

[Cite as *Sinclair v. Dept. of Job & Family Servs.*, 2015-Ohio-1645.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101747

THOMAS H. SINCLAIR

PLAINTIFF-APPELLEE

vs.

**OHIO DEPARTMENT OF JOB AND
FAMILY SERVICES, ET AL.**

[Appeal by CMHA]

**JUDGMENT:
REVERSED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-820085

BEFORE: Keough, J., Celebrezze, A.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: April 30, 2015

ATTORNEY FOR CUYAHOGA METROPOLITAN HOUSING AUTHORITY

Harold C. Reeder
Cuyahoga Metropolitan Housing Authority
Office of Legal Affairs
8120 Kinsman Road
Cleveland, OH 44104

ATTORNEYS FOR APPELLEES

Mike DeWine
Ohio Attorney General
By: Patrick MacQueeney
Assistant Attorney General
Ohio Attorney General's Office
615 West Superior Avenue, 11th Floor
Cleveland, OH 44113

ATTORNEY FOR THOMAS H. SINCLAIR

Jaye M. Schlachet
55 Public Square, Suite 1600
Cleveland, OH 44113

KATHLEEN ANN KEOUGH, J.:

{¶1} Cuyahoga Metropolitan Housing Authority (“CMHA”), appeals the trial court’s judgment reversing the decision of the Unemployment Compensation Review Commission (“Review Commission” or “commission”) that upheld the denial of Thomas Sinclair’s (“Sinclair”) application for unemployment compensation benefits. Finding merit to the appeal, we reverse and enter judgment for CMHA.

I. Procedural Background

{¶2} Sinclair was employed at CMHA as a project manager in its construction department. He was discharged on August 19, 2013, for violating CMHA’s job abandonment and absent without leave policies.

{¶3} He filed an application for unemployment benefits with the Ohio Department of Job and Family Services (“ODJFS”), which issued an initial determination of benefits that allowed the claim. CMHA appealed the determination, and ODJFS subsequently issued a redetermination denying the claim on the basis that Sinclair had been discharged for just cause and, therefore, was ineligible for unemployment benefits. Sinclair appealed the redetermination, and ODJFS transferred jurisdiction of Sinclair’s claim to the Review Commission. After an evidentiary hearing before a hearing officer, the commission issued a decision affirming the redetermination of benefits and denying Sinclair’s claim on the basis that he had been discharged for just cause. Sinclair filed a request for review of the hearing officer’s decision. Subsequently, the full Review Commission issued a decision

disallowing Sinclair's request for review. Sinclair then appealed the commission's decision to the common pleas court, which reversed the commission's decision, finding that Sinclair's termination was not for just cause. CMHA now appeals from the trial court's judgment.

II. Standard of Review

{¶4} R.C. 4141.29(D)(2)(a) prohibits the payment of unemployment compensation if the employee quit work without just cause or was discharged for just cause. “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.” *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Serv.*, 73 Ohio St.3d 694, 697, 653 N.E.2d 1207 (1995), quoting *Irvine v. Unemp. Comp. Bd. of Rev.*, 19 Ohio St.3d 15, 17, 482 N.E.2d 587 (1985). Whether just cause exists is unique to the facts of each case. *Id.*

{¶5} A reviewing court may reverse a commission decision only if it is unlawful, unreasonable, or against the manifest weight of the evidence. R.C. 4141.282(H); *Geretz v. Ohio Dept. of Job & Family Serv.*, 114 Ohio St.3d 89, 2007-Ohio-2941, 868 N.E.2d 669, ¶ 10. If the court does not find that the decision was unlawful, unreasonable, or against the manifest weight of the evidence, then the court “shall” affirm the decision. *Id.*

{¶6} There is no distinction between the scope of review of common pleas and appellate courts regarding just cause determinations under the unemployment compensation law. *Durgan v. Ohio Bur. of Emp. Serv.*, 110 Ohio App.3d 545, 551, 674 N.E.2d 1208

(9th Dist.1996), citing *Tzangas* at 696-697. Accordingly, this court is bound by the same limited scope of review as the common pleas court. *Moore v. Ohio Dept. of Job & Family Serv.*, 9th Dist. Summit No. CA23255, 2006-Ohio-6382, ¶ 13, citing *Irvine* at 18. Our focus when reviewing an unemployment compensation appeal is upon the commission's, rather than the trial court's, decision. *Ricks v. Dir., Ohio Dept. of Job & Family Serv.*, 8th Dist. Cuyahoga No. 99451, 2013-Ohio-3253, ¶ 11, citing *Hertelendy v. Great Lakes Architectural Serv. Sys.*, 2012-Ohio-4157, 976 N.E.2d 950, ¶ 16 (8th Dist.); *Goodrich v. Ohio Unemp. Comp. Rev. Comm.*, 10th Dist. Franklin No. AP-473, 2012-Ohio-467, ¶ 5.

{¶7} Reviewing courts are precluded from making factual determinations or determining the credibility of the witnesses in unemployment compensation cases — that is the commission's function as the trier of fact, and reviewing courts must defer to the commission on factual issues regarding the credibility of witnesses and the weight of conflicting evidence. *Irvine*, 19 Ohio St.3d at 18, 482 N.E.2d 587; *Tzangas*, 73 Ohio St.3d at 696, 653 N.E.2d 1207. The courts' role is to determine whether the decision of the commission is supported by some competent, credible evidence in the record. *Tzangas*. If there is evidence in the record to support the commission's decision, a reviewing court cannot substitute its own findings of fact for those of the commission. *Lorain Cty. Aud. v. Unemp. Comp. Rev. Comm.*, 9th Dist. Lorain No. 03CA008412, 2004-Ohio-5175, ¶ 8. Moreover, every reasonable presumption should be made in favor of the commission's decision and findings of fact. *Banks v. Natural Essentials, Inc.*, 8th Dist. Cuyahoga No.

95780, 2011-Ohio-3063, ¶ 23, citing *Karches v. Cincinnati*, 38 Ohio St.3d 12, 19, 526 N.E.2d 1350 (1988). “The fact that reasonable minds might reach different conclusions is not a basis for the reversal of the board’s decision. * * * When the board might reasonably decide either way, the courts have no authority to upset the board’s decision.” *Irvine*, 19 Ohio St.3d at 18, 482 N.E.2d 587; *Struthers v. Morell*, 164 Ohio App.3d 709, 2005-Ohio-6594, 843 N.E.2d 1231, ¶ 14 (7th Dist.).

III. Analysis

{¶8} In its first assignment of error, CMHA contends that the trial court erred in reversing the commission’s decision because the decision was not unlawful, unreasonable, or against the manifest weight of the evidence. We agree.

{¶9} The record reflects that Sinclair was employed by CMHA from September 13, 2002 to August 16, 2013. On May 26, 2004 and May 1, 2008, Sinclair signed forms acknowledging that he had received a copy of CMHA’s Employee Manual. Included in the manual was CMHA’s absence abuse policy, which states that “unreported or unauthorized absences for three or more working days (job abandonment) will result in immediate discharge.” The manual also contained CMHA’s tardiness control policy, which states that “an employee will be considered absent without leave (AWOL) under the following circumstances and subject to discipline for job abandonment: a. any tardiness of more than one (1) hour at the beginning of the scheduled starting time * * *.”

{¶10} On August 6, 2013, Sinclair was arrested at work by Cleveland police

officers. Following his arrest, Sinclair did not appear for work on Wednesday, August 7; Thursday, August 8; and Friday, August 9.

{¶11} After a predisciplinary conference on August 14, 2013, CMHA terminated Sinclair's employment on August 19, 2013, for violating CMHA's job abandonment and absent without leave policies. Specifically, CMHA advised Sinclair that he was AWOL from Wednesday, August 7 through Friday, August 9, because he had not notified CMHA that he was not reporting for work on those dates.

{¶12} As part of his appeal from the redetermination denying unemployment benefits, Sinclair completed and signed two ODJFS factfinding questionnaires regarding his discharge. In his responses, Sinclair explained CMHA's call-off procedure as follows: "The proper call-off procedure is that in the morning, one is to phone one's direct supervisors, in the case of the Construction Department that would be the Deputy Director, or if he is not available, the Office Manager — or the Department Director, if necessary." When asked to explain the event that had led to his discharge, Sinclair did not assert that he, or anyone else, had reported his absences to CMHA and, in fact, denied that he had called in to report his absences from work. Sinclair stated:

On Tuesday, August 7, 2013 I was arrested at work by the Cleveland Police, and continuing through Friday, August 9, 2013, I did not notify my Department Director, Deputy Director, or Office Manager that I was not able to be at work. Wednesday & Thursday, I was held by the police and could not reach my Employer because the jail phones could not deal with a menu based telephone system (used by CMHA) and also would only call "collect," and the menu system does not accept "collect" calls.

I was released on Thursday, with no wallet or money and by the time I walked into my home it was late afternoon. Friday, August 10 [sic], 2013, I was home, in a state of shock and could not get out of bed until late in the day.

I did call my Department Director, Nilantha Samarasekera, late Friday to ask what I should do. He advised me to have my lawyer phone Dr. Joy, the Human Resources Director.

{¶13} When specifically asked “Did you call in as required?” Sinclair’s response was as follows:

Please see above. I was unable to call in on Wednesday and Thursday. On Friday I was sick in bed and under intense shock and stress, believing I had already been fired, and did not call in, though I later obtained a medical statement covering that day.

{¶14} As with his response to the previous question, Sinclair did not assert that his wife had called anyone at CMHA to report his absence.

{¶15} When asked in the questionnaires, “To whom did you report, and when?” — Sinclair’s response was “I phoned my Dept. Director privately, late, on Friday August 9, 2013, and then on Monday August 12, 2013, I called Human Resources, because he (Director) had informed me that it was what I needed to do.”

{¶16} Cedra Westbrook, a human resource business partner at CMHA, testified for CMHA at the hearing before the hearing officer. She testified that according to CMHA policy, the employee is expected to call in to report his absence but if the employee is incapacitated, someone else may call in for the employee. Westbrook testified that she conducted Sinclair’s predisciplinary conference on August 14, 2013, and that Sinclair made

no claim at the conference that he or anyone else had called in to report his absences on August 7, 8, or 9, 2013. Instead, she testified, Sinclair said that he could not call in because he was in jail.

{¶17} On direct examination by the hearing officer, Sinclair admitted receiving CMHA's policy manual in 2008. He testified that he knew the call-off policy, and stated that he had called in several times over the years to report his absences from work. Sinclair admitted that a CMHA employee is required to call in every day to report their absence. He said that he did not call in on Friday, August 9, because he was in shock and could not get out of bed. Then, contradicting his responses to the questionnaires, Sinclair told the hearing officer that after work on "the second day, August 8," he called Nilantha Samarasekera, the construction department director, and told him that he had been arrested, was out of jail, and would not be coming to work the next day because his lawyer had told him not to talk to anyone about the incident. Sinclair then testified that his wife had called Samarasekera "the day I got arrested and then the next day too." When the hearing officer asked Sinclair why there was nothing in his responses to the ODJS questionnaires about his wife calling anyone at CMHA, he said it was because "she did it all on her own."

{¶18} Notably, during her questioning of Sinclair, the hearing officer stopped at one point and advised Sinclair that his wife, who Sinclair admitted was in the room and passing him papers, had to stop making comments in the background and helping him with his testimony. Later, while Sinclair was being cross-examined by counsel for CMHA, the

hearing officer stopped the cross-examination and advised Sinclair that she continued to hear whispering in the background and that it sounded as if someone was writing notes and passing them to him. The hearing officer again told Sinclair “it needs to stop.”

{¶19} On direct examination by the hearing officer, Samarasekera testified that CMHA’s call-in policy requires that the employee call their immediate supervisor, which in Sinclair’s case would have been John Plifka, and that Sinclair had not called Plifka to report his absences on August 7, 8, or 9, 2013. Samarasekera also testified unequivocally that Sinclair called him in the late afternoon or evening of Friday, August 9, 2013, and advised him that the police had told him that he was on administrative leave and that his lawyer did not want him talking to anyone about the incident. Samarasekera testified that he advised Sinclair to talk to CMHA’s human resources director.

{¶20} On examination by Sinclair, however, Samarasekera testified that Sinclair “might have” called him on Thursday. Samarasekera testified further that he “believed” that Sinclair’s wife had called him on Tuesday and Wednesday to report that Sinclair was in jail. Samarasekera admitted, however, that CMHA’s call-in policy requires that an employee call in every morning if they are not coming to work. Samarasekera also acknowledged his signature on an email from Plifka to Westbrook dated August 13, 2013, regarding the construction department call-in procedure for project managers such as Sinclair. The email explained that construction project managers are to call Plifka, their direct supervisor; Samarasekera, the department director; or Tanya Berhannan, the

construction department officer manager, if they cannot be at work for any reason. The email contained a handwritten note stating, “[w]e did not receive a call from Thomas Sinclair on 8/7/13, 8/8/13, or 8/9/13.”

{¶21} After the hearing, the commission issued a decision finding that CMHA had terminated Sinclair for just cause. The commission found that the evidence established that as a longtime employee, Sinclair knew CMHA’s call-off policy, but that he “did not notify anyone within his supervisory chain of command that he would be absent within one hour of his starting time and did not report for work as scheduled on Wednesday, August 7, 2013; Thursday, August 8, 2013; or Friday, August 9, 2013.” The commission found that Sinclair was not on approved leave on any of these dates, and that his incarceration did not relieve him of his duty to advise CMHA of his absences. The commission found that Sinclair’s absences interfered with CMHA’s business operation because he was not at work to perform his duties and CMHA did not know if or when he would be returning to work. Accordingly, the commission affirmed the disallowance of Sinclair’s claim for unemployment benefits because “[Sinclair’s] violation of the absence abuse and tardiness policies constitutes fault sufficient to justify his discharge.”

{¶22} The evidence in the record supports the commission’s decision. The evidence established that CMHA’s absence abuse policy is that unreported or unauthorized absences of three or more working days are considered job abandonment and will result in immediate discharge. By Sinclair’s own admissions in his responses to the ODJFS questionnaires, he

did not notify anyone at CMHA, in compliance with the call-in procedure that he clearly understood, that he would not be at work on August 7, 8, or 9, 2013.

{¶23} Sinclair's argument that the evidence was "undisputed" that his wife called Samarasekera on Tuesday, August 7, and Wednesday, August 8, is not supported by the record. In his answers to the ODJFS questionnaires, Sinclair never claimed that his wife had called anyone at CMHA to report his absences. Likewise, Sinclair made no claim at his predisciplinary hearing that his wife had called anyone at CMHA to report his absences.

It was only at the telephonic hearing before the hearing officer, after his claim for unemployment benefits had been disallowed, that Sinclair suddenly asserted that his wife had called Samarasekera to report his absences. Because the factfinder is entitled to determine issues of credibility, the hearing officer apparently found that Sinclair's testimony on this issue was not credible. Such a conclusion is not surprising given Sinclair's answers to the ODJFS questionnaires and the hearing officer's several admonitions to Sinclair during the hearing that his wife had to stop assisting him with his testimony.

{¶24} It was likewise within the hearing officer's purview to discredit Samarasekera's testimony that Sinclair "might have" called him on Thursday, August 8, 2013. As the trier of fact, the hearing officer chose to believe Samarasekera's testimony on direct examination that Sinclair did not call him until the late afternoon or early evening of Friday, August 9, 2013, and that Sinclair had not called anyone at CMHA to report his

absences on Wednesday, August 7; Thursday, August 8; or Friday, August 9, 2013.

{¶25} The hearing officer was free to find that Sinclair's evidence was insufficient to substantiate his claim that he or his wife reported his absences. Because there was evidence in the record demonstrating that Sinclair was absent from work for three days without calling in to report his absences, in violation of CMHA's absenteeism and tardiness policies, and that CMHA therefore terminated Sinclair for just cause, the commission's decision was not unlawful, unreasonable, or against the manifest weight of the evidence.

{¶26} After a hearing,¹ the trial court reversed the commission's decision, finding that Sinclair's termination was without just cause. The trial court's judgment entry stated:

The facts, undisputed in the record, demonstrate that [Sinclair] actually complied with the extremely vague absence policy of CMHA or otherwise took all reasonable steps to comply therewith where compliance would have been impossible due to his being in jail. CMHA, [Sinclair's] employer, was aware of [Sinclair's] whereabouts and that he did not abandon his employment. The court finds that the stated reason for termination was a pretext for the actual reason with the employer having full knowledge of the criminal accusation pending at the time of the termination. [Sinclair] is therefore entitled to unemployment compensation benefits as the determination of the Review Board was against the manifest weight of the evidence, unlawful, and unreasonable and must be reversed.

{¶27} In its second, third, and fourth assignments of error, CMHA argues that the

¹R.C. 4141.282(H) requires that a reviewing court "shall hear the appeal upon the certified record provided by the commission"; it makes no provision for a de novo evidentiary hearing. The trial judge stated that "I am going to consider this a de novo hearing on this particular issue, and hear evidence regarding the denial of this matter." Our review of the transcript demonstrates that the parties did not produce any additional evidence, however, and merely argued their respective positions from the evidence presented to the commission. Accordingly, we find no error in the trial court's hearing.

trial court erred in reversing the commission's decision because an employer's motivation is not determinative of whether an employee is entitled to unemployment compensation; pretext is not a defense in an unemployment compensation review case; and Sinclair's subjective intent as to whether he intended to abandon his job is not relevant to whether he violated CMHA's absence abuse policy. We agree.

{¶28} The trial court impermissibly substituted its findings of fact for those of the commission. The trial court essentially rejected the commission's factual findings and conclusions, and made its own findings: that CMHA's absenteeism policy was vague, that Sinclair complied with or took all reasonable steps to comply with the policy, that compliance would have been impossible because he was in jail, that CMHA was aware of Sinclair's whereabouts, and that the stated reason for Sinclair's termination was a pretext. These findings, however, directly contradict the commission's findings, which were supported by the evidence, that Sinclair understood the call-in policy, did not comply with it, and that his incarceration did not relieve his responsibility to call in.

{¶29} Moreover, there was no evidence that CMHA knew of Sinclair's "whereabouts" during the three days he was absent from work. The evidence demonstrated that CMHA was aware that Sinclair was arrested at work on Tuesday, August 6, 2013. The commission discredited Sinclair's evidence that his wife called Samarasekera on Tuesday and Wednesday, however, and thus, there was no credible evidence that CMHA knew that Sinclair was still in jail on Wednesday, August 7; or

Thursday, August 8, and that he was released Thursday evening. As a reviewing court, the trial court was required to defer to the commission's credibility determination.

{¶30} Furthermore, the employer's motivation for the termination is not part of a just cause determination in the unemployment compensation context. As the Ninth District stated in *Durgan*, 110 Ohio App.3d at 549, 674 N.E.2d 1208, "[i]t is important to distinguish between just cause for discharge in the context of unemployment compensation and in other contexts." The court explained that, "just cause, under the Unemployment Compensation Act, is predicated upon employee fault. We are, therefore unconcerned with the motivation or correctness of the decision to discharge." *Id.*, citing *Friedman v. Physicians & Surgeons Ambulance Serv.*, 9th Dist. Summit No. 10287, 1982 Ohio App. LEXIS 12291 (Jan. 6, 1982).

{¶31} In its fifth assignment of error, CMHA contends that the trial court erred in reversing the commission's decision on the basis that Sinclair's compliance with CMHA's absence abuse policy "would have been impossible due to his being in jail." We agree. Not only is this finding improper because the trial court is not permitted to make factual findings, it is also factually incorrect. Sinclair was arrested on Tuesday, August 6, 2013, and did not report for work on Wednesday, August 7, 2013; Thursday, August 8, 2013; or Friday, August 9, 2013. Sinclair admitted that he was released from jail on Thursday evening. If so, he could have reported to work on Friday morning, or if he was unable to work, he could have called in to report his absence, as required by the policy. If Sinclair

had called in on Friday morning, he would not have been AWOL for three days in violation of the policy and would not have been terminated. Accordingly, compliance with the policy was not impossible.

{¶32} Because the commission's decision was not unlawful, unreasonable, or against the manifest weight of the evidence, the trial court erred in reversing the commission's decision. The assignments of error are sustained. The trial court's judgment is reversed, and judgment is entered for CMHA.

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.

KATHLEEN ANN KEOUGH, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
EILEEN T. GALLAGHER, J., CONCUR