

[Cite as *Alexander v. Lowe's Home Ctrs., Inc.*, 2011-Ohio-113.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95027

LAURA K. ALEXANDER

PLAINTIFF-APPELLANT

vs.

LOWE'S HOME CENTERS, INC., ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-695792

BEFORE: Kilbane, A.J., Sweeney, J., and Cooney, J.

RELEASED AND JOURNALIZED: January 13, 2011

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MARY EILEEN KILBANE, A.J.:

{¶ 1} Plaintiff-appellant, Laura Alexander (“Alexander”), appeals from the judgment of the trial court that affirmed the decision of the Unemployment Compensation Review Commission (“review commission”) denying Alexander’s application for unemployment benefits in connection with her discharge from Lowe’s Home Centers (“Lowe’s”) and ordering her to repay previously awarded benefits. For the reason set forth below, we reverse and remand.

{¶ 2} Alexander began working for Lowe’s in November 2003. On the evening of October 21, 2008, at approximately 6:00 p.m., Alexander, who was working as the manager-on-duty, observed a customer forcefully exit through the entrance doors, pushing them from their tracks, and damaging them. After observing the individual later in the parking lot, and learning that he had also been in the store two hours earlier, Alexander considered him to be suspicious and called local police, on a non-emergency line, and requested that they send a police cruiser to drive through the lot.

{¶ 3} On October 22, 2008, a customer’s purchase activated a security alarm. Alexander approached the customer to speak with him about the incident, and the customer fled from the store abandoning the item he had purchased and the other items hidden inside the box.

{¶ 4} Loss prevention personnel discussed both incidents with Alexander, and she was discharged on October 26, 2008. She filed a claim for unemployment compensation, which Lowe’s opposed asserting that she was discharged for just cause, i.e., “failing to follow procedure during a shoplifting

situation that occurred on October 22, 2008.” Lowe’s also included its policy on contacting law enforcement officials and claimed that Alexander had violated this policy on October 21, 2008.

{¶ 5} On November 19, 2008, the director of the Ohio Department of Job and Family Services issued an initial determination that held that Alexander was discharged from employment without just cause in connection with work. In relevant part, the determination stated:

“The employer failed to establish negligence or willful disregard of the rule on the part of the claimant. Ohio’s legal standard that determines if a discharge is without just cause is whether the claimant’s acts, omission, or course of conduct were such that an ordinary person would find the discharge not justifiable. After review of the facts, this agency finds that the claimant was discharged without just cause * * *.”

{¶ 6} Lowe’s appealed the initial determination, and again asserted that Alexander “failed to follow procedure during a shoplifting procedure.” Upon redetermination the director ruled that “a review of the original facts, plus those submitted on appeal, does not support a change in the initial determination.”

{¶ 7} Lowe’s filed a further appeal to the review commission. The matter was heard via telephone on March 9, 2009, and April 13, 2009.

{¶ 8} Lowe’s presented only one witness, Human Resources manager Jennifer Demaline. She testified that Alexander was discharged for contacting the police in a non-emergency situation. (Tr. 8, 18.) This policy states:

“Contacting Law Enforcement

A. Responsibilities

1. * * * It is the responsibility of the Store Manager to contact the Regional Loss Prevention Director, Area Loss Prevention Manager, Vice President of Loss Prevention or the Legal Department at the CSC before requesting law enforcement assistance in the prosecution of an individual. If the Store Manager is not available, it is the responsibility of the Manager on Duty (MOD) to make this contact.

2. The Regional Loss Prevention Director, Vice President of Loss Prevention or the Legal Department at the CSC is responsible for advising and granting approval for the Store Manager (or MOD) to summon law enforcement and/or authorize the prosecution of a customer in cases of suspected theft.

3. The only exception is when the safety of an employee or customer is in jeopardy, (for example: robbery, assault, etc.) or when the damage to company property is imminent, (for example: vandalism). In these cases, the Regional Loss Prevention Director, Vice President of Loss Prevention, or the Legal Department at the CSC must be contacted as soon as possible.

B. Summoning a law enforcement officer and authorizing the prosecution of a customer suspected of theft are serious matters that must be executed according to policy.

C. Approval for Customer Prosecution

* * *

D. Employee Prosecution

E. Failure to obtain appropriate approval in any case may result in disciplinary action up to and including termination of employment.”

{¶ 9} Demaline also outlined various infractions that Alexander allegedly committed in July and August 2008,¹ after returning from medical leave, which culminated in a written final warning.

{¶ 10} Demaline also stated, with regard to the incident on October 22, 2008, that Alexander violated corporate policy by yelling a profane term at the man who was fleeing the store during the aborted shoplifting incident.

{¶ 11} On cross-examination, Demaline stated that she did not have first-hand knowledge of the events of October 21, 2008, and that this was a matter for Loss Prevention Representative Lisa Dix (“Dix”), who did not testify. Demaline then referred to Dix’s statement that indicated that Alexander’s version of events was refuted by a videotape. No video was offered into evidence.

{¶ 12} Finally, Demaline claimed that Alexander was also subject to termination for cursing at the would-be shoplifter.

{¶ 13} Alexander testified that after being hired in 2003, she had been promoted to Operations Manager. In April 2007, however, Alexander was diagnosed with a brain tumor that required surgery and left her partially deaf.

¹On July 16, 2008, Alexander received a written warning for failing to secure two dock doors. Alexander refused to sign the warning because she secured the door in the manner in which she was trained, and other employees were not reprimanded for similar infractions.

On August 11, 2008, Alexander was reprimanded for leaving a written work order and not using the company computer system. On August 16, 2008, she received a written warning that she failed to “work the mandatory reports” and “failed to walk [her] zone.” On August 22, 2008, Alexander received a final notice because she allegedly “processed (4) item numbers and (5) item numbers were sent on the truck * * *.”

She returned to work in July 2007. She was then transferred to the Macedonia store, and then the Strongsville store. In February 2008, she was transferred to the Rocky River location for operations manager training. In May 2008, Alexander passed out at work and was taken by ambulance to the hospital. Following a three-week medical leave, she returned to work.

{¶ 14} According to Alexander, she was subjected to hostile comments, excluded from meetings, and unfairly disciplined. She offered explanations or refutations as to each of the infractions preceding her dismissal.

{¶ 15} Alexander further testified that store manager Laurie Thomas, accompanied by Demaline, informed her that she was terminated for calling the police. With regard to this incident, Alexander testified that a cashier had alerted her that a man abruptly and violently exited through the entrance doors, knocking all four doors and a weather stripping panel off the door frame. The store cashier became upset by the man's conduct, and the cashier's manager also informed Alexander that the man had been in the store two hours earlier. Alexander observed the man loitering in the vestibule area. She spoke to him, and determined that he was "very despondent." He said that he was looking for his buddy. She then observed him and a second man walking around parked cars in the parking lot. A fellow employee's car had been broken into a few days earlier, so Alexander considered this behavior to be suspicious. She called the Rocky River Police on the non-emergency number and asked them to cruise through the parking lot.

{¶ 16} With regard to the October 22, 2008 incident, Alexander testified that she noticed an individual who had previously stolen from the store and began to watch him. He went through register line with a \$22 toilet box but security buzzers alerted as he was leaving the store. She approached the man and observed that the box was not properly sealed. Noticing that there were other items in the box, she asked if she could ring out the items. The man refused, pushed his cart at her, and fled the store without the items. Alexander yelled a profane term at the man, and it was then discovered that the box did not even contain a toilet but had been used to conceal \$900 in other merchandise.

{¶ 17} On April 15, 2009, the review commission hearing officer reversed the decision on redetermination. In support of this decision, the hearing officer outlined the July – August infractions and determined that Alexander acted properly in connection with the shoplifting incident, but had violated company policy in contacting law enforcement. The hearing officer concluded:

“* * * There appears to be no real dispute * * * [that claimant yelled] an expletive * * * at a fleeing shoplifter [but] claimant was discharged not for the shoplifting incident, but rather for the incident of the preceding evening when the doors were knocked off their track.

“The policy is clear that store management is not permitted to contact local police without first receiving approval to do so from [Regional Loss Prevention Director, Area Loss Prevention Manager, Vice President of Loss Prevention or the Legal Department]. The only exception to this policy is when the safety of an employee or customer is in jeopardy, or when the damage to company property is eminent [sic]. There is no dispute that the safety of no employee or customer was in jeopardy. The only issue is whether damage to company

property is eminent [sic]. The Hearing Officer finds that it was not.”

{¶ 18} The hearing officer also determined that Alexander must repay \$5,840 in the previously approved unemployment benefits. Alexander’s request for further review was denied, and she appealed to the court of common pleas, pursuant to R.C. 4141.282. The court of common pleas affirmed the decision of the Review Commission, finding that it was not unlawful, unreasonable, or against the manifest weight of the evidence.

{¶ 19} Alexander appeals that ruling herein, assigning the following error for our review:

“The decision of the Unemployment Compensation Review Board was unlawful, unreasonable, and against the manifest weight of the evidence.”

{¶ 20} In support of this assignment of error, Alexander asserts that she did not violate the policy at issue and did not demonstrate unreasonable disregard for Lowe’s best interest; therefore, there was no just cause for termination. She further asserts that she was terminated in contravention of public policy, and that the hearing officer improperly considered past discipline.

{¶ 21} In opposition, Lowe’s insists that Alexander was terminated for just cause because she improperly summoned law enforcement to the premises without authority to do so.

{¶ 22} Pursuant to R.C. 4141.282(H), a reviewing court may reverse the decision of the Unemployment Compensation Review Commission if it is

“unlawful, unreasonable, or against the manifest weight of the evidence.” *Id.*; see, also, *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 696, 1995-Ohio-206, 653 N.E.2d 1207. That is, all reviewing courts, from common pleas courts to the Supreme Court of Ohio, are charged with determining whether the commission’s decision is unlawful, unreasonable, or against the manifest weight of the evidence. *Williamson v. Complete Healthcare for Women, Inc.*, Licking App. No. 10CA0044, 2010-Ohio-3693.

{¶ 23} While 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. *Irvine v. Unemployment Comp. Bd. of Rev.* (1985), 19 Ohio St.3d 15, 482 N.E.2d 587, 590.

{¶ 24} Ohio Revised Code Section 4141.29 establishes the eligibility requirements for unemployment benefits. A claimant is ineligible if he 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* at 17. Whether just cause exists is unique to the facts of each case. *Id.*

{¶ 25} Clearly, calling the non-emergency number for the local police after a man damages store property, loiters in the vestibule while appearing despondent, then acts suspiciously in the store parking lot, cannot be viewed by an ordinary,

intelligent person as unjustifiable in this day of heightened attention to security. As manager-on-duty, Alexander was in a position of authority and responsibility, and had to take control of the situation as it unfolded. She behaved responsibly and reasonably in calling police on the non-emergency line to have an officer cruise through the parking lot.

{¶ 26} With regard to whether a claimant was discharged for “just cause” for violating a company policy, the court in *Porreca v. Miners & Mechanics Sav. & Trust Co.* (Apr. 2, 1996), Jefferson App. No. 94-J-60, stated as follows:

“When an employee’s resignation revolves around a breach of company policy, the policy must either be unfair or administered unfairly for the employee to claim the resignation was for just cause. See *Fetzer v. Ohio Bur. of Unemployment Comp.* (Nov. 5, 1993), Lucas App. No. L-93-055, unreported, citing *Harp v. Admr., Bur. of Unemployment Comp.* (1967), 12 Ohio Misc. 34. In determining whether a policy is fair, a court should look to whether the employee received notice of the policy, whether the policy could be understood by the average person, whether there is a rational basis for the policy, and whether the policy instituted by the employer was applied to some individuals and not to others. *Shaffer v. American Sickle Cell Anemia Assn.* (June 12, 1986), Cuyahoga App. No. 50127.”

{¶ 27} In this matter, Alexander was discharged, after being transferred several times, following a series of infractions noted after her medical leave. In relevant part, the policy at issue states:

“* * * It is the responsibility of the Store Manager to contact the Regional Loss Prevention Director, Area Loss Prevention Manager, Vice President of Loss Prevention or the Legal Department at the CSC before requesting law enforcement assistance *in the prosecution of an individual*. If the Store Manager is not available, it is the responsibility of the Manager

on Duty (MOD) to make this contact * * * [and to grant] approval for the Store Manager (or MOD) to summon law enforcement and/or authorize the prosecution of a customer *in cases of suspected theft.*” (Emphasis added.)

{¶ 28} Here, however, law enforcement was not contacted relative to prosecution for suspected theft. Further, in our view, this policy could be understood by the average person to allow non-prosecution related calls for police surveillance on the parking lot when suspicious activity has occurred.

{¶ 29} Moreover, with regard to the exception to this policy, the undisputed evidence of record indicated that the call was prompted after a man had been at the store two hours earlier, forcefully exited through the entrance doors, knocking them off of their track, and then remained in the parking lot, walking about with a second man and peering into vehicles. Here, store property was in fact damaged.

{¶ 30} In accordance with all of the foregoing, we conclude that the decision of the Review Commission that determined that Alexander was discharged for just cause and ordered her to repay previously awarded benefits is unlawful, unreasonable, and against the manifest weight of the evidence. “Just cause” is that to which an ordinary, intelligent person is a justifiable reason for doing or not doing a particular act. *Irvine*. Herein, the record establishes that during an evening shift, a cashier alerted Alexander that a man forcefully pushed through the entrance doors, knocking all four doors and a weather stripping panel off the door frame. The cashier was upset by the man’s conduct, and the cashier’s

manager notified Alexander that the man had been in the store two hours earlier. Alexander found the man loitering in the vestibule area, spoke to the man, and determined that he was “very despondent.” The man claimed that he was looking for his buddy, and Alexander next observed the man and a second man walking between parked cars in the parking lot. A fellow employee’s car had been broken into a few days earlier, so Alexander considered the men’s behavior to be suspicious. Based upon this conduct, and information that the first man had been in the store two hours earlier, Alexander considered him to be suspicious. She had concern for customers and fellow employees and called the local police, on a non-emergency line, and requested that a police cruiser simply drive through the lot. Alexander’s actions were both reasonable and responsible, such that an ordinary person would find the discharge unjustifiable.

{¶ 31} Finally, although Lowe’s maintained that Alexander’s version of the events did not correspond to Dix’s observations on a videotape, Dix did not testify and the video was not introduced. In short, Dix’s statement was hearsay upon hearsay that was not entitled to greater weight than Alexander’s sworn testimony.

Mason v. Admr. Ohio Bur. of Emp. Servs. (Apr. 7, 2000), Hamilton App. No. C-990573.

{¶ 32} The assignment of error is well taken. The judgment of the trial court, which affirmed the Review Commission, is reversed and the matter is remanded with instructions to reverse the decision of the Review Commission.

It is ordered that appellant recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

JAMES J. SWEENEY, J., and
COLLEEN CONWAY COONEY, J., CONCUR