisor if that was covered in any meetings with her" prior to September 20, 2010. Other conflicting evidence presented at the hearing included Martin's opinion that one local had petitioned for decertification because of claimant's poor representation. Claimant, on the other hand, testified that the local at issue was upset about increased dues, and that members of that local did not attend scheduled meetings. Martin acknowledged that he had not personally spoken with claimant about the decertification issue. Similarly, while Martin testified that claimant "was not being honest on the reports required for her position," claimant denied any such conduct, and appellant presented no documented evidence that appellant had taken any corrective action with claimant on this issue.

{¶ 25} In cases where conflicting testimony is presented, "the commission, not the court, resolves the conflicts and determines the credibility of the witnesses." *Cottrell v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 05AP-798, 2006-Ohio-793, ¶ 15. Given the disputed testimony at the hearing, it was up to the commission to resolve factual disputes. Based upon the evidence in the record, the hearing officer could have concluded that the complaints from locals did not constitute just cause for termination, especially in light of evidence of appellant's disregard of its progressive correction policy.

{¶ 26} Upon review, we agree with the trial court that the decision of the commission is supported by the evidence in the record and is not unreasonable, unlawful, or against the manifest weight of the evidence. Accordingly, appellant's single assignment of error is without merit and is overruled, and the judgment of the Franklin County Court of Common Pleas, affirming the decision of the commission, is hereby affirmed.

Judgment affirmed.

SADLER and FRENCH, JJ., concur.
