

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

RALPH J. REIDELL, III	:	
	:	C.A. CASE NO. 26392
Plaintiff-Appellant	:	
	:	T.C. NO. 14-CV-1996
v.	:	
	:	(Civil appeal from
THE REYNOLDS AND REYNOLDS	:	Common Pleas Court)
COMPANY, INC., et al.	:	
	:	
Defendants-Appellees	:	

.....

OPINION

Rendered on the 20th day of March, 2015.

.....

DAVID M. DUWEL, Atty. Reg. No. 0029583, 130 West 2nd Street, Suite 2101, Dayton, Ohio 45402

Attorney for Plaintiff-Appellant, Ralph Reidell, III

DAVID P. PIERCE, Atty. Reg. No. 00061972, Coolidge Wall Company, LPA, 33 West First Street, Suite 600, Dayton, Ohio 45402

Attorney Defendant-Appellee, The Reynolds & Reynolds Co., Inc.

ROBIN A. JARVIS, Atty. Reg. No. 0069752, Attorney General's Office, 1600 Carew Tower, 444 Vine Street, Cincinnati, Ohio 45202

Attorney for Plaintiff-Appellee, ODJFS

.....

DONOVAN, J.

{¶ 1} Plaintiff-appellant Ralph J. Reidell, III, appeals from a judgment of the

Montgomery County Court of Common Pleas, Civil Division, affirming the decision of the Unemployment Compensation Review Commission (UCRC) finding that Reidell was not entitled to unemployment benefits after defendant-appellee Reynolds and Reynolds Company (hereinafter “Reynolds”) terminated his employment for just cause upon his being found to have repeatedly violated the company’s strict anti- tobacco/nicotine policy. Reidell filed a timely notice of appeal with this Court on September 18, 2014.

{¶ 2} The record establishes that Reidell began his employment at Reynolds as a network specialist on October 6, 2003. Beginning in 2007, Reynolds introduced a strict Drug, Alcohol, and Tobacco/Nicotine Policy with the stated goal of providing “a safe and healthy workplace” that “promote[s] the health and well-being of its associates.” Pursuant to the policy, “all associates must maintain a smoke free, tobacco free and nicotine free status at all times. Smoking or otherwise using tobacco or nicotine products (in any form or manner) at any time by associates is prohibited. This prohibition includes both on premises (including parking lots) and off premises, both during work hours and non-work hours.” The policy also states that Reynolds employees will be subject to random testing for illegal drug use and tobacco/nicotine use.

{¶ 3} The tobacco/nicotine portion of the policy was phased in over a period of several years, and Reynolds provided its employees who were smokers the opportunity to attend a smoking cessation program. Reidell attended one such program in 2008 and purportedly quit smoking at that time. The tobacco/nicotine policy was included in the Associate Handbook which was provided to all Reynolds employees, including Reidell. Reidell does not dispute that he was aware of the strict requirements of the tobacco/nicotine policy after it was introduced and implemented by Reynolds. In fact,

Reidell acknowledged that he received a copy of the Associate Handbook on December 17, 2010.

{¶ 4} After a random drug test administered on June 4, 2013, Reidell tested positive for nicotine. Reynolds permitted Reidell to sign a “last chance agreement,” whereby he was able to maintain his employment in exchange for his agreement to submit to random drug testing at least once a month for twelve months at his own expense. Reidell was advised that if he was found to be in violation of the tobacco/nicotine policy again, his employment would be terminated. Approximately four months later on October 14, 2013, Reidell tested positive for nicotine a second time. After notifying Reidell of the test results, Reynolds immediately terminated his employment.

{¶ 5} On October 23, 2013, Reidell applied for unemployment compensation benefits. On November 12, 2013, the Ohio Department of Job and Family Services (ODJFS) issued a Determination of Unemployment Benefits finding that Reidell was discharged for just cause, and therefore, he was not entitled to any benefits. Reidell appealed the decision, and on December 2, 2013, the ODJFS issued a Director’s Redetermination affirming its initial determination that Reidell’s employment was terminated for just cause. Reidell subsequently appealed the redetermination decision.

{¶ 6} On January 6, 2014, the UCRC held a telephone hearing during which it heard testimony from Reidell and representatives from Reynolds. Shortly thereafter on January 10, 2014, the UCRC issued a decision affirming the ODJFS’ redetermination that Reidell was discharged for just cause. Reidell filed a Request for Review with the UCRC on January 21, 2014. On March 6, 2014, the UCRC issued a decision in which it

affirmed its initial determination that the ODJFS was correct in finding that Reidell was discharged for just cause.

{¶ 7} Reidell appealed the decision of the UCRC to the trial court. On August 21, 2014, the trial court issued a decision affirming the UCRC's determination finding that Reidell's employment was terminated by Reynolds for just cause for failing to comply with the terms of the last chance agreement he entered into after violating the company's tobacco/nicotine policy. The trial court found that Reidell's failure to comply with the tobacco/nicotine policy "represented an unreasonable disregard for [Reynolds'] best interest, specifically its interests related to the costs of health care insurance that it is now mandated to pay by federal legislation." ¹

{¶ 8} It is from this judgment that Reidell now appeals.

{¶ 9} Reidell's sole assignment of error is as follows:

{¶ 10} "THE TRIAL COURT ERRED WHEN IT AFFIRMED THE DECISION OF THE REVIEW COMMISSION BECAUSE THAT DECISION WAS UNLAWFUL, UNREASONABLE, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 11} In his sole assignment, Reidell contends that the trial court's judgment affirming the decision of the UCRC which found that he was discharged for just cause was against the manifest weight of the evidence. Specifically, Reidell argues that smoking is not against the law, and therefore, violation of Reynolds' tobacco/nicotine policy cannot

¹In the decision which is the basis for the instant appeal, the trial court also granted Reynolds' and defendant-appellee ODJFS' motions to strike an exhibit Reidell attached to his reply brief before the trial court, namely a copy of a determination of unemployment compensation benefits for Tara M. Hall, a non-party to Reidell's administrative appeal. Hall had apparently requested unemployment benefits after her employment was terminated by Reynolds in 2011. Reidell, however, does not challenge the trial court's decision granting appellees' motions to strike in the instant appeal, so we need not address the trial court's decision in that regard.

constitute “just cause” pursuant to R.C. 4141.29(D), such that he is precluded from receiving unemployment compensation benefits.

{¶ 12} R.C. 4141.29 establishes the requirements for eligibility for unemployment compensation benefits. Under that statute, a claimant is not eligible for benefits if he or she is discharged for “just cause in connection with the individual’s work.” R.C. 4141.29(D)(2)(a). “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. Unemp. Comp. Bd. of Review*, 19 Ohio St.3d 15, 17, 482 N.E.2d 587 (1985); *Williams v. Ohio Dept. of Job & Family Servs.*, 129 Ohio St.3d 332, 2011-Ohio-2897, 951 N.E.2d 1031, ¶ 22. “Just cause for discharge may be established by proof that the employee violated a specific company rule or policy, * * * so long as the policy was fair and fairly applied.” *Jones v. Bd. of Review*, 10th Dist. Franklin No. 93AP-430, 1993 WL 393908, *3 (Sept. 28, 1993).

{¶ 13} The “just cause” determination must be made in light of the legislative purpose underlying the Unemployment Compensation Act. *Williams* at ¶ 22.

“The [A]ct 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.

(Citations omitted.) *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Serv.*, 73 Ohio St.3d 694, 697-698, 653 N.E.2d 1207 (1995). Nevertheless, we keep in mind that the unemployment compensation statute must be liberally construed in favor of awarding benefits to the applicant. *Clark Cty. Bd. of Mental Retardation & Dev. Disabilities v. Griffin*, 2d Dist. Clark No. 2006-CA-32, 2007-Ohio-1674, ¶ 10; R.C. 4141.46.

{¶ 14} “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. Butler No. CA2008-11-278, 2010-Ohio-3135, ¶ 14, citing *Warrensville Heights v. Jennings*, 58 Ohio St.3d 206, 207, 569 N.E.2d 489 (1991). The discharged employee bears the burden of persuasion to prove that he or she is entitled to unemployment compensation. *Silkert v. Ohio Dept. of Job & Family Servs.*, 184 Ohio App.3d 78, 2009-Ohio-4399, 919 N.E.2d 783, ¶ 36 (2d Dist.).

{¶ 15} An appellate court's scope of review in employment compensation appeals is quite limited. *Silkert* at ¶ 26. An appellate court may reverse the Unemployment Compensation Review Commission's determination of “just cause” only if it is “unlawful, unreasonable or against the manifest weight of the evidence.” *Tzangas* at paragraph one of the syllabus; R.C. 4141.282(H). “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.” *Silkert* at ¶ 26; see also *Williams* at ¶ 20.

The reviewing court must affirm the UCRC's decision if it is supported by some competent, credible evidence. *Williams* at ¶ 20.

{¶ 16} In his brief, Reidell argues that “the essence of [his] appeal *** is whether the [S]tate of Ohio may deny unemployment compensation benefits to an employee for smoking a cigarette or cigar in his residence (or anywhere else other than the work site) when he is not working for his employer or being paid by his employer. [Reidell] is not seeking a ruling by this Court that Reynolds is precluded from having or enforcing such a policy, but only that violation of such a policy constitutes just cause pursuant to R.C. 4141.29(D), such that unemployment compensation benefits are not available.”

{¶ 17} Initially, we note that it was the province of the hearing officer to consider the testimony and documentary evidence before him and to determine the credibility of the witnesses and the weight to be given to the evidence provided. Thus, we must defer to the hearing officer's credibility determinations on appeal.

{¶ 18} Upon review of the evidence before the hearing officer, we cannot conclude that the determination made by the UCRC, and affirmed by the trial court, was unlawful, unreasonable, or against the manifest weight of the evidence. Moreover, as a matter of law, we find that competent, credible evidence was adduced which established that Reidell's actions clearly violated Reynolds' tobacco/nicotine policy, and he was, therefore, terminated with just cause. By his own admission, Reidell was provided with ample notice of the stringent requirements of Reynold's tobacco/nicotine policy. The record establishes that the tobacco/nicotine policy was phased in over a number of years, and Reynolds provided all of its employees who used tobacco or other products containing nicotine adequate warning to refrain from the use of those products. Notably,

Reynolds provided its employees the opportunity to attend a smoking cessation program prior to new guidelines taking effect. Reidell took advantage of one such program in 2008, after which he purportedly quit using nicotine products.

{¶ 19} Nevertheless, on June 4, 2013, Reidell tested positive for nicotine use in violation of Reynolds' established tobacco/nicotine policy. Reynolds then permitted Reidell to sign a "last chance agreement" whereby he was able to maintain his employment in exchange for his agreement to submit to random drug testing at least once a month for twelve months at his own expense. Reidell testified before the hearing officer that he acknowledged that he was advised that if he was found to be in violation of the tobacco/nicotine policy again, his employment would be terminated. Despite Reynolds' unequivocal warning, Reidell tested positive for nicotine a second time on October 14, 2013.

{¶ 20} Reidell acknowledged that his failure to abide by Reynolds' tobacco/nicotine policy was in direct violation of the clearly established company policy whose stated purpose is "to provide a safe and healthy workplace and to promote the health and well-being of its associates." Testimony was adduced before the hearing officer that another equally important goal of the tobacco/nicotine policy was to reduce health insurance costs for its associates in light of the premiums associated with federally mandated health care. No evidence was submitted by Reidell which established that the tobacco/nicotine policy was implemented in a capricious or arbitrary fashion, and Reidell failed to demonstrate that he was treated differently than any other Reynolds employees in the State of Ohio who violated the tobacco/nicotine policy. While we acknowledge that the tobacco/nicotine policy is arguably intrusive to the extent that it purports to control its

employees' conduct outside of the work environment, Reynolds is a privately owned company which is free to enact lawful policies. Therefore, we conclude that the trial court did not err when it found that Reynolds' decision to terminate Reidell's employment was supported by just cause, thereby rendering him ineligible for unemployment compensation benefits.

{¶ 21} Reidell's sole assignment of error is overruled.

{¶ 22} Reidell's sole assignment of error having been overruled, the judgment of the trial court is affirmed.

.....

WELBAUM, J., concurs.

FROELICH, P.J., concurring:

{¶ 23} I concur.

{¶ 24} Appellant's assignment of error is that the Review Commission's decision was "unlawful, unreasonable, and against the manifest weight of the evidence." As our opinion notes, he specifically states that he "is not seeking a ruling by this court that Reynolds is precluded from having or enforcing [an anti-smoking] policy, but only that a violation of such a policy constitutes just cause pursuant to Section 4141.29(D) of the Ohio Revised Code, such that unemployment compensation benefits are not available." Therefore, assuming, without deciding – especially on this record (i.e., we do not know where or how he ingested the nicotine) - that the policy is lawful, the Appellant's failure to follow it, constituted just cause for his termination.

Copies mailed to:

David M. Duwel
David P. Pierce
Robin A. Jarvis
Hon. Mary K. Huffman