[Cite as *Martinez v. Greene*, 2011-Ohio-118.]

[Vacated opinion. Please see 2011-Ohio-1359.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT

COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95311

BRENDA MARTINEZ

PLAINTIFF-APPELLANT

vs.

LILLIAN GREENE

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-705816

BEFORE: Gallagher, P.J., Kilbane, A.J., and Stewart, J.

RELEASED AND JOURNALIZED: January 13, 2011

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SEAN C. GALLAGHER, P.J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the trial court records, and briefs of counsel.

{¶ 2} Appellant Brenda Martinez brings this appeal challenging the decision of the Cuyahoga County Court of Common Pleas affirming her termination from employment from the Cuyahoga County Recorder's Office. For the reasons set forth herein, we affirm.

{¶ 3} On November 6, 2008, appellee Recorder Lillian Greene terminated Martinez from her position as a supervisor in the cashier's department of the recorder's office. Recorder Greene cited insubordination and making racially derogatory remarks in the presence of fellow employees and members of the public as the reasons for Martinez's termination.

{¶ 4} On November 14, 2009, Martinez appealed her termination from employment to the State Personnel Board of Review ("SPBR"). After a formal hearing, the Administrative Law Judge ("ALJ") submitted his report and recommendation to the SPBR, based on the following evidence.

{¶ 5} In 2001, Martinez was hired as a cashier in the cashier's department of the Cuyahoga County Recorder's Office. She was promoted to supervisor in that same department in October 2007. Martinez claims she was the only self-identified Republican working in the recorder's office at that time. In June 2008, Recorder Lillian Greene was appointed to fill the unexpired term of former recorder Patrick O'Malley; she assumed those duties on July 8, 2008. Further, Recorder Greene was elected to the position in the November 4, 2008 election.

{¶ 6} On November 6, 2008, two days after President Barack Obama was elected, Martinez reported to work as usual. She testified that employees in the office were talking about the recent election. In particular, she stated that some employees were teasing her about the fact that the candidate she supported had lost the election. Martinez admitted that she believed the comments were made in a light-hearted manner, and they were not offensive to her.

{¶ 7} Sometime prior to the lunch hour, Martinez was standing with Jerome Petro, the document security administrator in the Cuyahoga County Recorder's Office. Martinez told Petro a joke she had heard on the radio that morning. According to Petro, Martinez said, "How do they expect one black man to run the White House if 11 of them can't run White Castle?" He testified he told her he found the joke offensive, and she responded with a comment about her freedom of speech. Petro also testified that shortly thereafter, he overheard Martinez say aloud words to the effect that, "They're going to start calling the White House the Black House." At the time Petro heard Martinez make the second comment, he noticed customers at the service desk of the cashier's office, approximately 15 feet from where he and Martinez were standing. Petro reported the incident to Recorder Greene and was instructed to file a report.

{¶ 8} Ron Mack, a department head in the cashier's office and Martinez's supervisor, testified that he had not overheard any comments or jokes made by Martinez that morning; however, Martinez had shown him a text on her cell phone about calling

the White House the "Black House." Mack instructed Martinez to put her phone away, and he filed an incident report about what had occurred.

{¶ 9} Recorder Greene testified that on November 6, Jerome Gibson, supervisor of the scanning digital department, reported to her that he had just heard someone in the elevator commenting about an inappropriate remark the person overheard in the cashier's office. After consulting Mary Walsh, the personnel administrator, and the Recorder's Office Policies and Procedures Manual ("Manual"), Recorder Greene prepared a termination letter for Martinez. Recorder Greene determined that if, in fact, Martinez had made the statements Petro and Mack alleged she had made, her behavior constituted removable infractions as set forth in the Manual.

{¶ 10} Section 1.1 of the Manual, the affirmative action policy, states in relevant part: "The Recorder's Office seeks to maintain a work environment free from verbal, written, and demonstrative harassment on the basis of a person's race, religion, national origin, sex, ancestry, age, disability, sexual orientation, or veteran status."

{¶ 11} Section 4 of the Manual provides for "Removable Infractions," which are defined as behavior "so unacceptable that engaging in it even once may be sufficient to justify removing an individual from county employment, regardless of the person's past record." Such behavior includes, but is not limited to, "any other act * * * which constitutes gross incompetency, inefficiency, dishonesty, neglect of duty, immoral conduct, insubordination, discourteous treatment of the public, failure of good behavior, misfeasance, or nonfeasance." Section 4.

{¶ 12} After the lunch hour, Recorder Greene met with Walsh and Martinez in her office. Recorder Greene testified she asked Martinez if she had told the White Castle joke earlier that day in the cashier's office; Martinez admitted that she had. Recorder Greene testified that Martinez told her that she did not think there was anything offensive or improper about telling that joke. Recorder Greene immediately informed Martinez she was terminated and handed her the termination letter she had prepared that morning. She also testified that had Martinez denied making the

statements, Recorder Greene would have conducted further investigation into the matter and not terminated her immediately. The meeting between Recorder Greene and Martinez lasted approximately two minutes.[1]

{¶ 13} Martinez testified she told the White Castle joke to Petro, but that she never showed Mack a text message about the "Black House" on her cell phone, nor made that comment out loud. She also testified she "knew" there were no customers or members of the public at the cashier's service desk. She based this knowledge on the fact that she had just finished serving the last customer and walked away from the service desk; she stated that had there been additional customers, she would not have left her station. On cross-examination, Martinez admitted that she did not check

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[1] Martinez raised a procedural due process claim in federal court, in Case 1:08-CV-2904, captioned *Martinez v. Cuyahoga Cty. Recorder's Office*. The Court held that even though the pretermination hearing lasted approximately two minutes, Recorder Greene had not violated Martinez's procedural due process rights under *Cleveland Bd. of Edn. v. Loudermill* (1985), 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494, and *Powell v. Mikulecky* (C.A. 10, 1989), 891 F.2d 1454.

the area to see if anyone was standing at the service desk immediately before telling Petro the White Castle joke.

{¶ 14} Martinez stated that when she met with Recorder Greene in her office after lunch, Recorder Greene asked only whether she had made a racial statement, which she denied, and whether she had said something about "black," which she admitted. Recorder Greene then handed her the termination letter that had been prepared in advance, and Martinez was escorted from the building.

{¶ 15} According to the ALJ, the issue before him was "whether an employee should be removed for showing racially offensive and derogatory statements to co-workers in the office on a cell phone and then orally repeating the statements, with a total disregard for the potential presence of the public which continually visit the office?" Based on the evidence adduced at the hearing, the ALJ recommended that Martinez's termination be affirmed, finding that "she clearly violated recognized standards of modern civil service behavior and, as clearly, violated [Recorder

Greene's] rather specific Affirmative Action policy." He also found that Martinez acted with "complete disregard for the presence of the public who are served by her employer." In conclusion, the ALJ found that Martinez's conduct constituted a failure of good conduct and immoral behavior, "both removable offenses under [Recorder Greene's] disciplinary guidelines."

{¶ 16} On September 24, 2009, the SPBR adopted the ALJ's report and recommendation, and issued an order affirming Recorder's Greene's termination of Martinez's employment. Martinez appealed to the Cuyahoga County Court of Common Pleas. On May 28, 2010, the trial court affirmed the SPBR's order, finding that its decision was supported by reliable, probative, and substantial evidence, and was in accordance with the law.

{¶ 17} Martinez filed the instant appeal, raising two assignments of error for our review. Because of their relatedness, we address them together.

{¶ 18} "I. The court of common pleas affirmed the SPBR rulings despite alleged errors described below."

{¶ 19} "II. All affirmations of the alleged errors constitute reversible error on the part of Common Pleas Judge Gaul."

{¶ 20} Martinez argues that Recorder Greene failed to show by a preponderance of the evidence that Martinez made racially offensive statements and that the statements were made in the presence of members of the public. We disagree.

{¶ 21} Administrative appeals brought pursuant to R.C. 124.34 and R.C. 119.12 are subject to trial de novo. *Wolf v. Cleveland*, Cuyahoga App. No. 82135, 2003-Ohio-3261, at ¶ 8. The common pleas court may substitute its own judgment on the facts for that of the commission, based upon the court's independent examination and determination of conflicting issues of fact. Id., citing *Newsome v. Columbus Civ. Serv. Comm.* (1984), 20 Ohio App.3d 327, 486 N.E.2d 174. A trial court must not simply determine if the ruling of the commission was arbitrary or capricious, the standard

for appeals brought pursuant to R.C. Chapter 2506, but must evaluate the evidence anew. *Ramsey v. Cleveland*, Cuyahoga App. No. 91940, 2009-Ohio-2387.

{¶ 22} In reviewing the common pleas court's decision on an administrative appeal pursuant to R.C. 124.34, the appellate court's review is limited to a determination of whether the common pleas court's decision is supported by reliable, probative, and substantial evidence and is in accordance with law. *Wolf* at ¶ 10, citing R.C. 119.12; *Arlen v. State* (1980), 61 Ohio St.2d 168, 399 N.E.2d 1251; *Ohio State Bd. of Pharmacy v. Poppe* (1988), 48 Ohio App.3d 222, 549 N.E.2d 541. Therefore, this court's review is limited to a determination of whether the court of common pleas abused its discretion. Id., citing *In re Barnes* (1986), 31 Ohio App.3d 201, 208, 510 N.E.2d 392.

{¶ 23} Abuse of discretion suggests more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. "The term

'discretion' itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." (Internal citations omitted.) *Ramsey*, at ¶ 23.

{¶ 24} Martinez is essentially asking us to conduct a de novo review of the evidence submitted at the hearing. Our review does not extend that far. The trial court affirmed the SPBR's order without making separate findings of fact or conclusions of law; therefore, we can conclude that the trial court adopted the SPBR's findings in their entirety. As well, we presume regularity in the lower court's proceedings and the validity of its judgment. See *Ksiezyk v. City of Cleveland*, Cuyahoga App. No. 80895, 2002-Ohio-4439, citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197,

199, 400 N.E.2d 384 (no evidence that trial court failed to consider all of the evidence prior to rendering its decision).

{¶ 25} Our review of the evidence supporting the SPBR's order, regardless of whether we agree with the punishment imposed on Martinez, demonstrates that its order was supported by reliable, probative, and substantial evidence. Martinez admitted to telling an arguably racist and offensive joke to a coworker. She admitted that she did not check the service area to see if customers were present immediately prior to telling the joke. Despite her argument that there was no verifiable proof other than the unsupported hearsay statement by Jerome Gibson to Recorder Greene that a member of the public heard her, we note that the "hearsay rule is relaxed in administrative hearings * * *." *Cully v. Admr.* (Oct. 13, 1994), Cuyahoga App. No. 66187, quoting *Haley v. Ohio State Dental Bd.* (1982), 7 Ohio App.3d 1, 6, 453 N.E.2d 1262. Thus Gibson's statement, introduced through the testimony of Recorder Greene, was admissible.

{¶ 26} Evidence of Martinez's conduct supports a finding that she violated policies set forth in the Manual and that she acted with a reckless disregard for whether her statements could be overheard by the public both she and the recorder's office serve. We find that the trial court did not abuse its discretion by affirming the SPBR's order. While we may not have made a similar factual finding regarding Martinez's conduct, our limited review of the matter does not merit reversal of the lower court. Martinez's assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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 common pleas 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.

SEAN C. GALLAGHER, PRESIDING JUDGE

MARY EILEEN KILBANE, A.J., and
MELODY J. STEWART, J., CONCUR