[Cite as *Westphal v. Cracker Barrel Old Country Store, Inc.*, 2010-Ohio-190.]

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

RODNEY K. WESTPHAL Appellant v. CRACKER BARREL OLD COUNTRY STORE, INC. Appellee	C. A. No. 09CA009602 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 08CV157422

DECISION AND JOURNAL ENTRY

Dated: January 25, 2010

CARR, Judge.

{¶1} Appellant, Rodney Westphal, appeals the judgment of the Lorain County Court of Common Pleas, which affirmed the decision of the Unemployment Compensation Review Commission. This Court affirms.

I.

{¶2} Mr. Westphal was the general manager for Cracker Barrel Old Country Store, Inc. ("CBI") until his separation from employment on July 31, 2007. He filed an application for unemployment benefits with appellee, Ohio Department of Jobs and Family Services ("ODJFS"), which allowed him unemployment benefits. CBI requested a redetermination on the claim on August 15, 2007. Upon redetermination, the Director found that Mr. Westphal was discharged without just cause and affirmed his allowance of unemployment benefits. CBI then appealed to the Unemployment Compensation Review Commission ("UCRC").

{¶3} The matter proceeded to hearing before the UCRC on December 11, 2007, and March 5, 2008, on the following issue: "Was the claimant discharged by the employer for just cause in connection with work?" On March 31, 2008, the UCRC hearing officer found that Mr. Westphal violated CBI's food handling policies by directing the refreezing of poultry and fish for later use in contravention with the company's "Maximum Hold Times" chart. The hearing officer concluded that CBI, therefore, terminated Mr. Westphal for just cause. The UCRC reversed the Director's August 31, 2007 redetermination and directed Mr. Westphal to immediately repay the $9230.00 in unemployment compensation benefits he had received.

{¶4} On April 18, 2008, Mr. Westphal notified the UCRC by letter that he was appealing the hearing officer's March 31, 2008 decision. He further notified the commission that CBI had agreed to withdraw its objections to his application for unemployment benefits upon the discovery of new evidence. Mr. Westphal appended the parties' agreement to that effect to his notification letter, although he did not submit the alleged new evidence.

{¶5} On May 29, 2008, the UCRC issued its decision disallowing Mr. Westphal's request for review. On June 27, 2008, Mr. Westphal filed a notice of administrative appeal in the Lorain County Court of Common Pleas. The UCRC filed a record of the proceedings on August 7, 2008, and the parties subsequently filed their respective briefs. On May 15, 2009, the trial court affirmed the decision of the UCRC. Mr. Westphal filed a timely appeal, raising two assignments of error for review. This Court rearranges the assignments of error to facilitate review.

II.

ASSIGNMENT OF ERROR II

"THE COURT OF COMMON PLEAS ERRED BY NOT CONSIDERING THE NOTICE OF WITHDRAWAL OF THE OBJECTIONS TO THE APPLICATION

FOR UNEMPLOYMENT COMPENSATION BENEFITS FILED BY THE APPELLEE EMPLOYER SINCE THE APPELLEE EMPLOYER WAS SATISFIED THAT MR. WESTPHAL WAS ENTITLED TO THE BENEFITS."

{¶6} Mr. Westphal argues that the trial court erred by not considering the parties' agreement that CBI was withdrawing its objections to his application for unemployment benefits, when it affirmed the UCRC's decision which concluded that Mr. Westphal was not entitled to such benefits because he was terminated for just cause. Mr. Westphal's argument is without merit.

{¶7} Mr. Westphal asserts that this issue presents a case of first impression. While this district has not considered whether parties may privately agree regarding a former employee's eligibility for unemployment benefits, the Ohio Supreme Court has addressed the issue. The high court has held that the legislature has reserved to the Ohio Bureau of Employment Services the authority to determine eligibility for unemployment compensation. *Youghiogheny & Ohio Coal Co. v. Oszust* (1986), 23 Ohio St.3d 39, 41 (stating that "the legislature has not provided that the determination as to eligibility for unemployment compensation may be made on the basis of private arrangements for the settlement of grievances."); see, also, *McCoy v. Admr., Ohio Bur. of Emp. Servs.*, 4th Dist. No. 00CA12, 2000-Ohio-1959 (stating that "the legislature left the determination of just cause to the Commission, not to the parties."). Specifically, "[t]he board of review has a statutory duty to hear the evidence, develop a record, and apply the law." *Oszust*, 23 Ohio St.3d at 41. Moreover, R.C. 4141.06 states that "[t]he commission and its hearing officers shall hear appeals arising from determinations of the director of job and family services involving claims for compensation and other unemployment compensation issues. The commission shall adopt, amend, or rescind rules of procedure, and undertake such investigations, and take such action required for the hearing and disposition of appeals as it deems necessary

and consistent with this chapter." Accordingly, the UCRC was not bound by, nor was it required to consider, any private agreement wherein Mr. Westphal and CBI determined that he was eligible for unemployment benefits.

{¶8} OAC Chapter 4146-7 addresses the conduct of hearings and other proceedings before the UCRC. OAC 4146-7-02(M) permits the UCRC, for good cause, to reopen the appeal for further proceedings "[a]t any time after hearing and prior to the issuance of a decision[.]" Mr. Westphal filed a request for review of the review commission's March 31, 2008 decision. Although Mr. Westphal appended a copy of the parties' agreement and asserted that new evidence was discovered, he did not move to reopen the appeal. Because Mr. Westphal failed to utilize the appropriate procedural mechanism prior to the May 29, 2008 decision, the UCRC did not err by disallowing his request for review. Moreover, there is no procedural mechanism by which Mr. Westphal could submit new evidence for consideration by the trial court in the first instance. *Abrams-Rodkey v. Summit Cty. Children Servs.*, 163 Ohio App.3d 1, 2005-Ohio-4359, at ¶32. Mr. Westphal's second assignment of error is overruled.

ASSIGNMENT OF ERROR I

> "THE DECISION OF THE COURT OF COMMON PLEAS IN AFFIRMING THE DECISION OF THE APPELLEE, THE REVIEW COMMISSION OF THE STATE OF OHIO, UNEMPLOYMENT COMPENSATION, SHOULD BE REVERSED BECAUSE IT IS UNREASONABLE, UNLAWFUL, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶9} Mr. Westphal argues that the decision of the UCRC should be reversed because it is unreasonable, unlawful, and against the manifest weight of the evidence. This Court disagrees.

{¶10} R.C. 4141.29(D)(2)(a) prohibits the payment of unemployment compensation if the employee "has been discharged for just cause in connection with the individual's work[.]" This Court has defined just cause and the role it plays in R.C. 4141.29 determinations as follows:

> "'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."' (Emphasis added.) *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Serv.* (1995), 73 Ohio St.3d 694, 697, quoting *Irvine v. State, Unemployment Comp. Bd. of Rev.* (1985), 19 Ohio St.3d 15, 17. It is important to distinguish between just cause for discharge in the context of unemployment compensation and in other contexts. An employer may justifiably discharge an employee without incurring liability for wrongful discharge, but that same employee may be entitled to unemployment compensation benefits. See *Adams v. Harding Machine Co.* (1989), 56 Ohio App.3d 150, 155. This is so because just cause, under the Unemployment Compensation Act, is predicated upon employee fault. *Tzangas*, 73 Ohio St.3d at 698; *Adams*, 56 Ohio App.3d at 155. We are, therefore, unconcerned with the motivation or correctness of the decision to discharge. *Friedman v. Physicians and Surgeons Ambulance Serv.* (Jan. 6, 1982), 9th Dist. No. 10287. The Act protects those employees who cannot control the situation that leads to their separation from employment. See *Tzangas*, 73 Ohio St.3d at 697." *Durgan v. Ohio Bur. of Emp. Serv.* (1996), 110 Ohio App.3d 545, 549-550.

{¶11} Consistent with that purpose, courts have repeatedly held that a discharge is considered to be for just cause where an employee's conduct demonstrates some degree of fault, such as behavior that displays an unreasonable disregard for his employer's best interests. *Tzangas*, 73 Ohio St.3d at paragraph two of the syllabus; *Kiikka v. Admr., Ohio Bur. of Emp. Serv.* (1985), 21 Ohio App.3d 168, paragraph two of the syllabus; *Sellers v. Bd. of Rev.* (1981), 1 Ohio App.3d 161, paragraph two of the syllabus. The Ohio Supreme Court has specifically held:

> "When an employee is at fault, he is no longer the victim of fortune's whims, but is instead directly responsible for his own predicament. Fault on the employee's part separates him from the Act's intent and the Act's protection. Thus, fault is essential to the unique chemistry of a just cause termination." *Tzangas*, 73 Ohio St.3d at 697-698.

{¶12} The Ohio Supreme Court has further stated that the employee has the burden to prove his entitlement to unemployment compensation benefits under R.C. 4141.29(D)(2)(a).

Irvine v. State, Unemployment Comp. Bd. of Rev. (1985), 19 Ohio St.3d 15, 17. To show he is entitled to unemployment compensation, the employee must provide evidence that his discharge was without just cause by demonstrating he was without fault in the incident resulting in his termination. Id. If the employee is unhappy with the UCRC's decision concerning his entitlement to unemployment compensation, he may appeal that decision before a common pleas court, which would hear the case upon the record as certified and provided by the UCRC. R.C. 4141.282(H). Only if the court finds the UCRC's decision was "unlawful, unreasonable, or against the manifest weight of the evidence" is it required to reverse, vacate, modify, or remand such decision. Id. Absent such a finding, the reviewing court must affirm the UCRC's decision as it is the UCRC's function to make factual findings and determine the credibility of witnesses in unemployment compensation cases. *Irvine* at 18. If the record reveals evidence to support the UCRC's findings, the reviewing court cannot substitute its own findings of fact for those of the UCRC. *Wilson v. Unemployment Comp. Bd. of Rev.* (1984), 14 Ohio App.3d 309, 310. Nonetheless, the reviewing court's function involves determining whether the UCRC's decision is supported by evidence in the record. Id. at 311.

{¶13} This Court has discussed its duty to review a UCRC decision under the same scope of review:

> "R.C. Chapter 4141 does not distinguish between the scope of review of a common pleas court and that of an appellate court with respect to Review Commission decisions. See R.C. 4141.282(H)-(I). Additionally, the Supreme Court of Ohio has confirmed that 'there is no distinction between the scope of review of common pleas and appellate courts regarding "just cause" determinations under the unemployment compensation law.' See *Durgan v. Ohio Bur. of Emp. Servs.* (1996), 110 Ohio App.3d 545, 551, citing *Tzangas v. Administrator, Ohio Bur. of Emp. Serv.* (1995), 73 Ohio St.3d 694, 696-97.
>
> "Thus, in a review of a decision by the Review Commission regarding eligibility for unemployment compensation benefits, an appellate court is bound by the same limited scope of review as that required of the common pleas courts. *Irvine*, 19

> Ohio St.3d at 18. Therefore, an appellate court may only reverse an unemployment compensation eligibility decision by the Review Commission if the decision is unlawful, unreasonable, or against the manifest weight of the evidence. *Tzangas*, 73 Ohio St.3d at 696. Also, this Court is required to focus on the decision of the Review Commission, rather than that of the common pleas court, in such cases. *Barilla v. Ohio Dept. of Job & Family Servs.*, 9th Dist. No. 02CA008012, 2002 Ohio 5425, at ¶6, citing *Tenny v. Oberlin College* (Dec. 27, 2000), 9th Dist. No. 00CA007661." *Upton v. Rapid Mailing Servs.*, 9th Dist. No. 21714, 2004-Ohio-966, at ¶¶8-9.

{¶14} In determining whether a UCRC decision is or is not supported by the manifest weight of the evidence, this Court applies the civil manifest weight of the evidence standard set forth in *C.E. Morris Co. v. Foley Const. Co.* (1978), 54 Ohio St.2d 279, syllabus, which holds: "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." The Ohio Supreme Court has clarified that:

> "when reviewing a judgment under a manifest-weight-of-the-evidence standard, a court has an obligation to presume that the findings of the trier of fact are correct. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81. This presumption arises because the trial judge had the opportunity 'to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' Id. at 80. 'A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not.' Id. at 81." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶24.

{¶15} In the instant matter, the UCRC found that Mr. Westphal was familiar with CBI's food handling procedures, which included a "Maximum Hold Times" chart which clearly set out the maximum time that food could be kept and served to customers. The UCRC further found that Mr. Westphal exceeded the maximum hold times by refreezing unsold portions of certain foods for later preparation and sale. The commission concluded that CBI terminated Mr. Westphal's employment for just cause based on his violation of these food handling procedures.

{¶16} At hearing, District Manager Liz Miskalo testified on behalf of CBI. She testified that she terminated Mr. Westphal for improper handling of food which put both the safety of guests and the company brand at risk.

{¶17} Ms. Miskalo further testified as follows. Mr. Westphal was the general manager of CBI store number 508. On March 31, 2007, an associate manager informed Ms. Miskalo that he intended to quit because he no longer wished to participate in the improper handling of fish and chicken which was taking place at the restaurant. Based on these allegations, Ms. Miskalo began an investigation, during which she interviewed the associate manager, two grill cooks, and Mr. Westphal; reviewed prior audits of the restaurant; and reviewed Mr. Westphal's personnel file, including prior disciplinary actions against him for other food handling infractions.

{¶18} Ms. Miskalo testified that Mr. Westphal admitted to refreezing fish and chicken that had previously been thawed for use. She testified that two grill cooks confirmed Mr. Westphal's practice of refreezing products and directing others to do so as well.

{¶19} Ms. Miskalo testified that CBI's standards are evidenced in the company's "maximum hold times" chart regarding refrigerated items, as well as in recipes which set out hold times for food. The maximum hold times chart indicates that fish may be held for a maximum of 5 days, while chicken breasts may be held for use for 72 hours. Ms. Miskalo testified that the chart specifies that hold times include all times during which the product is held under refrigeration in preparation for use, including the time necessary to thaw the product. She testified that company policy dictates that any product not used within its allotted hold time is considered "waste" and must be discarded. Ms. Miskalo testified that Mr. Westphal was familiar with that policy.

{¶20} Ms. Miskalo testified that all managers receive four to six weeks of training at a simulated kitchen to address issues such as the proper handling of food, including the discarding of waste. She testified that managers receive additional food safety training at the company's home office. She testified that she believed that Mr. Westphal knew that the refreezing of food was improper and that he agreed that refreezing constituted a violation of company policy and that he would cease the action immediately.

{¶21} Ms. Miskalo acknowledged that the United States Department of Agriculture says that foods may be refrozen if they have not been kept at a temperature of 40 degrees or more for more than four hours and the food still contains ice crystals. She testified, however, that Mr. Westphal's refrozen products had been completely thawed for more than 72 hours. She emphasized that there are no company standards regarding the refreezing of food because the company does not refreeze food. Rather, the surplus product is designated as waste and its discard is considered the cost of doing business.

{¶22} Ms. Miskalo discussed the company's rules of conduct. She testified that the proper handling of food is encompassed by the directives to pay full attention to work and to perform the job in a safe manner. She emphasized that the enumerated rules are not all-inclusive. In fact, the rules state: "Be aware that these Rules of Conduct list many of the most important rules but they are not intended to cover all conduct or work performance issues which may be grounds for disciplinary action or immediate dismissal[.]" Ms. Miskalo testified that "any time there is an infraction on food handling safety that, that is grounds for immediate termination." She conceded that there is no written policy requiring immediate termination for refreezing, but she was very clear throughout her testimony that managers are responsible for the

quality and safety of foods and that the maximum hold times chart and recipes address that. Ms. Miskalo testified that managers do not have any discretion to disregard the maximum hold times.

{¶23} Mr. Westphal testified at the hearing. He conceded that he did refreeze fish, that he recalled telling one of the grill cooks to refreeze chicken or cod in 2005, and that he "might have" exceeded the maximum hold time on fish products. He further conceded that he had received training regarding the safe handling of food and that he was familiar with the various training and policy manuals. He also testified that he knew he was supposed to reject any deliveries of frozen products which appeared to have been thawed.

{¶24} Mr. Westphal testified, however, that he was never concerned that he was violating company policy by refreezing fish because the product never left the cooler. He asserted that "a lot of times it had ice crystals still on it[,]" although he conceded that he did not check the temperature of the food each time before he refroze it. Mr. Westphal testified that he believed that the maximum hold times for food began anew once a refrozen product was again pulled for use. He testified that he had never read anything directing that thawed food must be discarded if not used. Mr. Westphal testified that he was never told that the refreezing of food was cause for immediate termination.

{¶25} Bearing in mind that Mr. Westphal has the burden of proving his entitlement to unemployment compensation benefits, this Court concludes that the UCRC's decision that Mr. Westphal was terminated for just cause by CBI is neither unlawful, unreasonable, nor against the manifest weight of the evidence. As a reviewing court, we must defer to the UCRC's credibility assessment and factual determinations in the case. CBI demonstrated that the refreezing of food for later use is against company policy in the interests of guest safety and brand reputation. Mr. Westphal admitted to having received food safety training, as well as his familiarity with

company manuals and policy. The maximum hold times chart sets out the length of time food products may be held for use once they have been placed under refrigeration. Mr. Westphal admitted to refreezing food, as well as possibly exceeding maximum hold times. Accordingly, the UCRC's findings that Mr. Westphal was at fault and that CBI terminated him for just cause are not unlawful, unreasonable, or against the manifest weight of the evidence. Mr. Westphal's first assignment of error is overruled.

III.

{¶26} Mr. Westphal's assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

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 Lorain, 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.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
MOORE, P. J.
CONCUR

APPEARANCES:

DAVID A. VAN GAASBEEK, Attorney at Law, for Appellant.

RICHARD CORDRAY, Attorney General of Ohio, PATRICK MACQUEENEY, Assistant Attorney General, for Appellees.