IN THE COMMON PLEAS COURT
OF MIAMI COUNTY, OHIO
GENERAL DIVISION

JOHN A. RICHARDS	:	CASE NO. 11-351
Appellant,	:	Judge Robert J. Lindeman
VS.	:	
HARBORSIDE TROY, LLC, et al.	:	JUDGMENT ENTRY
Appellees.	:	

This case is before the Court on an administrative appeal filed by John A. Richards (Appellant) from a decision of the Ohio Unemployment Compensation Review Commission which denied the Appellant's claim for unemployment compensation benefits after he was discharged from his job as a LPN on April 23, 2010.

The Court has considered the briefs of the parties and reviewed the transcript of the proceedings filed with the Clerk of Courts.

The Court's function is not to make factual findings or determine witness credibility, when reviewing an appeal from an administrative agency.[1] The trial court must, however, determine if the board's decision is supported by evidence in the record.

The burden of persuasion is upon the discharged employee to prove he is entitled to unemployment compensation benefits.[2]

Pursuant to O.R.C. 4141.29(D)(2)(a), a discharged employee is not eligible for benefits if he or she was discharged for just cause. Fault on the part of the discharged employee

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[1] *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Serv.* (1995), 73 Ohio St.3d 694.

[2] *Silkert v. Ohio Dept. of Jobs & Family Serv.* 184 Ohio App.3d 78, 2009-Ohio-4399.

generally places the former employee outside the scope of benefits for unemployment compensation.

The Appellant in this case was given four written warnings (as well as three other verbal warnings) regarding his on-the-job performance, during his brief tenure as an employee with the Appellee (March 2, 2009 to April 23, 2010).

The first incident occurred when the Appellant failed to use a gait belt when transferring a patient from the toilet to her wheelchair. The patient went to the floor and suffered some injuries (Tr. 5, second day). At hearing the Appellant blamed another nurse for not telling him to use the belt (Tr. 19-20). However in argument he admits the facts but claims he should not have been given a written warning because it was not consistent with his employer's written policy.

Of course, the Review Commission's function is to determine if benefits should be granted, not whether a contract has been breached.[3]

Nevertheless, the policy reference made by the Appellant must be read in conjunction with the entire resource policy. The noted language is found at page 16 of 25 in the record, being part of the Harborside Policy and Resource Manual. This language does not state a written warning will only be issued after an employee has been counseled or advised of a deficiency. In fact, the policy notes (page 15 of 25) that most infractions may start with a written warning. In addition, under the guideline for implementing the policy, the employer reserved the right to determine the appropriate level of discipline in individual cases. Finally, the Appellant waived any such claim when he failed to object when the written warning was issued.

It is the conduct of the Defendant that is the primary focus in determining if benefits should be afforded to the Appellant.

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[3] *Wilson v. Matlock, Inc.* (2000), 14 Ohio App.3d 95, 101.

In this warning, the Appellant dropped a resident and she sustained an injury. This is misconduct supporting a written warning.

In the second incident, on July 14, 2009, the Appellant gave a resident the wrong medication. The Appellant has argued he was on his second day of orientation at the time of the incident (the Appellant started his employment on March 9, 2009, and this incident occurred July 14, 2009), and his supervising nurse failed to properly supervise him. However, the Appellee's representative testified he was not on orientation at the time of the carelessness (Tr. 12, first day of hearing). Accordingly, it becomes an issue of credibility, and the hearing officer clearly found the Appellee's witness more credible. Evidence in the record supports the second warning given to the Appellant for carelessness.

In the last incident, argued by the Appellant, which led to the Appellant's discharge, he received medication orders for twenty residents on April 17, 2010. He signed off on the orders, notified the pharmacy but he failed to transcribe all the medication orders to the patients' MAR (medical documentation record) and TAR (treatment record).

The Appellant has argued he was responsible for 34 residents on that shift which is excess of state standards (20 to 30 residents per nurse). The Appellee's witness testified the hall to which the Appellant was assigned on this date holds 30 residents but it was not full. This is an issue of credibility for the trier of fact.

The Appellant further argued that he passed responsibility for completing the medical orders to the next nurse. There was evidence in the record that the nurse in question (Anna Compton) denied the Appellant passed her any orders (Tr. 10, 13, first day of hearing).[4]

[4] Hearsay can be considered in administrative agency hearings since the Rules of Evidence do not strictly apply. The agency cannot, however, arbitrarily consider hearsay; which the Court finds it did not. (*Haley v. Ohio St. Dental Bd.* (1982), 7 Ohio App.3d 1) because both the employee and employer raised this issue on direct and cross.

The Court finds evidence in the record, which, if believed, supports the factual findings of the hearing officer. The Court also finds the direct testimony of Averett was undermined by her elusive responses while questioned on cross and her final reluctance to answer the question, who is responsible for a medical order, by replying, "I'm not for sure because I'm not for sure of the situation.." (Tr. 18, second day.)

The Court finds the record in this case supports the conclusion the Appellant had four incidents of negligence, carelessness or poor performance during a twelve month period. Such a record establishes fault which provides just cause for a discharge from employment.

Accordingly, the Court finds the Review Commission decision finding that the Appellant was discharged for just cause was not unlawful, unreasonable or against the manifest weight of the evidence. The decision of the Review Commission is therefore affirmed.

ROBERT J. LINDEMAN, JUDGE

cc: Brandon A. Coate
Robin A. Jarvis

Pursuant to Civ.R. 58(B), the Clerk of this Court is hereby directed to serve upon all parties not in default for failure to appear, notice of this judgment and the date of entry upon the journal of its filing.

Judge