

STATE OF OHIO                    )  
  )ss:  
COUNTY OF LORAIN            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

LORAIN COUNTY AUDITOR, et al.

C.A. No.       09CA009694

Appellants

v.

STATE OF OHIO, UNEMPLOYMENT  
REVIEW COMM., et al.

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF LORAIN, OHIO  
CASE No.     08CV159024

Appellees

DECISION AND JOURNAL ENTRY

Dated: May 3, 2010

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MOORE, Judge.

{¶1} Appellants, Lorain County Auditor and the Lorain County Board of Mental Retardation and Developmental Disabilities, appeal from the judgment of the Lorain County Court of Common Pleas, which affirmed the decision of Appellee, the State of Ohio Unemployment Compensation Review Commission, in favor of Appellee, Carolyn Brown. We affirm.

I.

{¶2} Carolyn Brown was a special education teacher employed by the MRDD Board. On January 30, 2008, she reprimanded one of her students, J.Y., an autistic nine year old. J.Y. had taken pickles that Brown had set aside for herself in a restricted area of the classroom. J.Y. took the pickles from the restricted area twice. After the first instance, Brown instructed J.Y. to throw the pickles away. J.Y. then used the restroom. Upon his return, J.Y. reentered the restricted area and attempted to take Brown's second set of pickles. Brown's testimony, which

the Unemployment Compensation Review Commission found credible, indicated that after the second incident she led J.Y. by the hand to the classroom's sensory area, where she instructed him to sit on a beanbag for several minutes for making an inappropriate choice. Brown remained seated approximately two feet away for the duration of J.Y.'s time in the sensory area. A speech therapist accused Brown of physically abusing the student.

{¶3} Lorain County Children Services investigated the incident, finding initially that abuse was indicated. Upon further review, the agency determined that abuse did not take place. The Center for the Teaching Profession also investigated and determined that no abuse occurred. Brown's teaching certificate was renewed. The Board, however, discharged Brown on March 18, 2008 for physical abuse of a student and willfully demeaning and humiliating a student. According to the testimony of Thomas Forhan, the Director of Human Resources for the Lorain County Auditor, a single instance of either physical abuse or willfully demeaning and humiliating a student would allow for a discharge with just cause.

{¶4} On March 21, 2008, Brown filed an application for a determination of benefit rights with regard to unemployment compensation. On April 10, 2008, the Ohio Department of Job & Family Services issued a Determination of Benefits in which it disallowed Brown's claim on the basis that she was discharged for just cause. Brown appealed from that disallowance. On May 19, 2008, the Department issued a Director's Redetermination affirming the disallowance of unemployment benefits. Brown appealed from the Redetermination. On June 5, 2008, the Department transferred jurisdiction to the Unemployment Compensation Review Commission.

{¶5} On August 15, 2008, Brown signed a release in which she agreed to dismiss with prejudice a lawsuit she had filed against, among others, the MRDD Board. She dismissed with prejudice her grievance contesting her discharge, submitted an irrevocable resignation letter

effective June 30, 2008, and submitted an irrevocable request for unpaid leave effective from March 18, 2008 through June 30, 2008. A paragraph of the release states that Brown “covenants not to sue, file, or pursue any administrative action, appeal, charge, or grievance[.]”

{¶6} On August 28, 2008, the Review Commission held a hearing regarding Brown’s discharge. The release was submitted to the hearing officer and appears in the Review Commission File. On September 5, 2008, the Review Commission issued its decision reversing the Director’s Redetermination and granting Brown unemployment compensation benefits. The Review Commission determined that Brown had been discharged without just cause. The Auditor and Board filed a request for review. On September 30, 2008, the Review Commission issued its decision disallowing the request for review. The Board and Auditor then appealed the Review Commission’s redetermination to the Lorain County Court of Common Pleas. The trial court affirmed the Review Commission’s decision, finding that it was not unlawful, unreasonable or against the manifest weight of the evidence.

{¶7} The Auditor and the Board timely filed a notice of appeal, raising a single assignment of error for our review.

## II.

### **ASSIGNMENT OF ERROR**

“THE TRIAL COURT’S FINDING THAT [BROWN] WAS DISCHARGED WITHOUT JUST CAUSE, AND THUS ELIGIBLE FOR UNEMPLOYMENT COMPENSATION WAS UNLAWFUL, UNREASONABLE AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AS SUCH, THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR WHEN IT RULED CONTRARY TO THE STATUTORY STANDARD OF REVIEW IN AFFIRMING AND UPHOLDING THE AWARD OF UNEMPLOYMENT COMPENSATION.”

{¶8} In their assignment of error, the Auditor and Board contend that the trial court’s decision affirming the Review Commission’s ruling that Brown’s discharge was without just cause was unlawful, unreasonable and against the manifest weight of the evidence. We disagree.

{¶9} In support of its contention that Brown is not entitled to unemployment compensation benefits, the Auditor and Board present two arguments. The first is that Brown’s termination of employment was based on just cause and that the Review Commission’s decision was against the manifest weight of the evidence. The second argument asserts that Brown agreed to forego unemployment compensation benefits as part of the settlement of her civil suit and union grievance actions.

#### JUST CAUSE DETERMINATION

{¶10} Under R.C. 4141.29(D)(2)(a), Brown has the burden of proving that she is entitled to unemployment benefits. *Irvine v. Unemp. Comp. Bd. of Review* (1985), 19 Ohio St.3d 15, 17.

{¶11} 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[.]”

“[J]ust 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. 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. This is so because just cause, under the Unemployment Compensation Act, is predicated upon employee *fault*.” (Internal citations and quotations omitted.) *Durgan v. Ohio Bur. Emp. Servs.* (1996), 110 Ohio App.3d 545, 549.

{¶12} The discharge of an employee is considered to be for just cause where the employee’s conduct demonstrated some degree of fault such that the employee displayed an unreasonable disregard for his employer’s best interests. *Westphal v. Cracker Barrel Old Country Store, Inc.*, 9th Dist. No. 09CA009602, 2010-Ohio-190, at ¶11.

“R.C. 4141.282(H) sets forth the scope of review in unemployment compensation cases. Pursuant to this section, the trial court may only reverse the Review Commission’s decision if it is unlawful, unreasonable, or against the manifest weight of the evidence. *Markovich v. Employers Unity, Inc.*, 9th Dist. No. 21826, 2004-Ohio-4193, at ¶10, citing *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.*, (1995), 73 Ohio St.3d 694, 696. When we review the trial court’s decision, we apply the same standard. *Id.* The Ohio Supreme Court has explained that the resolution of factual questions is chiefly within the Review Commission’s scope of review. *Tzangas*, 73 Ohio St.3d at 696; *Irvine*, 19 Ohio St.3d at 17. If the reviewing court finds evidence in the record to support the findings, then the court cannot substitute its judgment for that of the Review Commission. *Durgan* (1996), 110 Ohio App.3d at 551, citing *Wilson v. Unemp. Comp. Bd. of Rev.* (1984), 14 Ohio App.3d 309, 310. Therefore, ‘we must uphold the hearing officer’s decision so long as it is not unlawful or unreasonable and some competent, credible evidence supports it.’ *Brown v. SYSCO Food Servs. of Cincinnati, L.L.C.*, 4th Dist. No. 09CA2175, 09CA3276, 2009-Ohio-5536, at ¶22; see *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶24. ‘The fact that reasonable minds might reach different conclusions is not a basis for the reversal of the [Review Commission’s] decision.’ *Irvine*, 19 Ohio St.3d at 18.” *Myers v. Ohio Dept. of Job & Family Servs.*, 9th Dist. No. 09CA0024, 2009-Ohio-6023, at ¶5.

{¶13} In this case, the Auditor and Board contend that the Review Commission’s decision was against the manifest weight of the evidence because Brown assaulted and physically abused an eight-year-old autistic student. There was, however, conflicting evidence before the Review Commission as to what actually occurred on January 30, 2008 in Brown’s classroom. During the Review Commission hearing, Forhan testified on behalf of the Auditor and Board. He related the allegations made by a speech therapist who was working in Brown’s room at the time of the incident. Kimberly Antush, the speech therapist, did not testify in person, but provided the Board with a written statement of her version of the events. Forhan related the contents of this statement at the Review Commission hearing. He testified that on January 30, 2008, J.Y. took two pickles that Brown had set aside for herself. Brown then grabbed J.Y. by the back of his neck and pushed him face-first into some beanbag chairs. Brown then sat on J.Y.’s legs for a period of time to immobilize him. Brown set aside another pickle for herself. When

Brown saw J.Y. take the pickle a second time, she again grabbed him by the back of the neck, pushed him face-first into the beanbag chairs and sat on his legs to immobilize him. Forhan testified that a classroom aide who was in the room throughout the incident did not hear or see anything and was, therefore, unable to corroborate or refute Antush's allegations.

{¶14} Brown testified that she did reprimand J.Y. for taking pickles that did not belong to him. She further testified that after the first incident she instructed J.Y. to throw away the pickles. After the second incident, she led J.Y. by the hand to the sensory area for some time away because he made an inappropriate choice. The sensory area consisted of two six-foot-tall barriers which were arranged in a "V" formation. The sensory area was located on the right side of the classroom, near the door. The open end of the sensory area was angled towards the door. During the incident, the aide and Antush were sitting at the table in the far-left corner of the classroom with their backs to the sensory area. The sensory area walls were angled such that no one at the table in the far-left corner of the classroom could view the inside of the sensory area. Brown testified that J.Y. was a very loud student. Had he been restrained in the manner Antush claimed, he would have been very upset, screamed and cried. As previously noted, the aide reported that she did not see or hear anything during the incident.

{¶15} A subsequent investigation by Lorain County Children's Services did not reveal bruising on J.Y.'s wrist or neck. Children Services' final determination was that the claim of abuse was unsubstantiated. Additionally, the Center for the Teaching Profession conducted an investigation. That entity determined there was no abuse and renewed Brown's teaching certificate. The state department of MRDD did not place Brown on its registry of those who have abused clients or students.

{¶16} Brown’s testimony contradicted Forhan’s testimony and established that she did not physically abuse or willfully demean or humiliate a client/student as alleged by the Auditor and Board. The Review Commission found Brown’s testimony to be credible, as was its prerogative. *Durgan*, 110 Ohio App.3d at 551. Allegations of physical abuse of any child, let alone an autistic child, are extremely disturbing. The Review Commission hearing officer had the opportunity to evaluate the credibility of the witnesses as they testified. Brown’s testimony, as well as the results of multiple investigations, provided some competent, credible evidence that Brown did not physically abuse or willfully demean or humiliate a client/student. *Brown*, at ¶22; *Wilson*, at ¶24. Accordingly, we will not reverse the Review Commission’s determination that Brown established that her discharge was without just cause.

#### SETTLEMENT

{¶17} In the alternative, the Auditor and Board contend that the Review Commission erred in failing to enforce the contractual rights resulting from the settlement between the Board and Brown. In this case, upon her discharge by the Board on March 18, 2008, Brown availed herself of the grievance procedures and filed a civil lawsuit in the Lorain County Court of Common Pleas. On August 15, 2008, Brown signed a release in which she agreed to dismiss the civil lawsuit with prejudice, dismiss her grievance with prejudice, sign a letter containing an irrevocable request for unpaid leave from March 18, 2008 through June 30, 2008 and sign a second letter stating that her irrevocable resignation from employment with the Board was effective June 30, 2008. She also covenanted not to “sue, file, or pursue any administrative action, appeal, charge or grievance” against the Board or Antush. In return, the Board would vacate Brown’s termination effective March 18, 2008, accept her irrevocable requests for unpaid leave and resignation and submit a neutral employment verification letter to the Ohio

Department of Education. The Board now seeks to enforce the language of the release to bar Brown from collecting unemployment benefits.

{¶18} The Auditor and Board direct this Court to *Shepard v. Ohio Dept. of Job & Family Servs.*, 166 Ohio App.3d 747, 2006-Ohio-2313, which they cite for the proposition that “voluntary resignation in and of itself is a separation from employment circumstance that disqualifies an employee from receiving unemployment compensation.” That case actually states that “R.C. 4141.29(D)(2)(a) provides that an individual may not obtain unemployment benefits if he ‘quit his work without just cause.’” *Shepard* at ¶19. *Shepard* involved an employee who quit her job for medical reasons but had never asked for any accommodation to her needs. *Id.* at ¶24-25. Therefore, *Shepard* is factually distinguishable. The Auditor and the Board also point to *Twinsburg Twp. Bd. of Trustees v. Hill* (1988), 46 Ohio Misc.2d 9. In that case, the Summit County Court of Common Pleas enforced a judicially approved settlement in which the plaintiff agreed to forego unemployment benefits. *Id.* That court found that the judicially approved settlement overrode the provisions of R.C. 4141.32, which provides that “[n]o agreement by an employee to waive his right to benefits is valid[.]” Assuming without deciding that *Hill’s* authority is correct, it is also distinguishable. In *Hill*, the parties entered a Consent Order in which Hill agreed not to pursue unemployment benefits. *Hill*, 46 Ohio Misc.2d at 9<sup>1</sup>. The Consent Order was approved by the judge presiding over the civil suit. *Id.* at 9-10. After the township paid all severance benefits, Hill applied for unemployment compensation benefits, which were granted. *Id.* at 9. The Review Commission affirmed. *Id.* On appeal to the court of common pleas, the court found that the consent order was a judicially approved

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<sup>1</sup> *Hill* was not appealed to this Court.



settlement in which Hill's interests were protected by legal counsel. *Id.* at 9-10. Unlike *Hill*, in this case the Board did not present any evidence that the release was a judicially approved settlement or ever made part of a court order with regard to the action in the Lorain County Court of Common Pleas. Accordingly, *Hill* is distinguishable.

{¶19} Assuming without deciding that the language of the settlement is sufficient to demonstrate that Brown contractually agreed to forego unemployment benefits, we will not enforce the release with regard to unemployment benefits. In *Youghioghney & Ohio Coal Co. v. Oszust* (1986), 23 Ohio St.3d 39, the Supreme Court stated 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.” *Id.* at 41. In *Westphal v. Cracker Barrell Old Country Store, Inc.*, *supra*, this Court followed *Youghioghney*, holding that the Review Commission “was not bound by, nor was it required to consider, any private agreement” regarding unemployment benefits. *Id.* at ¶7; see, also, *McCoy v. Admr., Ohio Bur. of Emp. Servs.* (Sept. 26, 2000), 4th Dist. No. 00CA12. Accordingly, we will not enforce the release with regard to Brown's claim for unemployment benefits.

{¶20} The Review Commission's decision granting Brown unemployment benefits was not unlawful, unreasonable or against the manifest weight of the evidence. *Tzangas*, 73 Ohio St.3d at 696. Further, the release Brown signed is unenforceable with regard to unemployment benefits. *Westphal* at ¶7. Accordingly, the trial court did not err in affirming the Review Commission's decision. The Auditor and Board's assignment of error is overruled.

### III.

{¶21} The Auditor and Board's assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

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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 Appellants.

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CARLA MOORE  
FOR THE COURT

BELFANCE, P. J.  
CONCURS

CARR, J.  
CONCURS, SAYING:

{¶22} I concur in the judgment of the majority. I write separately, however, to emphasize the context for our judgment. In this case, the Auditor and Board opposed Brown's request for unemployment benefits on the basis of the parties' prior settlement agreement. The

parties' settlement agreement did not compel the Review Commission to deny Brown's request for benefits. While it may be the case that other remedies may be available to an employer who seeks to enforce the terms of such a settlement agreement, our decision today merely holds that that remedy does not lie in proceedings before the Review Commission.

APPEARANCES:

DENNIS P. WILL, Prosecuting Attorney, and M. ROBERT FLANAGAN, Assistant Prosecuting Attorney, for Appellants.

RICHARD CORDRAY, Ohio Attorney General, and LORI WEISMAN, Assistant Attorney General, for Appellee.