[Cite as *Swoope v. Summit Cty. Dept. of Human Serv.*, 2002-Ohio-2210.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

LARRY SWOOPE Appellant v. COUNTY OF SUMMIT, DEPARTMENT OF HUMAN SERVICES Appellee	C.A. No. 20700 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 00 09 4031

DECISION AND JOURNAL ENTRY

Dated: May 8, 2002

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

WHITMORE, Judge.

{¶1} Plaintiff-Appellant Larry Swoope has appealed from an order of the Summit County Court of Common Pleas that affirmed a decision of the Summit County Human Resources Commission ("the Commission"). The Commission's decision affirmed a hearing officer's conclusion that the termination of

Appellant's employment with the Summit County Department of Human Services ("DHS")[1] should be sustained. This Court affirms.

I

{¶2} Appellant was employed by DHS as a job developer, or an "employment placement specialist." Appellant's duties included meeting with clients who were seeking work and potential employers, and helping clients find suitable jobs.

{¶3} On March 10, 2000, DHS terminated Appellant from his employment. A hearing on Appellant's termination was held before a hearing officer of the Commission. Both Appellant and DHS were represented by counsel at this hearing, at which testimony and other evidence was presented. Following the hearing, the hearing officer found that Appellant was terminated by DHS for just cause, and recommended that the termination be sustained. The hearing officer's decision included detailed findings of fact and conclusions of law. The Commission subsequently entered an order summarily affirming the decision of the hearing officer. The Commission's order did not include any findings of fact or conclusions of law.

[1] At some point after Appellant began his employment, DHS was renamed the Department of Job and Family Services. For ease of discussion, this Court will uniformly refer to Appellant's employer as "DHS."

{¶4} Appellant then appealed the decision of the Commission to the Summit County Court of Common Pleas pursuant to R.C. Chapter 2506. Appellant also moved the common pleas court to permit the admission of additional evidence pursuant to R.C. 2506.03(A)(5), on the ground that the Commission failed to file conclusions of fact supporting its order. The common pleas court granted the motion, and the appeal was heard based upon the record before the Commission and additional evidence and testimony presented at a hearing before the court.

{¶5} Following the evidentiary hearing and the submission of briefs, the common pleas court entered an order affirming the Commission's decision that DHS was justified in terminating Appellant. Appellant has timely appealed from that decision, asserting two assignments of error. This Court has rearranged Appellant's assignments of error to facilitate review.

II

{¶6} R.C. 2506.04 provides the standard of review for the common pleas court on Appellant's administrative appeal from the Commission's decision:

> **{¶7}** The court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court.

R.C. 2506.04. In making its determination, "[t]he common pleas court considers the 'whole record,' including any new or additional evidence admitted under R.C. 2506.03[.]" *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147.

{¶8} The decision of the court of common pleas may then be appealed to an appellate court "on questions of law." R.C. 2506.04. The standard of review of the court of appeals is more limited in scope than that of the court of common pleas:

> **{¶9}** [R.C. 2506.04] grants a more limited power to the court of appeals to review the judgment of the common pleas court only on "questions of law," which does not include the same extensive power to weigh "the preponderance of substantial, reliable and probative evidence," as is granted to the common pleas court.

Henley, 90 Ohio St.3d at 147, quoting *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34, at fn. 4. Accordingly, a court of appeals must "affirm the common pleas court, unless the court of appeals finds, as a matter of law, that the decision of the common pleas court is not supported by a preponderance of reliable, probative, and substantial evidence." *Smith v. Granville Twp. Bd. of Trustees* (1998), 81 Ohio St.3d 608, 613, quoting *Kisil*, 12 Ohio St.3d at 34.

{¶10} Assignment of Error Number Two

> **{¶11} The Court erred in affirming the decision of the [Commission] to terminate [Appellant], because the decision was not supported by a preponderance of reliable, probative and substantial evidence, on the whole record.**

{¶12} In his second assignment of error, Appellant has argued that the common pleas court erred in affirming the Commission's decision because that decision was unreasonable and unsupported by the preponderance of the evidence. Appellant has contended that he acted reasonably and in good faith on the occasions for which he was disciplined, and that the disciplines issued by DHS that resulted in his dismissal were unwarranted and unreasonable.

{¶13} The first incident which contributed to Appellant's ultimate termination occurred on October 28, 1999. On that date, Appellant was required to report to DHS's Twinsburg office at 8:00 a.m., his standard starting time. Ralph Reid, one of Appellant's supervisors, telephoned the Twinsburg office at approximately 8:00 a.m. on October 28 looking for Appellant. Mr. Reid spoke to another employee at DHS, who told Mr. Reid that Appellant was not in the office. Mr. Reid left a message with the employee to have Appellant call him as soon as he arrived. Appellant did not return the call until 8:42 a.m.

{¶14} Employees of DHS's Twinsburg office were required to record their time on paper time cards that were submitted for a supervisor's approval, because the office did not have an automated time clock. When Appellant submitted his time card for the period including October 28, 1999, he had entered his arrival time for that date as 8:00 a.m. Another of Appellant's supervisors, Christine Marshall, discovered the discrepancy in the time of Appellant's arrival as reported on his time card (8:00 a.m.) and the time Appellant actually reported to a

supervisor on that day (8:42 a.m.). Ms. Marshall then summoned Appellant into her office to discuss the inconsistency. According to Ms. Marshall's testimony at the evidentiary hearing before the common pleas court, Appellant admitted that he arrived to work late on the morning of October 28. Furthermore, Appellant had not called in to his supervisor to report that he would be late on that day, as DHS policy required.[2] Ms. Marshall consequently changed Appellant's time card to reflect an arrival time of 8:42 a.m., and Appellant was not paid for the time between 8:00 a.m. and 8:42 a.m.

{¶15} The second incident leading to Appellant's termination occurred on November 2, 1999. Appellant stated that on that day, he was scheduled to meet with a client at the Twinsburg office at 9:00 a.m. Appellant was still required, however, to report to the Twinsburg office at his usual start time of 8:00 a.m. At the hearing before the common pleas court, Appellant testified that he had car trouble while en route to work on the morning of November 2, 1999. Appellant called a DHS employee, who was not one of Appellant's supervisors, at the

[2] At the hearing before the Commission, DHS introduced into evidence a copy of its manual of "Policies and Procedures," which was distributed to all DHS employees. That manual provided, in part: "Any employee who will be delayed more than 30 minutes, for any reason, must call the Supervisor to explain the circumstances." In August 1999, Appellant had been suspended for three days for, among other things, failing to call his supervisor to explain the circumstances of his delayed arrival. Appellant's supervisors testified that they had repeatedly admonished Appellant to timely report to his supervisor any anticipated delays or absences from work.

Twinsburg office that morning to report his car trouble. Appellant's immediate supervisor, Delbert Dyer, waited for Appellant to arrive at the office on that morning. By almost 9:00 a.m., when Mr. Dyer left, Appellant still had not arrived at the office. Appellant's first contact with his supervisors was a voice mail message Appellant left for Mr. Dyer at 9:44 a.m.

{¶16} According to Appellant, the client he was supposed to meet on the morning of November 2 also failed to arrive at the office for the scheduled 9:00 a.m. meeting. Appellant stated that he met with a representative of a staffing agency at 11:00 a.m., and treated the agent to lunch. DHS, however, claimed that the staffing agent reported that she ate lunch alone on that day. Appellant further stated that the client with whom he was scheduled to meet at 9:00 a.m. finally arrived at 1:30 p.m., and that he met with her after the representative from the staffing agency left. Appellant did not report back to his office until approximately 3:00 p.m. on November 2.

{¶17} When Appellant submitted his time card for the period covering November 2, he had again entered 8:00 a.m. as his arrival time for that date. On this occasion Mr. Dyer noticed the inconsistency in Appellant's actual and reported start times, and confronted Appellant about the discrepancy. Mr. Dyer required Appellant to change the time card to reflect that Appellant did not arrive until 9:30 a.m. on November 2. In addition, Mr. Dyer required Appellant to

request paid leave for the hours between 8:00 a.m. and 9:30 a.m., because he was not in the office during that time.[3]

{¶18} On November 24, 1999, DHS issued to Appellant a notice that a pre-disciplinary hearing would be conducted on December 1 with respect to certain allegations of Appellant's misconduct. The specific violations itemized in the notice included the discrepancies on Appellant's time card, false or inconsistent statements regarding his whereabouts on November 2, and his repeated failures to timely contact his supervisor to report delays or absences. The notice requested that Appellant attend the predisciplinary hearing, and stated that Appellant would be given an opportunity to respond to the allegations at the hearing.

{¶19} Appellant attended the predisciplinary hearing on December 1, 1999. According to Appellant's supervisors, Appellant asserted for the first time at this hearing that he was actually at work at 8:00 a.m. on October 28, but that that he was outside in his car at the time of Mr. Reid's telephone call. Appellant stated that he arrived at work that morning at approximately 7:55 a.m., and spilled a cup of hot tea on his lap as he got out of his car. He then went into a restroom in the office, took off his pants and underwear, and squeezed out of his clothes as much of the tea as possible. Appellant claimed that he then went back to his car and turned on the blower to dry off his wet clothes. When he went back into his office

[3] Ms. Marshall refused to approve the request for leave because Appellant had failed to report his delay to a supervisor in a timely manner.

he received a message that Mr. Reid was looking for him, and returned Mr. Reid's call.

{¶20} After the hearing was adjourned, further disciplinary action was deferred pending the hearing officer's submission of a written report of findings and a recommendation to the Human Services Director and County Executive.

{¶21} Although Appellant attended the predisciplinary hearing on December 1, 1999, he had called DHS to report that he would be absent due to illness every work day since November 30, 1999. Appellant thereafter reported absent due to illness every work day for the next three months, until his termination on March 10, 2000. Appellant occasionally spoke with a supervisor when he called in, but usually left a voice mail message for a supervisor and/or at an extension that DHS had created for the purpose of recording messages from employees who would be absent due to illness.

{¶22} With respect to "hospitalization or prolonged absence," DHS's employee manual provides:

> **{¶23}** In the case of an illness of 5 or more consecutive work days, or ten (10) nonconsecutive absences due to illness within a 12 month period, a physician's statement specifying the employee's inability to report to work and the probable date of recovery shall be required[.]

Appellant failed to provide any such physician's statement with respect to his illness until January 31, 2000. Nevertheless, DHS applied Appellant's accumulated sick leave during his absence until he exhausted his sick leave on

December 27, 1999. At the hearing before the common pleas court, Appellant testified that in early January 2000, he drove his fifteen-year-old son to DHS and his son delivered an envelope addressed to Mr. Dyer containing a form requesting vacation leave. However, Appellant's supervisors testified that they never received any such vacation request form from Appellant during that time. Accordingly, DHS categorized Appellant's continued absence after December 27, 1999, as unauthorized leave without pay.

{¶24} On January 5, 2000, Appellant was notified that another predisciplinary hearing had been scheduled. The notice advised Appellant that the specific allegations of misconduct to be addressed at the hearing included his failure to submit the required medical statements concerning his illness, and his failure to request authorized leave without pay and/or vacation after the exhaustion of his sick leave on December 27, 1999.

{¶25} The predisciplinary hearing went forward on January 31, 2000. Appellant appeared at the hearing, and presented notes from two physicians dated January 28, 2000, that stated that Appellant was being treated for hypertension. In addition, Appellant submitted requests for vacation leave beginning on January 31, 2000. Ms. Marshall approved Appellant's request for vacation from January 31 through February 25, 2000. Ms. Marshall testified that she wanted additional documentation from a physician regarding Appellant's medical condition and treatment before approving additional vacation time. Ms. Marshall further

testified that she never received the requested documentation. Based on the violations that were the subject of both predisciplinary hearings, Appellant was terminated on March 10, 2000.

{¶26} After thoroughly reviewing the record, this Court cannot conclude as a matter of law that the trial court erred in holding that the Commission's decision sustaining Appellant's termination was supported by a preponderance of substantial, reliable, and probative evidence on the whole record. The record contains evidence sufficient to support the Commission's finding that Appellant violated DHS's policy regarding submitting time cards, timely reporting to a supervisor anticipated absences or delays, providing physicians' statements during periods of absence due to illness, and submitting requests for leave, and that Appellant's violations justified his termination by DHS. Appellant's second assignment of error is without merit.

{¶27} Assignment of Error Number One

> **{¶28} The court erred in affirming the decision of the Summit County Human Resource Commission to terminate [Appellant], where the reason for the termination was in violation of the mandates of the Family and Medical Leave Act.**

{¶29} In his first assignment of error, Appellant has argued that the common pleas court erred in affirming the Commission's decision because Appellant's termination was in violation of the Family and Medical Leave Act, 29 U.S.C. 2601 et seq. ("FMLA"). Appellant has contended that he was entitled to

twelve weeks of leave under the FMLA, and that DHS failed to satisfy a legal obligation to apprise Appellant of his FMLA rights.

{¶30} The FMLA entitles "eligible employees" to a total of twelve weeks of leave during any twelve-month period for, inter alia, "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. 2612(a)(1)(D). A "serious health condition" is defined as "an illness, injury, impairment, or physical or mental condition that involves-- (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. 2611(11).

{¶31} An employee is not required to explicitly invoke the FMLA when taking leave; the employee need only notify the employer that he needs leave for an FMLA-qualifying reason. 29 C.F.R. 825.303(b); *Hammon v. DHL Airways, Inc.* (C.A.6, 1999), 165 F.3d 441, 450. "[A]n employee gives his employer sufficient notice that he is requesting leave for an FMLA-qualifying condition when he gives the employer enough information for the employer to reasonably conclude that an event described in [29 U.S.C. 2613(a)(1)] has occurred."[4] *Hammon*, 165 F.3d at 451; see, also, *Manuel v. Westlake Polymers Corp.* (C.A.5,

[4] Although *Hammon* cites "FMLA § 2613(a)(1)," this Court notes that the conditions qualifying an employee for entitlement to FMLA leave appear at 29 U.S.C. 2612(a)(1). Of these enumerated qualifying conditions, Appellant has argued the applicability only of "a serious health condition that makes the employee unable to perform the functions of [his] position[.]" 29 U.S.C. 2612(a)(1)(D).

1995), 66 F.3d 758, 764 ("[T]he critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition."). The burden then shifts to the employer to obtain any additional information that may be required to determine applicability of the FMLA. 29 C.F.R. 825.303(b); *Hammon*, 165 F.3d at 450.

{¶32} It is undisputed that Appellant never specifically requested leave pursuant to the FMLA. Appellant has contended, however, that he gave DHS sufficient notice of his illness to place the burden on DHS to inquire further into the applicability of the FMLA, and that when he exhausted his sick leave, DHS was obligated to advise Appellant of the potential availability of FMLA leave. This Court disagrees.

{¶33} The common pleas court concluded that Appellant "did not openly communicate with his supervisors" and did not provide enough information for DHS to conclude that he was in need of leave for an FMLA-qualifying reason. This Court likewise finds the record bereft of any evidence that Appellant apprised DHS that his condition was FMLA-qualifying.

{¶34} Appellant testified that he left voice mail messages with his supervisors and/or called the DHS call-off line daily, but did not testify as to what he stated about his medical condition in any of those messages or any conversations with his supervisors. Appellant's supervisors also testified that

Appellant's usual practice was to leave daily voice mail messages that he would be absent due to illness, but their testimony is likewise silent on the content of Appellant's messages or conversations regarding his illness. Moreover, it is undisputed that Appellant failed to produce any physician's statements until January 31, 2000, in spite of DHS's published policy requiring such documentation and his supervisors' testimony that they requested a physician's statement at Appellant's December 1, 1999 predisciplinary hearing.

{¶35} In sum, the record is void of any evidence of what Appellant told DHS about his condition during his extended period of absence due to illness. Accordingly, this Court cannot conclude as a matter of law that the common pleas court erred in finding that Appellant failed to show that he gave DHS sufficient notice that he was requesting leave for an FMLA-qualifying condition. Appellant's second assignment of error is without merit.

III

{¶36} Appellant's assignments of error are overruled. The judgment of the court of common pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into

execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

BETH WHITMORE
FOR THE COURT

BAIRD, P. J.
CONCURS

CARR, J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:

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