[Cite as *State ex rel. Robinson v. Home Depot USA, Inc.*, 2013-Ohio-1465.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Renee L. Robinson,	:	
Relator,	:	No. 12AP-560
v.	:	(REGULAR CALENDAR)
Home Depot USA, Inc., and Industrial Commission of Ohio	:	
Respondents.	:	

D E C I S I O N

Rendered on April 11, 2013

Gallon, Takacs, Boissoneault & Schaffer Co. L.P.A., and *Theodore A. Bowman*, for relator.

Dinsmore & Shohl, LLP, Michael L. Squillace, and *Christen S. Hignett,* for respondent Home Depot USA, Inc.

Michael DeWine, Attorney General, and *Cheryl J. Nester*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶ 1} Relator, Renee L. Robinson ("claimant"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied temporary total disability ("TTD") compensation on the basis that she had voluntarily abandoned her employment with respondent, Home Depot USA, Inc. ("Home Depot"), and to enter an order granting said compensation.

{¶ 2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued the

appended decision, including findings of fact and conclusions of law, and recommended that this court deny claimant's request for a writ of mandamus. Claimant has filed objections to the magistrate's decision.

{¶ 3} Claimant presents two objections. In her first objection, claimant argues that the magistrate failed to acknowledge or apply *State ex rel. McKnabb v. Indus. Comm.*, 92 Ohio St.3d 559 (2001). In *McKnabb*, the worker was tardy or absent from work on numerous occasions prior to being injured, with only one day loss of work as a reprimand. Although the worker returned to work after his injury, he was subsequently fired for tardiness. The employer claimed the worker was fired according to a "strict" verbal attendance policy. The worker then received TTD compensation, and the employer sought to vacate such award, asserting that the worker's tardiness and subsequent termination constituted a voluntary abandonment of the workforce that precluded TTD. The commission granted the motion. Upon mandamus, this court found the commission erred when it granted the motion to vacate.

{¶ 4} The Supreme Court of Ohio affirmed our decision. The court found that written rules set forth a standard of enforcement and help prevent arbitrary sanctions, while verbal rules can be selectively enforced. The court said that, in the case before it, the allegedly "strict" employer policy on tardiness and absenteeism was apparently not that strict because the worker was late 15 to 20 times during an unspecified six-month period. The court found that this scenario raised more questions than it answered, such as, how the employer defined "late" and whether it was the same for all employees, whether the worker was routinely only a minute late or substantially later, and when the six-month period of tardiness occurred, e.g., whether the accusations of tardiness were suddenly resurrected to justify termination, becoming an issue only after the worker filed a workers' compensation claim. The court also said that, despite the worker's knowledge of the tardiness policy and the warning issued to him for tardiness, the timing of the warning is relevant: was it after the first infraction or the seventeenth? If after the first, and the employer continued to ignore late arrivals, the validity of the policy may have been diminished in the worker's mind, calling into question the worker's actual knowledge of it. The court also said the nature of the warning was relevant. The court concluded that written termination criteria aid the inquiry and are required.

{¶ 5} Claimant in the present case argues that the aspect of *McKnabb* that is relevant here is the court's acknowledgment that the validity of the verbal attendance policy may have been diminished in the worker's mind due to the employer's ignoring his tardiness after many infractions. Claimant contends that the repeated failure to enforce a rule calls into question whether the worker was actually on notice of the consequences that would flow from additional violations, and the employer's decision to discharge an injured worker soon after the injury calls into question whether the prior violations are being used as a pretext for a termination intended to avoid future claims for disability compensation. Claimant asserts that for Home Depot to call its written rule a mere "guideline" is not acceptable and offers no dependable guidance as to the disciplinary consequences of crossing that vague line. Claimant points out that her attendance issues were apparently not of sufficient concern to Home Depot to necessitate strict enforcement of its progressive disciplinary policy during the months of repeated absences and tardiness prior to her injury.

{¶ 6} We do not find *McKnabb* analogous to the present case. Initially, the court in *McKnabb* stresses the fact that there were no written policies in that case, which could lead to abuse by the employer. To the contrary, in the present case, there was a written attendance policy known to the employee. As for claimant's suggestion that the validity of Home Depot's attendance policy was diminished in her mind due to Home Depot's ignoring her tardiness after many infractions, unlike in *McKnabb*, the record is clear here that claimant knew the attendance policy and was on notice of the consequences of repeated absences. Claimant here received three counseling sessions before being terminated. At each counseling session, claimant was warned that further attendance issues could result in disciplinary action that included termination.

{¶ 7} Also distinguishing the present case from *McKnabb* is that the warnings here occurred at fairly regular intervals. From her start date until her first counseling session, claimant was tardy or absent six times. She was tardy or absent four times between her first and second counseling sessions. She was tardy or absent five times between her second and "final" counseling sessions. Between her final counseling session and her injury, she was tardy six times and absent due to illness two times. Between her return to work after her injury and her termination, she was tardy two more times. The

court in *McKnabb* indicated that the record was unclear as to the number of times the claimant was tardy, when specifically the six-month period of tardiness occurred, when the warning was given to the employee, the nature of the warning, and whether the employer resurrected the issue of attendance only after the claimant filed a workers' compensation claim. The record before this court in the present case is clear on each of these issues. Importantly, the record in this case does not suggest the issue of attendance was suddenly resurrected after claimant's injury. Instead, Home Depot had been explicitly warning claimant at fairly regular intervals over the course of ten months and during documented counseling sessions that further attendance problems could result in discipline or termination. Therefore, we find *McKnabb* distinguishable from the present case. Claimant's first objection is without merit.

{¶ 8} Claimant argues in her second objection that the magistrate's reliance on *State ex rel. Schade v. Indus. Comm.*, 10th Dist. No. 11AP-136, 2012-Ohio-4366, was improper because material factual differences exist between it and the present case. In *Schade*, the worker was injured and returned to work with restrictions. Six months after his injury, the employer terminated his employment. The commission denied the worker TTD, finding that the worker voluntarily abandoned his employment due to a violation of a written work rule. Upon mandamus, this court denied the worker's request. As pertinent to the present case, the worker argued that his employer's alleged failure to follow the progressive discipline process outlined in the handbook rendered him incapable of knowing that he would be discharged after only the first step of discipline. The worker contended that, because he had had so many absences, he could not have known that one more would lead to termination without additional discipline. However, this court found that the worker received a memorandum warning him that any further absences could result in discipline, up to and including termination, with or without notice. Furthermore, the worker had a clear understanding of the prohibitive behavior and a clear understanding that unless his attendance improved he would be terminated.

{¶ 9} In the present case, claimant argues that her case is distinguishable from *Schade* in three respects. First, the injured worker in *Schade* walked off the job the day before he was terminated, and it was his walking off the job that resulted in his termination, not the additional absences post-warning. Claimant asserts that walking off

the job is the very definition of voluntary abandonment. Second, claimant argues that *Schade* is distinguishable from her case because all the attendance infractions in *Schade* came post-injury, but in the present case, all but two of claimant's attendance infractions occurred pre-injury, and she received no warning as to her attendance post-injury. Third, claimant argues that *Schade* is distinguishable from her case because she was terminated two weeks after her injury, and in *Schade*, the worker was not fired until eight months after his injury. However, none of these factual differences were mentioned in the analysis in paragraphs 14 and 15 in *Schade*, and we do not find that any of them render *Schade* inapposite. Importantly, this court's analysis in *Schade* did not rely upon the worker walking off the job for its conclusion. In our analysis in paragraphs 14 and 15, we do not mention the worker walking off the job. Instead, we treated the worker walking off the job the day before his termination as merely another attendance policy violation.

{¶ 10} The gist of the worker's argument in *Schade* was the same as claimant's argument in the present case; that is, the employer's failure to follow the progressive discipline process rendered the worker incapable of knowing that he could be discharged for another infraction. However, like in the present case, we concluded in *Schade* that, because the worker received a warning that further absences could result in discipline or termination, the worker had a clear understanding of the prohibited behavior. Here, claimant received three counseling sessions where it was clearly explained that any further violations could result in termination. Claimant disregarded those explicit warnings at her own peril, and there is no evidence that she disregarded them because they were not in lockstep with the progressive discipline guidelines. For these reasons, claimant's second objection is without merit.

{¶ 11} After an examination of the magistrate's decision, an independent review of the record pursuant to Civ.R. 53, and due consideration of claimant's objections, we overrule the objections and adopt the magistrate's findings of fact and conclusions of law. Claimant's writ of mandamus is denied.

Objections overruled and writ of mandamus denied.

TYACK and DORRIAN, JJ, concur.

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[Cite as *State ex rel. Robinson v. Home Depot USA, Inc.*, 2013-Ohio-1465.]

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Renee Robinson,	:	
Relator,	:	No. 12AP-560
v.	:	(REGULAR CALENDAR)
Home Depot USA, Inc., and Industrial Commission of Ohio	:	
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on November 26, 2012

Gallon, Takacs, Boissoneault & Schaffer Co. L.P.A., and *Theodore A. Bowman*, for relator.

Dinsmore & Shohl, LLP, *Michael L. Squillace*, and *Christen S. Hignett*, for respondent Home Depot USA, Inc.

Michael DeWine, Attorney General, and *Eric Tarbox*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 12} Relator, Renee Robinson, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied relator's application for temporary total disability ("TTD") compensation on grounds that she had voluntarily abandoned her employment with respondent Home Depot USA, Inc. ("Home Depot") and ordering the commission to find that she is entitled to that compensation.

Findings of Fact:

{¶ 13} 1. According to Home Depot's records, relator was hired on October 9, 2008. Relator was late to work on December 12, 2008, January 13, 15, 26, and 28, 2009 and was off sick January 16, 2009.

{¶ 14} 2. Relator received her first counseling session concerning her tardiness on January 30, 2009. At that time, relator was warned that the failure to improve immediately would result in further disciplinary action up to and including termination.

{¶ 15} 3. Relator was then late February 24, March 3, 4, 2009 and was off sick on March 13, 2009.

{¶ 16} 4. Relator received her second counseling session on March 16, 2009. Relator was warned that another violation would result in a final counseling session.

{¶ 17} 5. Relator was then late on April 7, 18, 19, and 21, 2009 and was a no call/no show on May 25, 2009. Relator received her final counseling session on May 29, 2009. Relator was again warned that any further violation would result in disciplinary action up to and including termination.

{¶ 18} 6. Thereafter, relator was late July 21, August 3, and 31, September 3, 7, and10, 2009. Relator also had two additional absences due to illness on July 9 and 31, 2009.

{¶ 19} 7. On September 29, 2009, relator sustained a work-related injury while lifting a bucket of mastic when she strained her right elbow.

{¶ 20} 8. Relator presented at Airport Urgent Care and Medical Center that same day and was diagnosed with a right elbow strain.

{¶ 21} 9. Relator did not file a claim at this time.

{¶ 22} 10. Further, beginning September 30, 2009, relator was released to return to work with no lifting, pushing, or pulling with her right arm for one week.

{¶ 23} 11. Relator returned to work and Home Depot was able to accommodate her restrictions.

{¶ 24} 12. Relator was again late for work on October 2 and 7, 2009.

{¶ 25} 13. There is no evidence in the record and relator has not asserted that either of these two final attendance infractions were due to the work-related injury. In her brief, relator does assert that the last attendance infraction "was due to a power outage which prevented her alarm from going off on time and for which Home Depot did

not request documentation." (Relator's brief, at 4.) There is no evidence in the record which would support this assertion.

{¶ 26} 14. On October 14, 2009, relator was terminated. The termination notice documents 28 occasions where relator was either late for work, failed to call or show, or was absent due to illness between December 12, 2008 and October 7, 2009, a period of only 10 months. The notice stated further:

> Renee, you were given a coaching for attendance on (1-30-09), a counseling on (3-16-09) and a final for failure to follow the attendance guidelines on (5-29-09). As a result of additional attendance occurrences your employment with The Home Depot will be terminated effective immediately. (see dates of unexcused occurrences above)

{¶ 27} 15. At the time she was terminated, relator had not yet filed a workers' compensation claim with Home Depot.

{¶ 28} 16. Relator began treating with Glenn P. Rothhaas, M.D. In his November 12, 2009 treatment note, Dr. Rothhaas noted his physical findings upon examination and discussed a recent MRI:

> 10/16/2009 Right Elbow shows medial epicondylitis and probable partial tear biceps tendon as it inserts into the radial tubercle[.]

{¶ 29} 17. Dr. Rothhaas concluded noting that he would seek authorization for a right tennis elbow brace and physical therapy and that he would seek to have relator's claim additionally allowed for "partial biceps tendon rupture at the right elbow and right elbow lateral epicondylitis."

{¶ 30} 18. Relator filed her First Report of an Injury Occupational Disease or Death ("FROI-1") form in April 2010.

{¶ 31} 19. On April 27, 2010, Home Depot certified relator's claim for the following conditions:

> 841-[Right] elbow strain; 726.31-[Right] medial epicondylitis; 840.8- partial Biceps tendon rupture, right.

{¶ 32} 20. On August 18, 2011, relator filed a C-86 motion seeking additional allowances, authorization for surgery, and TTD compensation. Specifically, relator requested:

> Amend claim to include the additional diagnosis of lateral epicondylitis, right elbow (726.32).
>
> Amend claim to include the additional diagnosis of right ulnar neuritis (723.4).
>
> Authorize C-9s dated May 2, 2011 requesting pre-op testing, surgery and post operative physical therapy.
>
> Pay temporary total disability benefits less OBES November 12, 2009 to the present and continuing based on the submission of appropriate medical proof.

{¶ 33} 21. Relator's motion was heard before a district hearing officer ("DHO") on September 26, 2011.

{¶ 34} 22. At the hearing, Home Depot argued that relator was not entitled to TTD compensation because she had voluntarily abandoned her employment due to a continuing pattern of showing up for work late and otherwise missing work. In support, Home Depot submitted its attendance and punctuality guidelines for hourly store employees. At the outset, that document provides, in relevant part, the following guidelines:

> These guidelines are designed to provide managers and associates with a general framework within which to manage attendance. Please address attendance and punctuality issues through the progressive disciplinary process as outlined in the Code of Conduct. The use of the term "guidelines" is intentional, since there is no policy governing the precise number of days absent or late that will result in disciplinary action because the discipline that is appropriate will vary according to the circumstances. For example, patterns of attendance issues * * * may precipitate a more serious response. In short, managers are expected to use sound business judgment and common sense and to consider all relevant circumstances when applying these guidelines. Thus, it is important for managers to communicate expectations and ensure consistency by reviewing/evaluating attendance issues of all associates. If it is determined that discipline is appropriate, managers should ensure that they are treating associates in their respective departments/work groups who have had similar attendance issues in a similar manner. This will help to ensure consistency and fairness. Finally, our associates are also expected to adhere to their schedule and follow the process outlined in these guidelines. By working together, associates and customers will benefit.

{¶ 35} 23. The guidelines also provide the following relevant definitions:

> **DEFINITIONS**
>
> Under the best of circumstances associates may have to miss work or come in late from time to time for legitimate reasons. These guidelines define some basic terms and outline the process associates should follow if this occurs.
>
> * * *
>
> **Unexcused Absence —** An absence that was not planned and/or not approved by management. Unexcused Absences will result in the exhausting of personal/sick time (if available) and progressive discipline.
>
> * * *
>
> **Failure to adhere to schedule —** When an associate fails to be at a designated place of work per the schedule. Also includes if an associate punches in late or early for his/her lunch or scheduled shift. If there is a pattern of clocking in early or late the associate will be subject to discipline at the manager's discretion.
>
> **Excused Tardy —** Having a legitimate reason or reasonably forewarning the MOD that the associate will be late to the designated place of work per the schedule, usually by less than one (1) hour. The associate is generally expected to make up the missed time but should first check with his/her manager.
>
> * * *
>
> **No call/No Show (NC/NS) —** Failing to call in and not report to work when scheduled at least one (1) hour after the associate's designated start time. One (1) NC/NS could qualify as a Counseling Session or even a Final Counseling, depending on the circumstances.
>
> * * *
>
> **Discipline —** Should be administered at the time of the occurrence or as close to the occurrence as possible. The objective of administering discipline is to provide reasonable time to correct the behavior. Managers should memorialize attendance violations on the Performance and/or Discipline

> Notice and utilize its progressive discipline model as set forth below. Moreover, attendance violations can be combined with other Work Rule violations set forth in the Code of Conduct to determine the appropriate discipline.
>
> **Improvement —** The cumulative effect of attendance issues over a 12-month period should be considered when advancing from one step in the process to the next. After 12 months, an associate's prior disciplinary record is not erased; however, if an associate demonstrates sustained improvement in attendance over a 12-month period, management may, in collaboration with HR, repeat the same step in the disciplinary process as previously administered. However, the documentation reflecting the associate's former attendance issues shall remain in the associate's file. For example,
>
> An associate received a documented "Counseling Session" on February 5, 2007, and he/she did not have any more attendance or punctuality issues for 15 months. Then on June 10, 2008, this same associate had an unexcused absence. The Store Manager would have the discretion to reissue him/her another "Counseling Session" instead of issuing him/her a "Final Counseling Session."

{¶ 36} 24. The guidelines also provide for a progressive disciplinary process for tracking absenteeism and tardiness which provides, in pertinent part:

> The chart below identifies the four different steps in The Home Depot's progressive disciplinary process. Depending on the circumstances, any step in the process may be repeated, omitted, or taken out of sequence. For example, if an associate demonstrates a pattern of behavior, * * * a Final Counseling Notice or termination may be appropriate.
>
> Coaching Session[,] Counseling Session[,] Final Counseling Session[,] [and] Termination Session[.]
>
> **Coaching Session —** A Coaching Session gives the manager an opportunity to make the associate aware of the unacceptable behavior, the consequences for continuing that behavior and gives the associate an understanding of what is needed to correct the behavior and an opportunity to improve.
>
> * * *

> **Counseling Session —** A Counseling Session is formal written notice to an associate that his/her behavior violates Company policy/procedure and depending upon the severity of the violation a prior Coaching Session may nor may not have occurred. * * * The associate should sign the Performance and/or Discipline Notice to acknowledge that the discussion occurred and be given a copy of the Notice. * * * Managers should conduct a Counseling Session either after a Coaching Session has already been conducted or for more serious first offense attendance and/or punctuality issues.
>
> * * *
>
> **Final Counseling Session —** Final Counseling occurs when an associate is put on notice that one more violation will result in immediate termination from employment. A final notice is appropriate when an associate demonstrates a pattern of unacceptable behavior.
>
> * * *
>
> The associate should sign the Performance and/or Discipline Notice to acknowledge that the discussion occurred and be given a copy of the notice. * * * Managers should conduct a Final Counseling Session for the most serious attendance and/or punctuality issues or for repeated patterns of unexcused absences and/or punctuality issues (3-5 unexcused attendance/punctuality issues in a 12 month period)[.]
>
> * * *
>
> **Termination Session —** A termination can occur as a result of a first offense * * * or after multiple violations as the final step in the progressive disciplinary process. * * * [T]he associate should sign the document to acknowledge the termination has occurred. * * * Managers should conduct a Termination Session when it is clear that an associate has abandoned his/her job or after multiple unexcused absences and/or punctuality issues (5 or more in a 12 month period) with no improvement.

{¶ 37} 25. Following the hearing, the DHO did allow relator's claim for the additional condition of "right lateral epicondylitis" after relator dismissed the request for right ulnar neuritis and surgery. The DHO denied the request for TTD compensation finding that relator had voluntarily abandoned her employment, stating:

> Temporary total disability is denied from 11/12/2009 to 11/13/2011, due to voluntary abandonment. Injured Worker had returned to her former employer on light duty. She violated written work rules that she should have known could lead to her termination. Specifically, she violated the tardiness policy on several occasions. Pursuant to the decision in Apostolic Christian Homes v. King the fact that Injured Worker had returned to gainful employment with her former employer is a factor to consider in determining whether or not Injured Worker has voluntarily abandoned her employment. In addition, the C-30 on file lists neuritis which is a condition that has been dismissed and is not allowed in this claim as one of injured worker's disabling conditions.

{¶ 38} 26. Relator appealed and submitted a memorandum in support arguing that Home Depot had not adhered to its enforcement standards and that her termination was pretextual and should not bar her receipt of TTD compensation.

{¶ 39} 27. Relator's appeal was heard before a staff hearing officer ("SHO") on November 9, 2011. The SHO agreed that relator's claim should be additionally allowed for right lateral epicondylitis and agreed with the DHO finding that relator was precluded from receiving TTD compensation because she voluntarily abandoned her employment with Home Depot. In explaining the reasoning, the SHO stated:

> Specifically, the Staff Hearing Officer relies upon the Performance/Discipline Notices submitted to the file, as well as Injured Worker's testimony at hearing, in making this finding.
>
> In the Notice dated 01/30/2009, Injured Worker was counseled for time and attendance issues for being tardy three days in two weeks. A Performance Improvement Plan was agreed to and signed by Injured Worker which indicated "immediate and sustained improvement is needed, failure to do so will result in further disciplinary action up to and including termination...".
>
> On 03/16/2009, Injured Worker again received a Performance/Discipline Notice for attendance and punctuality for calling off on 03/13/2009. On the form it indicated that "further violation will result in a final counseling."
>
> On 05/29/2009, Injured Worker again received a Performance/Discipline Notice for being a "no call/no show"

on 05/26/2009. The notice contained the statement that "this is your final notice concerning attendance. Any further violations will result in disciplinary action including up to termination."

On 10/14/2009[,] Injured Worker was terminated for attendance violations. The 10/14/09 Notice of Performance/Discipline stated that she had "failed to work as scheduled without sufficient prior notice of tardiness or absence to a salaried manager or without authorization by a salaried manager", for "having unexcused absences" and for having "excessive unexcused tardiness". The dates of occurrences are recorded that Injured Worker received coaching on 01/30/2009, counseling on 03/16/2009, and final counseling on 05/29/2009.

Injured Worker had additional attendance occurrences following her final counseling on 05/29/2009. She was two hours late on 09/10/2009, 46 minutes late on 10/02/2009, and one hour 47 minutes late on 10/07/2009.

The Staff Hearing Officer finds that the Injured Worker signed each Performance/Discipline Notice and acknowledged at hearing that she understood the import of each of the meetings. Therefore, the Staff Hearing Officer finds that Injured Worker was aware of the written work rule regarding attendance that, if violated, would result in her termination.

Further, the Staff Hearing Officer finds that the Employer followed their policy regarding the progressive disciplinary process for tracking absenteeism and tardiness. The process required the steps of coaching, counseling, final counseling and termination. The policy clearly states that "depending on the circumstances any step in the process may be repeated, omitted or taken out of sequence."
The Staff Hearing Officer relies upon the testimony of the Injured Worker's manager who clarified that Injured Worker was a good worker, however, her continued problems with tardiness were causing morale issues and after giving her many chances, the decision was made to terminate her. The Staff Hearing Officer does not find the weight of the evidence supports that this was a pretextual firing. Injured Worker was able to perform work within the restrictions provided by her physician at the time she was terminated for her tardiness. Following her final counseling, Injured Worker was 46 minutes late for work on 10/02/2009 and one hour 47 minutes late for work on 10/07/2009. It is clear that

> Injured Worker was well aware of her attendance issues at the time she was terminated and that violation of same could result in her termination.
>
> The treatment notes contemporaneous to the time of Injured Worker's termination in no way indicate that Injured Worker needed to be off of work due to her injury. The C30 motion filed 2 years after the Injured Worker was let go for tardiness is not found persuasive.

{¶ 40} The SHO also found that treatment notes contemporaneous with the time period of relator's termination did not reflect that she needed to be off work due to her injury and found that relator's C-30 motion signed by Dr. Rothhaas, filed August 10, 2011, was not persuasive because it was filed two years after her termination.[1]

{¶ 41} 28. Relator's appeal was refused by order of the commission mailed December 1, 2011.

{¶ 42} 29. Relator's request for reconsideration was refused by order of the commission mailed January 13, 2012.

{¶ 43} 30. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 44} In this mandamus action, relator contends that the totality of the circumstances surrounding her discharge support a finding that it was a pretextual discharge designed to ensure that Home Depot would not have to pay her any TTD compensation. In making this argument, relator points to Home Depot's attendance and punctuality guidelines and argues that Home Depot allowed her to be late too many times for Home Depot to have terminated her in good faith after her 28th attendance infraction in 10 months. Relator contends that, pursuant to the guidelines, she should have received her first counseling session the first time she was late to work (December 28, 2008) instead of January 30, 2009, at which time she had been tardy three times in a two-week period. Relator p0ints out that the guidelines provide that "if an associate reports to work late for his/her scheduled shift and this is his/her first offense, a Coaching Session would be appropriate." Here, relator had actually been late for work on five occasions in the past two months. Relator argues that she did not receive her first coaching session according to the guidelines.

---

[1] On the C-30, Dr. Rothhaas opined that relator was disabled from her employment from November 12, 2009 to an estimated November 13, 2011 due to the conditions of lateral epicondylitis right elbow.

{¶ 45} Relator also contends that she did not receive her second counseling session according to the guidelines. The guidelines provide that a counseling session should be conducted when "an associate reports to work late for his/her scheduled shift and a prior Coaching Session has occurred within the past 12 months." Her second counseling session occurred on March 16, 2009 after she had been late four more times and sick once (late February 24, 26, 2009, March 3, 4, 2009, and sick March 13, 2009). Relator contends that she did not receive this counseling session consistent with the guidelines.

{¶ 46} Relator also contends that her final counseling session held May 29, 2009, was not held in accordance with the guidelines. Those guidelines provide that a final counseling session should be conducted "for repeated patterns of unexcused absences and/or punctuality issues (3-5 unexcused attendance/punctuality issues in a 12 month period)." Relator's final counseling session was held May 29, 2009 after she was late four more times and was a no call/no show once (late April 7, 18, 19, and 21, 2009 and a no call/no show on May 25, 2009). Relator contends that this final counseling session was not held in a manner consistent with the guidelines.

{¶ 47} And finally, relator contends that her termination itself did not occur pursuant to the guidelines. Relator notes that termination is appropriate when "an associate * * * has had more than 5 previous instances of unexcused absences or tardiness issues in the previous 12 month period and has already been issued a Final Counseling." Relator was terminated after eight more instances of clocking in late, two of which occurred after she was injured (July 21, August 3, 31, September 3, 7, 10, and October 2, and 7, 2009). Relator contends that she was not terminated in accordance with the employer's attendance guidelines. Relator contends that she had no reason to know that any further infractions would actually result in her termination. As such, relator contends that the third prong of *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995), has not been met.

{¶ 48} In response, both Home Depot and the commission argue that the guidelines are not a rigid structure and that discipline issues are left to the discretion of the manager. As noted, the "guidelines" are designed to provide managers and associates with a general framework within which to manage attendance. The use of the term "guidelines" is intentional since there is no policy governing the precise number of days

absent or late that will result in disciplinary action because the discipline that is appropriate will vary according to the circumstances:

> These guidelines are designed to provide managers and associates with a general framework within which to manage attendance. Please address attendance and punctuality issues through the progressive disciplinary process as outlined in the Code of Conduct. The use of the term "guidelines" is intentional, since there is no policy governing the precise number of days absent or late that will result in disciplinary action because the discipline that is appropriate will vary according to the circumstances. For example, patterns of attendance issues.

{¶ 49} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶ 50} It is undisputed that voluntary abandonment of the former position of employment can preclude payment of TTD compensation. *State ex rel. Rockwell Internatl. v. Indus. Comm.*, 40 Ohio St.3d 44 (1988). In *State ex rel. Watts v. Schottenstein Stores Corp.*, 68 Ohio St.3d 118, 121 (1993), the court stated as follows:

> [F]iring can constitute a voluntary abandonment of the former position of employment. Although not generally consented to, discharge, like incarceration, is often a consequence of behavior that the claimant willingly undertook, and may thus take on a voluntary character.

{¶ 51} In *Louisiana-Pacific*, the court characterized a firing as "voluntary" when that firing is generated by the employee's violation of a written work rule or policy that: (1) clearly defined the prohibited conduct; (2) had been previously identified by the employer as a dischargeable offense; and (3) was known or should have been known to the employee.

{¶ 52} The Supreme Court of Ohio has stated that, because of the great potential for abuse created by permitting an employer's allegations of misconduct to bar the payment of compensation to which a claimant would otherwise be entitled, the termination must be carefully scrutinized. *See State ex rel. Smith v. Superior's Brand Meats, Inc.*, 76 Ohio St.3d 408 (1996). It is imperative to carefully examine the totality of the circumstances to determine whether the rule violation asserted as the reason for discharge was pretext for what was, in reality, an effort by the employer to foreclose any potential for future disability claims.

{¶ 53} Relator argues that because Home Depot did not strictly adhere to its guidelines, she had no reason to believe further offenses would lead to termination and, as such, it is apparent that the firing was actually pretextual and designed to keep relator from receiving TTD compensation.

{¶ 54} Relator does not dispute the fact that she had some 28 attendance infractions. Further, relator has not made any allegations that the two post-injury infractions were due to the allowed conditions in the claim. While relator does contend that the final infraction was caused by a power outage which Home Depot accepted, there is no evidence in the record which would substantiate this assertion. Relator's argument seems to be that if Home Depot was going to terminate her due to her excessive absenteeism then Home Depot should have done it much sooner. By failing to act until after she was injured, relator contends that Home Depot cannot show that it had a written work rule that relator knew or should have known would result in her termination and that the termination was pretextual and that the commission abused its discretion by finding a voluntary abandonment.

{¶ 55} As noted in the findings of fact, by the time relator sustained her work-related injury on September 29, 2009, relator had already been tardy or absent from work approximately 23 times since she was hired on October 9, 2008. Further, relator had already received her final counseling session related to her attendance issues. After she was injured on September 29, 2009, relator was able to return to modified work and, within one week, was tardy on two more occasions and was terminated.

{¶ 56} At the time she was terminated, relator had not filed a workers' compensation claim. It was not until seven months later that, on April 27, 2010, relator filed an FROI-1 and Home Depot certified her claim for right elbow strain, medial epicondylitis and partial biceps tendon tear, right. Relator did not seek TTD compensation until August 18, 2011, 23 months after the date of injury and 16 months after she filed her FROI-1. Relator requested TTD compensation beginning November 12, 2009, one and one-half months after she was injured and one month after she had been terminated.

{¶ 57} Pointing to the fact that relator had not yet filed a workers' compensation claim and was working a modified duty job at the time she was terminated, Home Depot argues that it did not terminate her because she had sustained an injury. Further, Home

Depot contends that relator made this argument at the commission level and that the commission relied in part on the fact that relator had not filed a claim and there was no indication that she would seek a period of TTD compensation when the commission made the factual determination that her termination was not an attempt to avoid the payment of compensation.

{¶ 58} In essence, relator is asking this court to find that, as a matter of law, unless an employer strictly complies with any guidelines or policies for which employees can be terminated, the termination for violating those guidelines or policies following an injury cannot bar the employee's entitlement to TTD compensation because the employee would have no reason to know that subsequent violations could actually lead to termination. It is this magistrate's opinion that this court should refrain from such a pronouncement.

{¶ 59} Instead, the magistrate finds this court's recent decision in (att. 20) *State ex rel. Schade v. Indus. Comm.*, 10th Dist. No. 11AP-136, 2012-Ohio-4366**,** to be instructive. In that case, Dennis D. Schade, III, injured his lower back on December 11, 2009. On December 15, 2009, Schade returned to light-duty work and performed such until his job termination on July 6, 2010. Between December 15, 2009 and the day Schade was terminated, July 6, 2010, his treating physician completed 14 MEDCO forms certifying that Schade could return to work with restrictions. At the time, Schade's claim was only allowed for sprain lumbar region. On May 6, 2010, Schade's claim would be additionally allowed for lumbar disc displacement L3-4, L4-5.

{¶ 60} On April 14, 2010, Schade's manager presented him with a written warning concerning his attendance. Specifically, that warning provided: westlaw

> Although we understand you may have personal reasons to be out or tardy, it is that these incidents are excessive and our ability to service customers suffers when you are not in. You have been tardy on 4 occasions, clocked out early on 9 occasions, and used unplanned PTO on 7 occasions since January 1 st. This is excessive and violates our policy.
>
> Please understand that if immediate, sustained and consistent improvement is not seen in your overall dependability, further corrective action up to and including your termination from employment may occur with our [sic] without notice.

Id. at ¶ 40.

{¶ 61} Schade signed the written memorandum and also indicated that his injury had played a part in his absences.

{¶ 62} Three months later, on July 6, 2010, Schade was terminated for violation of company work rules, including:

> On July 1st you did not call in to report your absence to any member of the management team and on July 2nd without communication to any member of the supervisor or management team, you left work without permission at 10:30 a.m.
>
> Additionally, your attendance and overall dependability has been a concern and addressed with you. These most recent incident [sic] indicates your lack of commitment to your position here at Vendors.

Id. at ¶ 42.

{¶ 63} Thereafter, Schade sought TTD compensation beginning July 7, 2010, the day after he was terminated. The commission denied Schade's request for TTD compensation finding that Schade had voluntarily abandoned his employment under *Louisiana-Pacific*.

{¶ 64} Schade filed a mandamus action in this court. The dispositive issue was whether the commission abused its discretion as to the question of whether the job termination was related to the industrial injury. A magistrate of this court recommended granting a writ of mandamus after finding that the commission abused its discretion when it determined that the file was void of any medical evidence to support Schade's allegation that absences were related to his industrial injury. The magistrate found that there was some medical evidence in the record which, if believed, could support Schade's argument.

{¶ 65} Upon review, this court disagreed with the magistrate and denied the writ of mandamus. Schade had argued that the policy's use of the word "may" rendered the policy unclear. As the SHO had found, while the handbook indicated that various written warnings and suspensions may occur prior to termination, the SHO found that there was no specific requirement that written warnings and/or a suspension must be issued. The commission had found that the policy met the requirements of *Louisiana-Pacific*, noting that, after the written warning on April 14, 2010, Schade had up to eight additional unexcused absences before he was terminated.

{¶ 66} In considering Schade's argument that his employer's failure to follow the progressive discipline process outlined in the handbook rendered the policy unenforceable, this court stated:

> The focus of relator's argument is employer's alleged failure to follow the progressive discipline process outlined in the handbook. He argues that he had no way of knowing that he would be discharged after only the first step of discipline. Part of his reasoning appears to be that, because he had had so many absences, he could not have known that one more would lead to termination without additional discipline. As the SHO found, however, relator received a memorandum warning him that any further absences could result in discipline, up to and including termination, with or without notice. The SHO expressly found that relator "had a clear understanding of the prohibitive behavior and as of 04/14/2010 had a clear understanding that unless his attendance improved he would be terminated." There is some evidence in the record to support the SHO's finding, and the commission did not abuse its discretion in this respect. Accordingly, we overrule the objection.

Id. at ¶ 15.

{¶ 67} This court's rationale from *Schade* is particularly pertinent here where relator had 28 unexcused absences in a 10-month period. While relator contends that, despite these unexcused absences, her performance evaluations determine that she was a valued associate and, as such, her termination was pretextual, the magistrate disagrees.

{¶ 68} A review of the performance and developmental summaries indicate that relator's overall performance code could have been rated as (1) top performer; (2) valued associate; or (3) improvement needed. Further, under "potential," relator could have been deemed to be (1) promotable; or (2) well positioned. Relator was specifically deemed a "valued associate" who was "well positioned." As such, relator was not deemed to be a top performer nor was she deemed to be promotable. Furthermore, as the SHO noted, relator's manager testified that she was a good worker; however, her continuing problems with tardiness were causing morale issues and, despite the fact that she was given numerous chances, the decision was finally made to terminate her. The SHO found this testimony to be credible when determining that the termination was not pretextual.

{¶ 69} A review of the stipulation of evidence indicates that there was some evidence in the record from which the commission could determine that relator

voluntarily abandoned her employment with Home Depot due to a long standing attendance problem and that the termination was not pretextual. As such, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

/S/ MAGISTRATE
STEPHANIE BISCA BROOKS

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).