[Cite as *Brown v. SYSCO Food Servs. of Cincinnati, L.L.C.*, 2009-Ohio-5536.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

NOAH E. BROWN,	:	
Appellant-Appellee,	:	Case No. 09CA3275 09CA3276
vs.	:	
SYSCO FOOD SERVICES OF CINCINNATI, LLC, et al.,	:	DECISION AND JUDGMENT ENTRY
Appellees-Appellants.	:	

APPEARANCES:

COUNSEL FOR APPELLANT SYSCO FOOD SERVICES OF CINCINNATI, LLC: James C. Frooman and Eliot G. Bastian, 2200 PNC Center, 201 East Fifth street, Cincinnati, Ohio 45202

COUNSEL FOR APPELLANT DIRECTOR, OHIO DEPARTMENT OF JOBS AND FAMILY SERVICES: Richard Cordray, Ohio Attorney General, and Robin A. Jarvis, Ohio Assistant Attorney General, 1600 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202-2809

COUNSEL FOR APPELLEE: Justin R. Blume, 9050 Ohio River Road, Wheelersburg, Ohio 45694

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 10-16-09

ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment

that determined that Noah E. Brown, appellant below and appellee herein, is entitled to receive unemployment compensation benefits as a result of being terminated from his employment without just cause.

{¶ 2} SYSCO Food Services of Cincinnati, LLC (SYSCO), and the Director of the Ohio Department of Job and Family Services (ODJFS), appellees below and appellants herein, separately appeal the trial court's judgment. We have consolidated the cases. SYSCO raises the following assignments of error for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED AS A MATTER OF LAW BY FINDING THAT THE REVIEW COMMISSION'S DECISION WAS UNLAWFUL, UNREASONABLE AND/OR AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED AS A MATTER OF LAW BY IMPROPERLY SUBSTITUTING ITS JUDGMENT FOR THAT OF THE REVIEW COMMISSION'S HEARING OFFICER WITHOUT ANY LEGAL BASIS TO DO SO."

{¶ 3} ODJFS raises the following assignments of error for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED BY HOLDING THAT THE OHIO UNEMPLOYMENT COMPENSATION REVIEW COMMISSION'S DECISION WAS UNLAWFUL, UNREASONABLE OR AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED BY SUBSTITUTING ITS JUDGMENT FOR THAT OF THE REVIEW COMMISSION'S."
>
> THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY UTILIZING A DE NOVO STANDARD OF REVIEW AND THEREBY FAILING TO GIVE PROPER DEFERENCE TO THE DETERMINATION OF THE OHIO UNEMPLOYMENT COMPENSATION REVIEW COMMISSION'S HEARING OFFICER."

{¶ 4} Appellee worked for SYSCO from February 27, 1989 to January 22, 2008, when SYSCO terminated him for allegedly violating its general work rules and its "policy against violence." SYSCO's policy against violence strictly prohibits, inter alia: (1) "[a]ny act or threat made against another person's life, health, well being, family or property"; (2) "[a]ny act or threat of violence including, but not limited to, intimidation, harassment, coercion or any act which is calculated to instill fear or which results in an unwanted physical touching"; (3) "[a]ny act or threat of violence, which endangers the safety of employees, customers, vendors, contractors or the general public"; and (4) "[a]ny act or threat of violence made directly or indirectly by words, gestures or symbols."

{¶ 5} In February 2000, SYSCO terminated appellee for threatening a physical assault against a co-worker. SYSCO subsequently re-instated appellee, and the parties entered into a "last-chance agreement" in which SYSCO agreed not to terminate appellee. In 2005, appellee threatened another co-worker. As a result, SYSCO required appellee to undergo counseling.

{¶ 6} On January 11, 2008, SYSCO met with appellee to inform him of a change in his position. SYSCO informed him that his route would begin in Cincinnati, about a two-hour drive from appellee's current location. Appellee was upset by this change. SYSCO advised appellee that he could either accept the change or take a

layoff. Appellee decided to accept the change. Later that day, appellee called Chris Militello, SYSCO's safety manager, and expressed his dissatisfaction with the change. During the conversation, appellee told Militello that he should "watch his back" because someone might have a picture of him. Militello testified that he felt threatened by appellee's statement. On January 22, 2008, SYSCO terminated appellee's employment.

{¶ 7} Appellee subsequently filed an application for determination of unemployment compensation benefits. On February 13, 2008, ODJFS allowed appellee's claim for unemployment compensation. That determination stated: "The employer discharged [appellee] for arguing or fighting with a supervisor. However, the employer has supplied general information that does not cite specific dates or incidents. Ohio's legal standard that determines if a discharge is without just cause is whether the claimant's acts, omissions, or course of conduct were such that an ordinary person would find the discharge not justifiable. After a review of the facts, this agency finds that the claimant was discharged without just cause * * *."

{¶ 8} SYSCO appealed the ODJFS decision. It referenced Militello's summary of his telephone conversation with appellee, in which Militello stated: "[Appellee] went on to say that when I am drinking in a bar down there that I better watch myself as someone might have a picture of me. I did not respond to this comment. [Appellee] then continued to ramble on that in addition to the [Department of Transportation] he was going to contact the Labor Board and other comments including again that he was protected by an agreement made by Tom Neal, an unknown union representative and the Labor Board."

{¶ 9} On March 19, 2008, the Office of Unemployment Compensation Director issued a redetermination that appellee's employer discharged him without just cause. The director's decision stated: "The employer discharged [appellee] for violating a company rule. The employer failed to establish negligence or willful disregard of the rule on the part of [appellee]. Ohio's legal standard that determines if a discharge is without just cause is whether the claimant's acts, omissions, or course of conduct were such that an ordinary person would find the discharge not justifiable. After a review of the facts, this agency finds that [appellee] was discharged without just cause * * *."

{¶ 10} On March 27, 2008, the employer filed an appeal from the redetermination. On April 11, 2008, the Ohio Department of Job and Family Services transferred jurisdiction to the Unemployment Compensation Review Commission.

{¶ 11} On May 21, 2008, Unemployment Compensation Review Commission Hearing Officer Nadine S. Pettiford held a telephone hearing regarding SYSCO's appeal. SYSCO Vice-President of Administration Charles R. Brough testified that SYSCO Vice President of Operations Jim Ward terminated appellee for violating "general work rule 82" and SYSCO's "policy against violence." Brough stated that he spoke with appellee following the conversation with Militello and appellee "tried to minimize and indicated that he was not intending to threaten [Militello]. That it was merely his intent to offer some words of wisdom. * * * [F]rom his perception, a threat had not been made."

{¶ 12} Appellee testified that his statement was not a threat, but that he simply intended to give Militello some advice about drinking with a co-worker. Appellee

stated: "I told him uh, that he better watch himself when he's out drinking with Tony [a co-worker]. 'Cause you got to know Chris, he's a fanatic about pictures. If there's a[n] accident or whatever, he wants pictures, the company wants pictures. And that's why I was telling him. I told him, I said, 'Chris, uh, you better watch yourself when you're out drinking * * * cause somebody is liable to get a picture of you and report you to corporate.'" He admitted that he told Militello that he should "watch hisself [sic]," but claimed it was only in reference to being careful about drinking with a co-worker and that he did not threaten to harm him.

{¶ 13} Militello testified that appellee threatened him and explained the telephone conversation as follows: "* * * [Appellee] had called in and we had a conversation and he concluded his conversation uh, with in stating that I better watch around, better watch who I hang around with. Um, and that there might be somebody taking pictures, someone might recognize me and you never, you never know when somebody may have a picture of you and you'd hate to see something happening to me. And he was very angry in his delivery of those words." Militello further explained the conversation as: "* * * I better be careful who I hang around with, that it would be too bad if someone recognized me in a bar one day and that I'd never know when someone may have a picture of me and that [appellee] would hate to see something happen to me." Militello stated that he felt threatened.

{¶ 14} Beverly Brown, appellee's wife, testified that she was present during appellee's phone call with Militello. She interpreted appellee's comment to mean that Militello should watch out when drinking with a co-worker because someone might take a picture of it and appellee felt it was unethical behavior. Terri Brown, appellee's

daughter, testified similarly.

{¶ 15} On June 18, 2008, the hearing officer determined that SYSCO terminated appellee for just cause. The hearing officer explicitly credited Militello's statement that he felt threatened and expressly discredited appellee's statement that he merely gave Militello advice about drinking with a co-worker.

{¶ 16} On June 30, 2008, appellee filed a request for review of the hearing officer's decision with the Ohio Unemployment Compensation Review Commission. On July 16, 2008, the commission denied his request for review.

{¶ 17} Appellee subsequently filed a notice of appeal from the commission's decision rejecting his request for review. On January 8, 2009, the trial court concluded that the commission's decision "was unlawful, unreasonable and/or against the manifest weight of the evidence." The court found that appellee's words did not include a "threat of physical harm" and that he did not make any statements that violate the employer's policy against violence. These appeals followed.

{¶ 18} SYSCO's and ODJFS's assignments of error all raise the related issue of whether the trial court properly determined that the commission's hearing officer's decision was unlawful, unreasonable, or against the manifest weight of the evidence. We therefore consider them together.

{¶ 19} A trial court and an appellate court employ the same, well-established standard of review in unemployment compensation appeals: "[A] reviewing court may reverse the board's determination only if it is unlawful, unreasonable, or against the manifest weight of the evidence." Tzangas, Plakas & Mannos v. Ohio Bur. of Emp.

Servs. (1995), 73 Ohio St.3d 694, 697, 653 N.E.2d 1207; see, also, Geretz v. Ohio Dept. of Job & Family Servs., 114 Ohio St.3d 89, 2007-Ohio-2941, 868 N.E.2d 669, at ¶10; Irvine v. Unemp. Comp. Bd. of Review (1985), 19 Ohio St.3d 15, 17-18, 482 N.E.2d 587; Baird v. S. Ohio Med. Ctr., Scioto App. No. 04CA2939, 2004-Ohio-5888, at ¶7. When a reviewing court–whether a trial or appellate court–applies this standard, it may not make factual findings or determine witness credibility. Irvine, 19 Ohio St.3d at 18. Factual questions remain solely within the commission's province. Tzangas, 73 Ohio St.3d at 696. As the Irvine court stated:

> " * * * Determinations of purely factual considerations is primarily within the province of the referee and the board. Upon appeal, a court of law may reverse such decisions only if they are unlawful, unreasonable, or against the manifest weight of the evidence. * * * Like other courts serving in an appellate capacity, we sit on a court with limited power to review. Such courts are not permitted to make factual findings or to determine the credibility of witnesses. * * * The duty or authority of the courts is to determine whether the decision of the board is supported by the evidence in the record. * * * The fact that reasonable minds might reach different conclusions is not a basis for the reversal of the board's decision. * * * Moreover, 'our statutes on appeals from such decisions [of the board] are so designed and worded as to leave undisturbed the board's decisions on close questions. Where the board might reasonably decide either way, the courts have no authority to upset the board's decision."

Id. at 17-18. Thus, a reviewing court may not reverse the commission's decision simply because "reasonable minds might reach different conclusions." Irvine, 19 Ohio St.3d at 18. We further note that the focus of an appellate court when reviewing an unemployment compensation appeal is upon the commission's, not the trial court's, decision. Moore v. Comparison Market, Inc., 9th Dist. No. 23255, 2006-Ohio-6382, at ¶8.

{¶ 20} R.C. 4141.29(D)(2)(a) generally renders an employee who is terminated

for just cause ineligible to receive unemployment compensation benefits. See Durgan v. Ohio Bureau of Emp. Services (1996), 110 Ohio App.3d 545, 674 N.E.2d 1208; see, also, Ford Motor Co. v. Ohio Bureau of Emp. Servs. (1991), 59 Ohio St.3d 188, 189, 571 N.E.2d 727. "Just cause" to terminate employment exists if a person of ordinary intelligence would have concluded that the circumstances justified terminating the employment. Warrensville Heights v. Jennings (1991), 58 Ohio St.3d 206, 207, 569 N.E.2d 489, 491; Irvine, 19 Ohio St.3d at 17, quoting Peyton v. Sun T.V. (1975), 44 Ohio App.2d 10, 12, 335 N.E.2d 751 (stating that "'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'"). Furthermore, the Ohio Supreme Court has stated:

> "The determination of what constitutes just cause must be analyzed in conjunction with the legislative purpose underlying the Unemployment Compensation Act. Essentially, the Act's purpose is 'to enable unfortunate employees, who become and remain involuntarily unemployed by adverse business and industrial conditions, to subsist on a reasonably decent level and is in keeping with the humanitarian and enlightened concepts of this modern day.' Leach v. Republic Steel Corp. (1984), 176 Ohio St. 221, 223, 199 N.E.2d 3."

Irvine, 19 Ohio St.3d at 17. The claimant bears the burden of proving that he or she is entitled to unemployment compensation benefits. Id.

{¶ 21} Moreover, "whether just cause exists necessarily depends upon factual considerations of the particular case." Id. Because the determination of just cause depends upon the "unique factual considerations" of a particular case, it is primarily an issue for the trier of fact. Wilson v. Matlack, Inc. (2000), 141 Ohio App.3d 95, 100, 750 N.E.2d 170, citing Irvine; Shephard v. Ohio Dept. of Job & Family Servs., 166 Ohio App.3d 747, 2006-Ohio-2313, 853 N.E.2d 335; Franklin v. Ohio Unemployment

Compensation Review Com'n, Franklin App. No. 80120, 2002-Ohio-5324; Summitville Tiles, Inc. v. Director, Ohio Dept. of Job and Family Services, Columbiana App. No. 01-Co-17, 2002-Ohio-3004; Barilla v. Higbee Dept. Stores (April 19, 2000), Lorain App. No. 98CA7176. But, see, Lombardo v. Ohio Bur. of Emp. Serv. (1997), 119 Ohio App.3d 217, 221, 695 N.E.2d 11 (stating "[w]hether, considering all circumstances, a reason for terminating a claimant's employment constitutes 'just cause' is a question of law"); Fuller v. Semma Ents., Inc., Butler App. No. CA2006-11-292.

{¶ 22} In the case at bar, the answer to whether SYSCO terminated appellee for just cause depends upon the credibility of Militello's statement that he interpreted appellee's comments as a threat. The hearing officer explicitly determined that Militello's testimony was credible and chose to discredit appellee's assertion that he simply gave Militello friendly advice about drinking with co-workers. In our limited role as a reviewing court, we may not reassess the credibility of Militello's testimony that he felt threatened or appellee's testimony that he merely made the comments to offer up some advice. Instead, we are bound to uphold the hearing officer's credibility determination. It is neither our duty nor the trial court's to second-guess credibility determinations when reviewing a decision from the Unemployment Compensation Review Commission. Rather, we and the trial court must defer to the hearing officer's credibility assessment. As a reviewing court, neither we nor the trial court can reverse the hearing officer's decision simply because reasonable minds might disagree. Instead, we must uphold the hearing officer's decision so long as it is not unlawful or unreasonable and some competent, credible evidence supports it.

{¶ 23} In the case sub judice, we believe that some competent, credible evidence supports the hearing officer's decision. Militello testified that he felt threatened upon hearing appellee's comments. SYSCO has a strict anti-violence policy. The policy prohibits: (1) "[a]ny act or threat made against another person's life, health, well being, family or property"; (2) "[a]ny act or threat of violence including, but not limited to, intimidation, harassment, coercion or any act which is calculated to instill fear or which results in an unwanted physical touching"; (3) "[a]ny act or threat of violence, which endangers the safety of employees, customers, vendors, contractors or the general public"; and (4) "[a]ny act or threat of violence made directly or indirectly by words, gestures or symbols." Here, the hearing officer could have rationally determined that appellee's statement that Militello should "watch out" and the circumstances under which he made it (i.e., he was angry about the relocation of the starting point for his job) constituted a threat of violence or intimidation within the meaning of SYSCO's anti-violence policy. Consequently, we conclude that the hearing officer's decision is lawful, reasonable, and some evidence supports it. We are, therefore, required to uphold it.

{¶ 24} Accordingly, based upon the foregoing reasons, we sustain SYSCO's and ODJFS's assignments of error and reverse the trial court's judgment.

JUDGMENT REVERSED.

JUDGMENT ENTRY

It is ordered that the judgment be reversed and that appellants recover of appellee the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Kline, P.J. & McFarland, J.: Concur in Judgment & Opinion For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.