[Cite as *Schivelbein v. Riverside Mercy Hosp.*, 2012-Ohio-3991.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Stephen L. Schivelbein	Court of Appeals No. L-11-1208
Appellant	Trial Court No. CI0201006801
v.	
Riverside Mercy Hospital, et al.	**DECISION AND JUDGMENT**
Appellee	Decided: August 31, 2012

* * * * *

Stephen L. Schivelbein, pro se.

Mike DeWine, Ohio Attorney General, and Eric A. Baum, Managing Attorney, for appellee Ohio Department of Job and Family Services.

* * * * *

OSOWIK, J.

{¶ 1} This is an accelerated administrative appeal from a judgment of the Lucas County Court of Common Pleas, which upheld the denial of a claim for unemployment benefits made by appellant, Stephen L. Schivelbein against appellee, Riverside Mercy

Hospital, d.b.a. St. Anne's Mercy Hospital ("St. Anne's"). For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} Appellant was employed by Riverside Mercy Hospital ("Riverside") as an MRI technologist on March 20, 2000. At some point during the term of appellant's employment, Riverside was moved to a new location and was renamed St. Anne's. On January 30, 2010, appellant was asked to send MRI images to another hospital in the Mercy hospital system. In response, appellant faxed a handwritten note that said: "You [sic] in the same system so, print them up over there. Don't think you find [sic] the images though. It either stops 05/06 [sic]. How far back you can go to retrieve studies [sic]. Have fun." Later that same day, after his regular shift was over, appellant returned to St. Anne's, found the requested images, and sent them to the requesting hospital.

{¶ 3} On March 8, 2010, appellant received a written warning from Janet Miller, St. Anne's human resources manager. Appellant replied that the accusations were false, and made the following statement: "Is the circus in town? Because I see and hear alot [sic] of managerial clowns around here. * * *" On March 18, 2010, appellant received verbal notice from St. Anne's vice president of human resources, Barb Gessel, that his employment at St. Anne's was terminated.

{¶ 4} Appellant applied for unemployment benefits, which were disallowed. Appellant appealed and, on May 14, 2010, the director of the Ohio Department of Job and Family Services ("ODJFS") issued a redetermination which upheld the disallowance of appellant's unemployment claim, based on the director's finding that appellant was

terminated for just cause. Appellant filed an appeal from the adverse redetermination on June 2, 2010. The next day, ODJFS transferred jurisdiction of the case to Ohio's Unemployment Compensation Review Commission. On August 17, 2010, Hearing Officer Nadine Pettiford held a hearing, at which testimony was presented by Janet Miller. Appellant did not appear at the hearing, however, he was represented by counsel.

{¶ 5} On August 27, 2010, the hearing officer issued a decision in which she found that appellant was employed by St. Anne's from March 20, 2000, until March 18, 2010, and that he was discharged due to "an alleged inappropriate reference to members of management." The hearing officer also found that, pursuant to policy, employees of St. Anne's "are expected to follow the employer's 'standard of behavior' and exhibit appropriate behavior." After citing St. Anne's written warning to appellant, the hearing officer noted appellant's written response. The hearing officer then reasoned that, although appellant had been notified on "numerous occasions" that his behavior was unacceptable, he continued to be disrespectful and exhibit inappropriate behavior. Based on these findings, the hearing officer concluded that appellant's discharge was "for just cause in connection with work" and upheld the May 14, 2010 denial of appellant's claim for unemployment compensation.

{¶ 6} On September 10, 2010, appellant filed a request for further review of the hearing officer's decision. In his request for review, appellant stated that the hearing officer's determination was "not supported by the facts or evidence" because no one ever said he was fired for being "inappropriate and unacceptable." In support of his argument,

appellant asserted that there was only one instance in which he allegedly exhibited "disruptive behavior" and that no other reason for his termination was ever given. Appellant's request for further review was denied on September 22, 2010.

{¶ 7} On September 29, 2010, appellant filed an administrative appeal in the Lucas County Court of Common Pleas. On July 19, 2010, the trial court upheld the hearing officer's decision to deny unemployment benefits to appellant on grounds that he was discharged for just cause in connection with his work. Appellant filed an appeal in this court on August 17, 2011.

{¶ 8} On appeal appellant, acting pro se, asserts the following "Assignments of Errors":

> 1. The lower court did not review or take into consideration that Plaintiff was verbally terminated on 03-18-2010 by Barb Gessel, CHRO for Mercy Health partners. Her words were "You just don't fit our system." Plaintiff was unaware of any paperwork of the termination sent to Unemployment Compensation, exhibits 3 and 4 in his briefing. Plaintiff had to request all of his case papers from Unemployment Compensation to discover "Dave" not Steve was terminated for disruptive behavior. The hearing officer did not even question this or write of this fact. This knowledge made Plaintiff aware that these papers were submitted after verbal termination by Defendant, Appellant's name is Steve not "Dave,"

who was the Defendant verbally terminating [sic] on 03-18-2010[.] See exibit [sic] #4

2. See exhibits 1-5 which I'm sending the court and in the manifest [sic] of evidence.

3. Plaintiff was aware of exhibit[s] 1 and 2 because he responded in writing on these allegations.

4. Court should note that this written discipline was given to Plaintiff 40 days after this situation arose and was resolved by plaintiff that same day, Exhibit #1.

5. Court should also note that Plaintiffs [sic] filed workman's compensation Claim on 03-03-2010, and [was] terminated verbally on 03-18-2010[.]

6. Plaintiff agreed to testify on behalf of another employee who was terminated by Defendant prior to his termination.

7. Plaintiff also made Defendant aware of himself claiming protection under the "Whistle Blower's Act" prior to his termination by Defendant.

{¶ 9} Appellant first argues on appeal that the hearing officer never questioned why Gessel was not available to testify, even though appellant attempted to compel her testimony at the hearing. Next, appellant asserts that the hearing officer failed to consider why Gessel waited several weeks between the alleged incident of disruptive behavior and

her verbal notice to appellant that he was fired, and failed to read appellant's written rebuttal and to consider the facts mentioned therein. In addition, appellant asserts that the termination summary provided to the commission states that "David," not "Steve" responded to the written warning in an inappropriate manner.

{¶ 10} Appellant further asserts that the hearing officer should have allowed his attorney to more fully explore the reasons for his termination, including asking Miller whether appellant was actually terminated in retaliation for filing a worker's compensation claim and agreeing to testify on behalf of a fellow employee who was also seeking unemployment compensation. Finally, appellant infers that the hearing officer's opening statement regarding the employer's role in cutting costs by challenging unemployment claims at an early stage is indicative of the hearing officer's prejudice against his claim. Because all of appellant's arguments on appeal are related, we will address them together.

{¶ 11} Initially, a claimant bears the burden of proving entitlement to unemployment compensation benefits. *Kosky v. Am. Gen. Corp.*, 7th Dist. No. 03-BE-31, 2004-Ohio-1541, ¶ 9. If the claimant is dissatisfied, he or she may appeal a decision of the Unemployment Compensation Review Commission ("commission") to the trial court. R.C. 4141.282(A). On appeal, [t]he trial court shall reverse, vacate, modify, or remand the commissions' decision if it finds that the decision was unlawful, unreasonable, or against the manifest weight of the evidence. *Id*., citing R.C. 4141.282(H). Conversely, the court shall affirm a decision that it finds is not unlawful,

unreasonable, or against the manifest weight of the evidence. *Id.* An unsatisfied party may appeal the trial court's decision to the court of appeals. *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 697, 653 N.E.2d 1207 (1995).

{¶ 12} Generally, on appeal, both the trial court and the appellate court apply the same standard of review, i.e., they "may reverse the board's determination only if it is unlawful, unreasonable, or against the manifest weight of the evidence." *Id.* at 697, *R*.C. 4141.282(H). When applying this standard, a reviewing court "may not make factual findings or determine witness credibility, since factual questions may only be determined by the commission. *Bennett, D.D.S, Ltd. v. Dept. of Job and Family Servs*., 10th Dist. No. 11AP-1029, 2012-Ohio-2327, ¶ 5. Accordingly, "a reviewing court may not reverse the commission's decision simply because 'reasonable minds might reach different conclusions.'" *Id.*, citing *Irvine v. State Unempl. Comp. Bd. of Rev.*, 19 Ohio St.3d 15, 18, 482 N.E.2d 587 (1985). On appeal, this court's focus "is upon the commission's decision, not the trial court's decision." *Id.*, citing *Moore v. Comparison Mkt., Inc.*, 9th Dist. No. 23255, 2006-Ohio-6382, ¶ 8.

{¶ 13} The Unemployment Compensation Act exists to compensate workers who, through no fault of their own, are temporarily without employment. *Tzangas, supra,* at 697. "Thus, [the existence of] fault is essential to the unique chemistry of a just cause termination." *Id.* "Nevertheless, the unemployment compensation statutes must be liberally construed in favor of awarding benefits to the applicant." *Clark Cty. Bd. of Mental Retardation & Dev. Disabilities v. Griffin*, 2d Dist. No. 2006-CA-32,

2007-Ohio-1674, ¶ 10, citing R.C. 4141.46; *Ashwell v. Ohio Dept. of Job & Family Servs.*, 2d Dist. No. 20552, 2005-Ohio-1928, ¶ 43.

{¶ 14} Pursuant to R.C. 4141.29(D)(2)(a), an individual is not entitled to receive unemployment benefits if the administrator finds that the employee was discharged for just cause in connection with his work. *Reef v. Ohio Bur. of Emp. Servs.*, 6th Dist. No. WD-95-070, 1996 WL 139487 (Mar. 1, 1996). "Just cause" has been defined as the type of conduct "which an ordinarily intelligent person would regard as a justifiable reason for discharging an employee. The conduct need not reach the level of misconduct, but there must be some fault on the part of the employee." *Angelkovski v. Buckeye Potato Chips Co.*, 11 Ohio App.3d 159, 463 N.E.2d 1280 (1983), paragraph four of the syllabus, *overruled on other grounds by Galluzzo v. Ohio Bur. Of Emp. Servs.*, 2d Dist. App. No. 95-CA-6, 1995 WL 704193 (Nov. 29, 1995).

{¶ 15} At least one Ohio appellate court has found that criticism of superiors that is expressed in a disrespectful, demoralizing manner can constitute just cause for termination and for denial of unemployment benefits, where such behavior is against company policy. *See Hord v. Ohio Dept. of Job and Family Servs*, 7th Dist. No. 05 JE 48, 2006-Ohio-4382. Another appellate court found that calling a superior names like "zero" constitutes "disrespectful and inappropriate" behavior that can amount to just cause for termination. *Moore v. Comparison Market, Inc.*, 9th Dist. No. 23255, 2006-Ohio-6382, ¶ 25. Still others have concluded that unreasonable disregard for an employer's best interest, such as chronic tardiness, constitutes just cause. *Kiikka v.*

Administrator, Ohio Bur. Of Employment Servs., 21 Ohio App.3d 168, 169, 486 N.E.2d 1233 (1985), *citing Stephens v. Bd. of Rev.*, 8th Dist. No. 41369, 1980 WL 355009 (May 22, 1980).

{¶ 16} In this case, the record of the administrative hearing contains Miller's testimony, in which she stated that appellant was discharged by Gessel for exhibiting "inappropriate behavior." Miller further testified that appellant's behavior "escalated" after he received a written warning, and that his written response to that warning, in which he referred to St. Anne's administration as "managerial clowns," was "inappropriate and threatening." Miller stated that, although appellant is an excellent technologist, he had received multiple complaints from both patients and co-workers concerning his behavior, with the most recent complaint made in January 2010. Miller also stated that appellant had a "pattern" of waiting for a prolonged period of time after he was given a warning before giving a response. Miller stated that, in December 2008, a receptionist complained that appellant was standing too close and making her "uncomfortable" and in May 2009, appellant made a written response to a warning in which he referred to his work environment as "nursery school." She further stated that co-workers complained that appellant did not always return patients in a timely manner, and would leave patients sit and wait before testing to the point where they would complain.

{¶ 17} As to how St. Anne's responded to appellant's behavior, Miller testified that appellant was placed in an employee assistance program to "get him to move the

mission better and follow our standard on behaviors, [however] he was just not able to do it." She stated that, although appellant never made physical threats, the administration took offense to being called "managerial clowns." On cross-examination, Miller testified that appellant was injured and filed a worker's compensation claim on March 17, 2009, and that he testified on behalf of a co-worker at an unemployment hearing. Miller further stated that, after giving his testimony, appellant filed for protection under the Federal Whistle Blower's Act. Miller testified that appellant was not willing to admit his own fault or take responsibility for his behavior, despite many warnings, and that his unacceptable behavior was "escalating." At the end of Miller's testimony, the hearing officer noted for the record that appellant did not appear to testify.

{¶ 18} In addition to Miller's testimony, the hearing record includes copies of prior determinations in which appellant's claim was denied, and appellant's letter to Gessel, in which he asserted a claim for protection under "the Federal Whistle Blowers [sic] Act. And others." Also included was a copy of Mercy Health Partners' statement regarding employee behavior, signed by appellant on May 5, 2004, which states that Mercy employees will adhere to standards of behavior which include "advocacy, appearance, attitude, commitment to co-workers, communication, delivery of care, privacy/confidentiality/corporate responsibility, safety and security." In addition, the record contains a copy of Mercy's definition of disruptive behavior as "anything an individual does that interferes with the orderly conduct of hospital business, from patient care to committee work * * * or that undermines the patient's confidence in the hospital

or another member of the healthcare team." Examples of such behavior include "profane or disrespectful language" and "demeaning behavior, such as name-calling."

{¶ 19} In this case, the record contains evidence that appellant filed a worker's compensation claim and testified on behalf of a co-worker at a separate unemployment compensation hearing. However, as set forth above, the hearing officer was free to disregard such evidence, and this court is required to give deference to that decision on appeal. Similarly, the hearing officer was free to disregard appellant's argument that the written disciplinary notice given to him by St. Anne's should not be considered because it refers to appellant as "Dave," especially since appellant does not deny responding to that same written notice with the comment that his superiors were "managerial clowns." Appellant does not argue, and the record does not demonstrate, how he was prejudiced by Gessel's absence at the hearing.

{¶ 20} This court has reviewed the entire record and, even after construing the evidence most strongly in favor of appellant, we conclude that sufficient evidence is present to support the hearing officer's finding that appellant's general conduct, as exemplified by his response to disciplinary action, was "disrespectful and inappropriate" and that appellant's discharge was, therefore, justified. Accordingly, neither the hearing officer's decision nor the trial court's judgment upholding it constitutes an abuse of discretion. Appellant's assignments of error are, therefore, not well-taken.

{¶ 21} The judgment of the Lucas County Court of Common Pleas is hereby affirmed. Pursuant to App.R. 24, costs of this action are hereby assessed to appellant.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE