[Cite as *Lippert v. Lumpkin*, 2010-Ohio-5809.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

CHARLES LIPPERT,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-01-004
	:	O P I N I O N
- vs -		11/29/2010
	:	
DOUGLAS E. LUMPKIN, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2009-03-1299

Charles Lippert, 5346 Boehm Drive, Unit B, Fairfield, Ohio 45014, appellant, pro se

Richard Cordray, Ohio Attorney General, Robin A. Jarvis, 1600 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202, for Douglas Lumpkin and Department of Job & Family Services,

RINGLAND, J.

{¶1} Plaintiff-appellant, Charles Lippert, appeals the decision of the Butler County Court of Common Pleas in an unemployment compensation action.

{¶2} On May 24, 2004, appellant began working for Excel Direct, Inc. as an operations manager. Appellant regularly worked Sunday through Thursday. On Monday through Thursday, appellant worked either an opening shift from 6:30 a.m. to 2:00 p.m. or a closing shift from 10:00 a.m. to 5:30 p.m. On Sundays, appellant would report to Excel at

6:00 a.m. to open the facilities, but would leave the job site for the remainder of the day to work from home and monitor the employer's drivers via phone until 5:30 p.m. Appellant testified that working from home allowed him to also perform nonwork-related tasks. Appellant noted that following his divorce he had custody of his children, irregularly attended church, and was involved in a study group on Sundays.

{¶3} On July 3, 2008, appellant and his co-workers were notified that Excel planned to modify the employee work schedules due to changing client demands. On August 1, 2008, appellant received an email detailing his new schedule. Appellant's weekday schedule primarily remained intact, but appellant was expected to be at Excel's facilities from 6:30 a.m. until 6:30 p.m. on Sundays. That day, appellant had a conversation with his supervisor regarding the new schedule. He informed the supervisor that he would not work according to the new Sunday schedule. On August 3, 2008, appellant sent his supervisor an email stating that he would continue to work under his previous schedule, but not work the new Sunday schedule. Appellant concluded, "If necessary, let me know when to expect my last day of employment."

{¶4} Through the first several weeks of August 2008, appellant refused to work the new schedule. Although appellant was away from work during some of that time due to a scheduled vacation, he failed to report to work on several Sundays after Excel implemented the schedule change and another manager had to work in appellant's place. Based upon his continuing refusal to work the schedule assigned to him, appellant was discharged by Excel on August 20, 2008.

{¶5} Appellant filed for unemployment benefits with defendant-appellee, director of the Ohio Department of Jobs and Family Services, on August 26, 2008. The ODJFS denied appellant's application for benefits. Appellant appealed the determination and the matter was referred to the review commission. Following a hearing, the review commission affirmed the

denial, concluding that appellant was discharged by Excel for just cause. Appellant appealed to the Butler County Court of Common Pleas and the decision was affirmed. Appellant now appeals to this court, raising two assignments of error. We will address appellant's assignments of error out of order.

{¶6} Assignment of Error No. 2:

{¶7} "STATE ACTION VIOLATED THE FIRST AMENDMENT."

{¶8} In his second assignment of error, appellant contends his termination and denial of unemployment benefits violates his First Amendment right to the free exercise of religion.

{¶9} The Free Exercise Clause of the First Amendment bans laws "prohibiting the free exercise" of religion, and applies to the states via the Fourteenth Amendment. Further, Section 7, Article I of the Ohio Constitution provides that "[a]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience."

{¶10} The state's denial of unemployment benefits to a claimant following termination for actions directly related his or her religion are governed by the test articulated by the United States Supreme Court in *Sherbert v. Verner* (1963), 374 U.S. 398, 83 S.Ct. 1790, and adopted by the Ohio Supreme Court in *State v. Schmidt* (1987), 29 Ohio St.3d 32. "The test is first, whether a defendant's religious beliefs are sincerely held; second, whether the regulation at issue infringes upon a defendant's constitutional right to freely engage in the religious practices; and third, whether the state has demonstrated a compelling interest for enforcement of the regulation and that the regulation is written in the least restrictive means." *State v. Blackmon* (1998), 130 Ohio App.3d 142, citing *Sherbert*, 374 U.S. at 403-407, and *Schmidt*, 29 Ohio St.3d at 34. See, also, Note, The Best of a Bad Lot: Compromise and Hybrid Religious Exemptions (2010), 123 Harv.L.Rev. 1494, 1496-1497; Wiles, Have American Indians Been Written Out of the Religious Freedom Restoration Act (2010), 71

Mont.L.Rev. 471, 475-478.

{¶11} The extent of appellant's evidence relating to his First Amendment free exercise of religion claim is a single statement offered to the review commission referee. Appellant testified, "I'm not going to sit here and say I go to church every week. I don't, but I did go to church irregularly [on Sundays]." Appellant argues the revised Sunday schedule impermissibly interfered with his ability to attend church on Sundays in violation of the free exercise clause and, as a result, he is entitled to unemployment compensation.

{¶12} After review of the record, we cannot say based upon this minimal evidence that appellant was terminated in violation of the free exercise clause. Appellant has failed to submit sufficient evidence to support a claim under the *Sherbert* standard. Specifically, appellant offers no evidence addressing the sincerity of his beliefs or describing how the work schedule infringes upon his constitutional right to freely engage in his religion, other than stating that he irregularly attends church on Sunday. There is no evidence in the record describing the tenets of appellant's religion, the sincerity of his religious beliefs, whether Sunday church service is integral to his religious practices, or if no alternative means of worship are available such as services only being offered during his working hours on Sunday. See *Blackmon* at 149.

{¶13} Moreover, there is no indication that appellant informed Excel that the new schedule would interfere with his religious practices. *Dupuy v. Ohio Bur. of Emp. Serv.*, Franklin App. No. 98AP-1376, 1999 WL 771068. Rather, when specifically asked if he ever informed Excel that he could not work the revised Sunday schedule due to religious reasons, appellant responded that he could not recall telling his employer. "An employee's failure to inform his employer of his religious needs and to assist in the accommodation process may be fatal to the right of the employee to have his beliefs accommodated by his employer and may constitute a waiver of such right." *Dupuy* at *5, citing *Shapiro-Gordon v. MCI*

Telecommunications Corp. (S.D.N.Y.1993), 810 F.Supp. 574, 579.

{¶14} Accordingly, we will not find a violation of the free exercise clause based upon the de minimis evidence offered by appellant. Appellant's second assignment of error is overruled.

{¶15} Assignment of Error No. 1:

{¶16} "EMPLOYER LACKED 'JUST CAUSE' WHEN TERMINATING APPELLANT."

{¶17} In his first assignment of error, appellant challenges the finding of "just cause" for his termination. Appellant primarily contends that he had an agreement with Excel allowing him to work from home on Sundays. Appellant argues that the change in schedule, requiring him to work on-site on Sundays, was substantial and his failure to accept the new schedule did not amount to "just cause" for his discharge.

{¶18} The standard of review in unemployment-compensation appeals is well established. A reviewing court may reverse the board's determination only if it is unlawful, unreasonable, or against the manifest weight of the evidence. *Geretz v. Ohio Dept. of Job & Family Servs.*, 114 Ohio St.3d 89, 2007-Ohio-2941, ¶10, citing *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 697, 1995-Ohio-206. "[W]hile appellate courts are not permitted to make factual findings or to determine the credibility of witnesses, they do have the duty to determine whether the board's decision is supported by the evidence in the record." *Tzangas* at 696. "This duty is shared by all reviewing courts, from the first level of review in the common pleas court, through the final appeal in this court." Id. See, also R.C. 4141.282(H).

Lower Court's Decision

{¶19} As a preliminary matter, we must address the lower court's decision in relation to the review commission's decision and the applicable standard of review. In affirming the decision of the review commission, the lower court in this case deviated considerably from

the commission's factual findings. A significant contention in this matter related to whether Excel required appellant under the new schedule to be present at the facilities the entire day on Sundays. At the hearing, appellant testified that the new schedule required him to be present on-site from 6:30 a.m. until 6:30 p.m. In opposition, Excel's representatives testified that appellant was given flexibility in how he managed the new Sunday Schedule. According to Excel, appellant could either remain at the worksite the entire day or he could open the facility in the morning, monitor the worksite from home, and return to close the facility in the evening. The referee credited appellant's testimony, finding that "under the new schedule, the employer expected claimant to be at the employer's facility from 6:30 a.m. until 6:30 p.m." Yet, the lower court deviated from the commission's finding, stating in the written decision that "[t]he Employer gave Appellant a choice in how he managed his Sunday schedule. Either Appellant could remain on the worksite during the day, or he could go home, monitor the worksite, and then return to the worksite to check-in with the independent contractors." The lower court further used this contradictory finding as justification for its decision and as evidence that appellant was terminated for just cause, concluding that "the record demonstrates that the Employer gave the Appellant several options for how to carry out his Sunday work responsibilities."

{¶20} In conjunction with this dispute, the ODJFS has advocated throughout the proceedings that the change to appellant's schedule was merely that appellant was being required to work one additional hour than previously scheduled, i.e., until 6:30 p.m. instead of 5:30 p.m. The review commission rejected this position. Yet, the lower court credited the ODJFS's argument, concluding that appellant acted against the best interest of his employer by "fail[ing] to work the additional hour required by the Employer." The ODJFS continues to adhere to this position in the instant appeal.

{¶21} We disagree with the ODJFS's position that the change in schedule was simply

one additional hour of work on Sundays. Granted, the new schedule required appellant to work an additional hour. However, this was neither the substance nor objection appellant had to the schedule change. As the review commission found, appellant objected to the schedule change because he could no longer work from home.

{¶22} The standard of review in unemployment compensation matters requires a reviewing court to defer to the commission's findings of fact. See *Tzangas* at 696. The lower court's deviation from the review commission's finding was improper. The review commission found that appellant was given no flexibility for his Sunday duties, requiring him to remain on-site from 6:30 a.m. until 6:30 p.m. We will follow the commission's findings in our review of this matter.

Employment Agreement

{¶23} Appellant first argues the referee and lower court erred in their respective decisions by failing to find the existence of an agreement between himself and Excel regarding a Sunday work schedule based upon his testimony. Appellant argues he offered uncontroverted evidence at the hearing of the existence of an agreement.[1]

{¶24} Like the referee and lower court, we are unconvinced that an explicit agreement existed between appellant and Excel. Appellant claimed at the hearing that, when he was hired, there was a "specific understanding" that he could work off-site on Sundays. Yet,

1. In his argument, appellant refers to R.C. 4141.281(C)(2), relating to the procedural aspects of unemployment compensation hearings. Appellant suggests that, although hearing officers are not bound by the rules of evidence, a hearing officer may not credit hearsay evidence over the testimony of a live witness. See, e.g., *Cunningham v. Jerry Spears Co.* (1963), 119 Ohio App. 169; *Taylor v. Board of Review* (1984), 20 Ohio App.2d 297. Appellant claims that he testified that an agreement existed between himself and Excel regarding his Sunday work schedule. As a result, appellant suggests the hearing officer was required to find the existence of an agreement because Excel offered no direct evidence to the contrary. Appellant argues that if this court holds otherwise by following its previous decision in *Hansman v. Director* (Feb. 9, 2004), Butler App. No. CA2003-09-224, this court is in conflict with the *Cunningham* and *Taylor* cases. We find appellant's alleged conflict inapplicable to the case at bar primarily because appellant's testimony regarding the existence of an agreement is not definitive. Appellant testified that no employment contract existed with Excel. Therefore, we find the referee did not commit legal error by failing to accept facts which were not clearly established in the record. Further, there is no indication that that the referee relied upon hearsay evidence to the detriment of direct testimony.

appellant testified that he never had a written employment contract with Excel describing the Sunday work schedule. Further, appellant was an at-will, salaried employee of Excel. Nevertheless, even if an employment agreement existed, the record still demonstrates that appellant was discharged for "just cause."

Review Commission Decisions

{¶25} Next, appellant argues that the referee erred by failing to follow prior decisions of the commission. Appellant submits the commission's decision in a claim filed by James Axe. See Unemp.Comp.Rev.Comm.Decision (July 12, 2007), No. C2007-064-0011. Appellant claims that the Axe case is directly applicable and the review commission erred by failing to reach the same conclusion in this matter.

{¶26} James Axe was employed as a construction superintendent by Venture One Construction. At the time he was hired, Axe agreed to work at out-of-town job sites but demanded that he be allowed to return home each weekend. The review commission found that Venture One agreed to the term. Following a lengthy job assignment in North Carolina, the employer met with Axe to review his performance. Axe was asked to sign a document agreeing that he would not necessarily be home every weekend and acknowledging that company policy was that superintendents would be home at least every other weekend. Axe refused to agree to a change in his work schedule and his employment with Venture One was terminated.

{¶27} The review commission found that Axe was discharged without just cause. The commission reasoned that Axe accepted employment with Venture One "on the condition that he would be permitted to be home every weekend." This term was negotiated at the time of hire and agreed to by Venture One.

{¶28} The decision is clearly distinct from the case at bar. In the Axe matter, the commission found that being home every weekend was a condition of Axe's employment,

negotiated at the time of hiring. The commission made no such finding in this case, nor as discussed above was such a finding required. The commission in Axe noted that Venture One agreed to the condition, while in this case Excel disputed the existence of an agreement. Accordingly, we find no error by the review commission in reaching a different factual and legal decision in Axe. Nor do we find error with the lower court finding Axe inapplicable.

Just Cause

{¶29} "[N]o individual may * * * be paid [unemployment] benefits * * * [f]or the duration of the individual's unemployment if the administrator finds that * * * [t]he individual * * * has been discharged for just cause in connection with the individual's work * * *." R.C. 4141.29(D)(2)(a).

{¶30} The Ohio Supreme Court has recognized that "[t]here is, of course, not a slide-rule definition of just cause." *Irvine v. Unemp. Comp. Bd. of Rev.* (1985), 19 Ohio St.3d 15, 19. However, the court has explained that "[t]raditionally, 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." *Tzangas* at 697, citing *Irvine* at 17. Just cause for discharge need not reach the level of misconduct but there must be some fault on the part of the employee. *McCarthy v. Connectronics Corp.*, 183 Ohio App.3d 248, 2009-Ohio-3392, ¶13.

{¶31} In order to award unemployment compensation, the just cause determination must be consistent with the legislative purpose underlying the Unemployment Compensation Act. *Tzangas* at 697. 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." Id. at 697-698.

{¶32} Since "fault is essential to the unique chemistry of a just cause termination,* * * the critical issue is not whether an employee has technically violated some company rule, but rather whether the employee, by his or her actions demonstrated an unreasonable disregard for employer's best interests." (Internal citations omitted.) *Binger v. Whirlpool Corp.* (1996), 110 Ohio App.3d 583, 590; *Janovsky v. Ohio Bur. of Emp. Serv.* (1996), 108 Ohio App.3d 690, 694.

{¶33} Each unemployment compensation case must be considered upon its particular merits in determining whether there was just cause for discharge. *City of Warrensville Heights v. Jennings* (1991), 58 Ohio St.3d 206, 207. The determination of just cause depends upon the "unique factual considerations" of a particular case and is therefore primarily an issue for the trier of fact. *Irvine* at 17.

{¶34} In this case, the review commission found that "[Claimant] refused to work the schedule assigned to him because his old schedule had allowed him to engage in non-work-related activities during working hours. [Claimant] noted that the new schedule would not allow him to engage in those activities. Claimant's failure to work the schedule assigned to him constitutes misconduct that will serve to suspend his unemployment compensation benefits. Claimant was discharged by Excel Direct, Inc. for just cause in connection with work." Similarly, the lower court concluded that "the evidence demonstrates that Appellant demonstrated an unreasonable disregard for the Employer's interest."

{¶35} We agree with the conclusions of the review commission and the lower court. Although the new schedule changed the demands placed upon appellant, he was not faultless in this situation. Appellant was an at-will employee of Excel and concedes that no written employment contract existed with Excel. Due to changing client demands, Excel was

required to modify employee schedules and duties. Appellant was notified in advance of the necessary changes.

{¶36} Appellant was asked at the hearing whether he informed his supervisor, Craig Bannon, of his reasons for objecting to the new schedule. Appellant testified that he never informed Bannon of any reasons why he could not work the revised schedule. Further, there is no evidence in the record that appellant notified Excel of reasons for his objection. Rather, the only evidence in the record of communication between appellant and Excel concerning the schedule change was a short email written by appellant stating, "Per our conversation on Thursday and today, I'm unable to accomodate [sic] the new work schedule. I'll continue my responsibilities as they stood prior to Thursday until told different. If necessary, let me know when to expect my last day of employment." If appellant had informed Excel of his reasons for objecting to the schedule change, Excel may have been willing to make accommodations. But appellant did not give Excel an opportunity.

{¶37} After implementation of the new work schedule, appellant failed to report to work on three consecutive Sundays. It is undisputed that appellant was away from work due to a scheduled vacation during part of August; however, appellant failed to report to work on the Sundays he was scheduled to work. Appellant cannot simply fail to report for work. Appellant's refusal to report to work when scheduled, without informing Excel of the reasons for objecting to the schedule change, demonstrates a disregard for the employer's interests and constitutes misconduct. Since appellant's actions in this matter constituted fault on his behalf, just cause existed for his termination.

{¶38} Appellant's first assignment of error is overruled.

{¶39} Judgment affirmed.

YOUNG, P.J., and HENDRICKSON, J., concur.

[Cite as *Lippert v. Lumpkin*, 2010-Ohio-5809.]