

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

BORNO SIMILIEN,

Plaintiff-Appellant,

vs.

OHIO STATE UNEMPLOYMENT  
COMPENSATION REVIEW  
COMMISSION, ET AL,

Defendants-Appellees.

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Case No. 11CVF06-7191

JUDGE BESSEY

**DECISION AND FINAL JUDGMENT ENTRY AFFIRMING THE DECISION OF THE  
OHIO STATE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION IN  
DOCKET NO.: C2010-012748**

**INTRODUCTION AND BACKGROUND**

Appellant, Borno P. Similien, was terminated from his employment with AY Manufacturing Ltd. (AY) on August 24, 2010. Mr. Similien began working for AY on June 4, 2010.

Mr. Similien filed an Application for Determination of Benefit Rights with the Ohio State Department of Job and Family Services (the Department). This matter was transferred to the Ohio State Unemployment Compensation Review Commission (the Commission) on November 8, 2010. The Department's Director allowed the application. On October 26, 2010, the Director issued a Redetermination which held that Mr. Similien was discharged by AY without just cause. Mr. Similien began receiving benefit payments pursuant to that finding. Those payments totaled \$3,052.00 as of February 26, 2011.

The payments covered the period beginning with the week ending August 28, 2010. It is unclear when the Department mailed the first payment to Mr. Similien, but it appears to have been shortly before or after the Redetermination date. AY filed an appeal from the

Redetermination on November 5, 2010. The Department transferred jurisdiction to the Commission on November 8, 2010.

The Commission held a hearing in this matter on February 24, 2010. All parties participated in the hearing. Hearing Officer Dina Toyzan issued a written decision finding that Mr. Similien was discharge by AY for just cause because he was insubordinate to his superior, Kim Young on August 24, 2010. That decision, mailed March 3, 2010, included a NOTICE OF OVERPAYMENT and advised Mr. Similien of his appeal rights.

Mr. Similien filed a request for review with the Commission. That request was disallowed and a copy of the Decision was mailed to Mr. Similien on May 11, 2010.

Mr. Similien timely filed an appeal of that Decision with this Court.

**STANDARD OF REVIEW AND APPLICABLE LAW**

In *Williams v. Ohio Dept. of Job & Family Servs.*, 129 Ohio St.3d 332, 2011-Ohio-2897, the Ohio Supreme Court set forth the law that applies to this case. The Court stated:

R.C. 4141.29 sets forth the eligibility and qualifications for unemployment benefits:

(D) \* \* \* [N]o individual may serve a waiting period or be paid benefits under the following conditions:

\* \* \*

(2) For the duration of the individual's unemployment if the director finds that:

(a) The individual quit work without just cause or has been discharged for just cause in connection with the individual's work \* \* \*.

R.C. 4141.46 provides that R.C. 4141.01 through 4141.46 is to be liberally construed.

*A. Standard of Review*

The Unemployment Compensation Review Commission's determination of whether a claimant was discharged with just cause is appealable to the court of common pleas: "If the court finds that the decision of the commission was unlawful, unreasonable, or against the manifest weight

of the evidence, it shall reverse, vacate, or modify the decision, or remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission." R.C. 4141.282(H). This limited standard of review applies to all appellate courts. *Irvine v. Unemp. Comp. Bd. of Review* (1985), 19 Ohio St.3d 15, 18, 19 OBR 12, 482 N.E.2d 587. Thus, a reviewing court may not make factual findings or determine a witness's credibility and must affirm the commission's finding if some competent, credible evidence in the record supports it. *Id.* In other words, a reviewing court may not reverse the commission's decision simply because "reasonable minds might reach different conclusions." *Id.*

*B. Just Cause*

Bridgeway contends that because Williams' employment was conditioned on the obtaining of an LISW certification within 15 months, her failure to comply with that condition was just cause for her termination and thus she was not eligible for unemployment benefits.

Although it is not defined by statute, we have stated that "just cause" is "that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act." *Irvine*, 19 Ohio St.3d at 17, 19 OBR 12, 482 N.E.2d 587, quoting *Peyton v. Sun T.V. & Appliances* (1975), 44 Ohio App.2d 10, 12, 73 O.O. 2d 8, 335 N.E. 2d 751. The determination whether there is just cause for discharge depends upon the factual circumstances of each case. *Warrensville Hts. v. Jennings* (1991), 58 Ohio St.3d 206, 207, 569 N.E.2d 489. "[W]hat constitutes just cause must be analyzed in conjunction with the legislative purpose underlying the Unemployment Compensation Act. Essentially, the Act's purpose is 'to enable unfortunate employees, who become and remain *involuntarily* unemployed by adverse business and industrial conditions, to subsist on a reasonably decent level and is in keeping with the humanitarian and enlightened concepts of this modern day.'" (Emphasis sic.) *Irvine* at 17, quoting *Leach v. Republic Steel Corp.* (1964), 176 Ohio St. 221, 223, 27 O.O.2d 122, 199 N.E.2d 3.

However, we have cautioned, "The Act does not exist to protect employees from themselves, but to protect them from economic forces over which they have no control. 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, Plakas & Mannos v. Ohio Bur. of Emp. Servs.* (1995), 73 Ohio St.3d 694, 697-698, 1995 Ohio 206, 653 N.E.2d 1207.

Fault on an employee's part is an essential component of a just-cause termination. Fault, however, is not limited to willful or heedless disregard of a duty or a violation of an employer's instructions. *Id.* at 698. Unsuitability for a position constitutes fault sufficient to support a just-cause discharge. "An employer may properly find an employee unsuitable for the required work, and thus to be at fault, when: (1) the employee does not perform the required work, (2) the employer made known its expectations of the employee at the time of hiring, (3) the expectations were reasonable, and (4) the requirements of the job did not change substantially since the date of the original hiring for that particular position." *Id.* at paragraph four of syllabus.

*Williams*, 2011-Ohio-2897, at ¶¶ 14-24.

In addition, the *Williams* Court looked to, the purpose of the Unemployment Compensation Act and found "[t]he act was intended to provide financial assistance to an individual who had worked, was able and willing to work, but was temporarily without employment through no fault or agreement of his own." *Id.* at ¶ 26 citing *Salzl v. Gibson Greeting Cards, Inc.* (1980), 61 Ohio St.2d 35, 39, 15 O.O.3d 49, 399 N.E.2d 76.

#### **Appellant Similien's Assignments of Error**

Appellant Similien has submitted for the Court's consideration a number of filings. Each of the filings challenges the factual findings of Hearing Officer Toyzan.

The Findings of Fact in Hearing Officer Toyzan's decision are succinct. The fact finder sets forth:

The claimant worked for this employer from June 4, 2010, through August 24, 2010, as a Production Associate.

The claimant was terminated on August 24, 2010, after he was insubordinate to his superior, Kim Young, on that date. Ms. Swira, Human Resources Coordinator, also witnessed the insubordination on that date. On August 24, 2010, the claimant became upset at Kim Young over an attendance issue. The claimant had raised his voice to Kim Young and had pointed his finger at her. Ms. Young had asked the claimant to calm down, but the claimant continued with his attitude towards her.

The claimant had received an earlier verbal warning in early August, 2010, about his attitude at the workplace. The claimant was informed that if he continued to treat others with disrespect, that he would no longer have a job.” (Dec. p. 3 of 6, E1214 – I85).

This Court is confined to the record at the administrative hearing. *Irvine, supra*. Accordingly, this Court must examine whether the record contains some competent, credible evidence to support the factual determination of the Hearing Officer as adopted by the Commission. *Id.* If the record contains some competent, credible evidence to support the findings of fact, this Court may not make additional or new findings of fact, nor may it make credibility determinations.

Essentially, Appellant Similien asks this Court to do what it is not permitted to do; namely revisit the factual findings of the Hearing Officer and make a credibility determination inconsistent with the Hearing Officer’s crediting of the testimony of Appellee AY’s employees. Because it is not allowed to do so, the Court will not engage in such analysis.

However, the Court does have the duty to ensure that the decision of the Commission is lawful, reasonable, and consistent with the manifest weight of the evidence. Accordingly the Court has examined the entire record and finds that the decision is consistent with the manifest weight of the evidence. The Court sets forth a sampling of the testimony from the hearing which supports the findings of fact of the Hearing Officer below. The Court notes that this sampling is a citation to specific instances of the evidence before the Hearing Officer from which the Hearing Officer made credibility determinations. Further, the record contains numerous repetitions of the witnesses’ testimony, some occasioned by clarification of earlier testimony, and some occasioned by less than artful cross-examination of AY’s witnesses by Appellant Similien.

Hearing Officer Toyzan conducted a direct examination of AY supervisor Kim Young concerning her interactions with Appellant Similien. In response to the Hearing Officer's questions, Ms. Young testified that when she talked with Mr. Similien in AY's office, "[c]orrect, we were having discussions and he became angry and refused to um (sic) cooperate with those discussions so we could move forward." (Tr. pg. 8; lines 15 -17). Ms. Young expanded, "he became agitated and angry and refused to answer some of my questions." (Tr. pg. 9; lines 1 – 2).

The incident was also testified to by the affidavits of Angela Swira and Mr. Baisden. Ms. Swira was in the room with Ms. Young and Appellant Similien when he became angry. (Tr. pg. 9; line 22 – pg. 10, line 20). Ms. Young, without objection, read Ms. Swira's statement into the record. In pertinent part, that statement read, "[i]n the course of the discussion, Kim Young, the HR Manager who was in the room when Borno came in, asked him a couple of questions and Borno became very defensive and disrespectful to her. He raised his voice as he spoke and at one time was pointing his finger at Kim who told him to stop doing that, calm down so we can get down to the issue at hand. He maintained his arrogant attitude and employee (sic) and I think it says and his who (sic) body language was disrespectful as he talked to Kim." (Tr. pg. 10; line 25 – pg. 11, line 6).

Ms. Young further testified concerning the finger pointing, "[w]ell, when I asked him the question about, you know I was trying to determine why he waited so late to come to me on Friday...so I asked him what time he clocked out so I could determine why he waited so long and that's when he pointed his finger at me, in my face, and said he didn't have to answer that question because it didn't relate to this work and I had access to that information, so basically if I wanted it, I could get it myself." (Tr. pg. 14, lines. 2 – 9).

Conversely, Mr. Similien testified in direct contradiction to Ms. Young. For example, he testified, “[m]a’am, I would not have a heated conversation with Ms. Young....[H]owever, when it came to the finger, I did not point my finger. I say this, I did not point my finger at Ms. Young.” (Tr. pg. 45, line 15 – 21).

Thus the fact finder was put to a choice of whether to believe Ms. Young’s version of events and the affidavit of Ms. Swira, or to believe Mr. Similien’s version of events. The fact finder found Ms. Young and Ms. Swira’s testimony to be more credible than Mr. Similien’s testimony. The Hearing Officer’s credibility determination will not be overturned by this Court as the record contains competent, credible evidence supporting the Hearing Officer’s determination. *Irvine, supra* at 18.

The Hearing Officer’s determination that Mr. Similien was terminated by AY for just cause is likewise lawful. The Hearing Officer reasoned that the employer “provided sufficient eyewitness testimony that the claimant was disrespectful to management” and that he was terminated for just cause. (Dec. at pg. 4 of 6; E1214 – I86).

The Court agrees. Disrespect and pointing one’s finger in the face of Ms. Young, AY’s human resource manager, demonstrates an unreasonable disregard of Mr. Similien’s employer’s best interests. Mr. Similien’s actions, not economic forces beyond his control, were the cause of his termination by AY. In short, Mr. Similien’s actions demonstrate fault on his part, and that fault manifested itself in an act of insubordination. Because Mr. Similien was at fault for his actions, his termination by AY was with just cause. *Tzangas, supra*.

#### CONCLUSION

The Decision of the Commission is **AFFIRMED** in all respects. All outstanding motions are hereby **DENIED** as moot. Costs to Appellant.

**IT IS SO ORDERED.**

**Copies to:**

Borno Similien  
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Franklin County Court of Common Pleas

**Date:** 01-31-2012  
**Case Title:** BORNO SIMILIEN -VS- OHIO STATE UNEMPLOYMENT  
COMPENSATION REVIEW  
**Case Number:** 11CV007191  
**Type:** DECISION

It Is So Ordered.



/s/ Judge John P. Bessey