IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Case No. 756018

Filed March 13 2012

Nancy Rolon	)	
	)	
Appellant	)	
	)	
vs.	)	
	)	**OPINION**
Cleveland Food Bank, Inc., et al.	)	
	)	
Appellees	)	

Peter J. Corrigan, J.:

This is an administrative appeal from the Ohio Unemployment Compensation Review Commission ("Review Commission") pursuant to R.C. 4141.282. The Review Commission found that claimant-appellant Nancy Rolon ("claimant") was discharged from employment with appellee Cleveland Food Bank, Inc. ("employer") for just cause. For the following reasons, this Court determines that the decision of the Review Commission is unlawful, unreasonable, or against the manifest weight of the evidence and is reversed.

The claimant was employed by the employer as a cook from May 21, 2002 until August 5, 2010. Claimant was discharged on August 5, 2010 after a confrontation with a co-worker. (Tr. I 24, Tr. II 31). Upon her discharge, claimant filed an application for unemployment benefits. On August 26, 2010, the Director of the Ohio Department of Job and Family Services ("ODJFS") issued a determination that claimant was discharged without just cause for using profanity when talking with another employee. The employer filed an appeal from the determination. On October 12, 2010, the Director issued a

redetermination which affirmed the determination, also finding that claimant was discharged without just cause.

The employer appealed this decision and the ODJFS transferred jurisdiction to the Unemployment Compensation Review Commission ("Review Commission"). A hearing officer held 45 minute telephone hearings on February 18, 2011 and March 24, 2011. The hearing officer reversed the two previous decisions of the director of ODJFS that claimant was discharged by the employer without just cause. The Hearing Officer stated that the just cause was claimant's use of profanity with a co-worker. Further appeal by claimant to the Review Commission was disallowed. It is from this decision that claimant appeals and that employer and appellee, Director Ohio Department of Job and Family Services seek to uphold.

According to R.C. 4141.29(D)(2)(a), a claimant is discharged without just cause if the claimant's acts, omissions, or course of conduct is such that an ordinary person would find the discharge not justifiable.

On appeal to the court of common pleas, the standard of review in an unemployment compensation benefits case is found in R.C. 4141.282(H), which provides in part that "[i]f 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."

While a reviewing court is not permitted to make factual findings or to determine the credibility of witnesses, it does have the duty to determine whether the hearing officer's decision is supported by the evidence in the record. *Tzangas, Plakas, & Mannos v. Ohio*

Bur. of Emp. Serv. 73 Ohio St.3d 694, 696, 1995-Ohio-206, 653 N.E.2d 1207. While the conclusions of the hearing officer and Review Commission "as to the legal import of an essentially undisputed set of facts are entitled to some deference," the question of whether an employee was discharged with just cause is a question of law and the reviewing court has a duty to reverse the Review Commission's decision if it is contrary to law. *Lombardo v. Ohio Bur. of Emp. Serv.,* 119 Ohio App.3d 217, 221, 695 N.E.2d 11 (6th Dist. 1997).

The Court will consider each conclusion of fact to determine whether it is supported with evidence in the record.

The hearing officer found that claimant was discharged after getting into a verbal confrontation with a co-worker, Ella McCleod. Specifically, the officer found that the verbal confrontation occurred

> when Ms. McCleod came out of the kitchen into the warehouse where claimant was working with volunteers and told her she needed the tater tots that claimant was to have prepped the day before. Claimant did not respond or prepare the tater tots quickly enough, and Ms. McCleod then returned to the warehouse area and said to claimant "didn't I tell you I needed the fucking tater tots." Claimant then responded "who the fuck do you think you are talking to like that," and "why don't you get the fucking tater tots—you are right there. I do a lot of stuff for you so why can't you do this for me." Ms. McCleod told claimant that she was busy and did not have time to do it, and that it was her job to do it. Ms. McCleod then returned to the kitchen and claimant instructed a volunteer to prep the tater tots and get them to Ms. McCleod, which was then done.
>
> About 20 minutes later, claimant entered the cooler in the kitchen where Ms. McCleod already was. Once she entered the cooler, claimant confronted Ms. McCleod and told her "you were fucking wrong talking to me like that. As much as I do for you, you couldn't go and get the tater tots and you had to make a big deal out of it." Ms. McCleod and claimant then proceeded to argue some more, both using profane or inappropriate language, although the argument in the cooler was not overheard by anyone else." (Decision, p. 5)

Claimant was terminated based on this confrontation, but Ms. McCleod was not. The hearing officer did not find this was disparate treatment because Ms. McCleod (a two-year employee) had never been disciplined, but claimant (an eight-year employee) had.

The mere fact that an employee uses profanity does not support a discharge for just cause. *Lombardo.* The courts generally consider four factors when determining whether the employee's use of profanity supports a discharge for just cause (1) the severity of the profanity used, (2) the provocation for the profanity, (3) whether the profanity was isolated or part of a pattern, and (4) whether other employees or customers were present. Id. at 221. In *Lombardo,* the court employed these factors and found that since the outburst was not part of a pattern, was spoken in front of only two managers and that claimant's reaction was understandable, the court found the claimant's discharge was without just cause.

Similarly, in *Barnes v. Director, Ohio Dept. of Job and Family Services,* 11th Dist. No. 2002-G-2426, 2003-Ohio-1883, the court considered the four factors and found that the claimant was discharged without just cause when the use of profanity was isolated, only one other employee was present, and the profanity was in response to his employer's use of profanity.

Here, the use of profanity, while made in the presence of other employees and volunteers, was in direct response to her co-worker's use of profanity and was an isolated incident. Although the confrontation continued twenty minutes later, it was a private conversation that occurred in the cooler. Thus, claimant's use of profanity alone does not constitute just cause for discharge.

However, the hearing officer stated that claimant had a history of confrontations and prior warnings. A review of all of the performance reviews that the hearing officer

termed as "a history of numerous prior warnings and counseling about issues of co-worker interactions and confrontations" boils down to only one other specific incident: on April 30, 2009 claimant had a confrontation with a co-worker about using a shelf for a different purpose than that decided by the kitchen team. The claimant did not use profanity that time. Although there were performance reviews and or development plans on September 8, November 9, 2009, January 1 and March 30, 2010 that generally mentioned other confrontations and noting that claimant was to learn not to react and be sensitive to others, the only incident ever specifically mentioned was the April 30, 2009 occurrence.

More importantly, the employer had a progressive discipline policy. The policy specifically provided that "if an employee has not been disciplined for one year, any prior discipline will not be considered for formal application of the progressive discipline policy. In some circumstances, prior discipline for similar misconduct will be considered an aggravating factor and will be considered in determining the level of discipline to be imposed." (Exhibit A, pgs. 35-36).

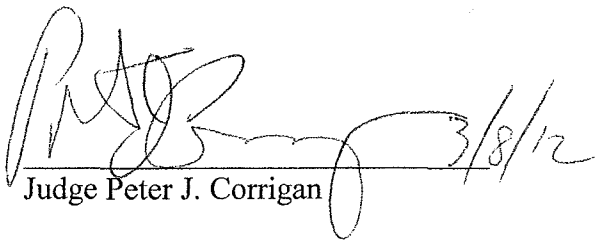
Generally, when an employer has established a progressive discipline policy, the employer must follow that policy to justify the employer's discharge as one for just cause. *Eagle-Pitcher Industries, Inc. v. OBES*, 65 Ohio App.3d 548, 584 N.E.2d 1245 (3th Dist. 1989). In *Peterson v. Director, Ohio Dept. of Job and Family Services*, 4th Dist. No. 03CA2738, 2004-Ohio-2030, the court explained that "progressive disciplinary systems create expectations in which employees rely. Fairness requires an employee to not be subject to more severe discipline than that provided by company policy."

During the hearing, Gordon Grey, the Food Service Manager, specifically stated the only reason for the discharge was the August 5, 2011 incident. (Tr. I, 15). Yet, after

leading questions from the hearing officer, Grey changed his answer and testified that the claimant's disciplinary history had an effect on the decision. However, the record established that there was no disciplinary action taken between August 5, 2010 and August 5, 2011 and Mr. Grey admitted this fact. (Tr. II, 11-12). Therefore, the employer has failed to show that the terms of the progressive discipline policy were followed. If the singular use of profanity on August 5, 2010 was sufficient to justify an immediate discharge (the most severe sanction), then the employer would have sanctioned Ms. McCleod as well with an immediate discharge.

In the recent case of *Cittadini v. Dir., Ohio Dept. of Job and Family Services,* 2011-Ohio-6625 (8th Dist.) our appellate court recognized that the Ohio Supreme Court declined to adopt a standard that reviews whether the employer's policy was fairly applied to everyone. *Williams v. Ohio Dept. of Job & Family Services*, 129 Ohio St.3d 332, 2011-Ohio-2897, 951 N.E.2d 1032. *Williams* found it was not necessary to adopt such a standard because the case could be decided on the employer's express condition of employment rather than company policy. Therefore, the court in *Cittadini* relied on earlier Eighth District precedent that adopted the "fairly applied policy" announced in *Shaffer v. Am. Sickle Cell Anemia Assn.* 8th Dist. No. 50127 (June 12, 1986) (termination pursuant to company policy will constitute just cause only if the policy is fair and fairly applied.) Applying this policy, *Cittadini* found that although both employees violated the hospital's policy, only Cittadini suffered the consequences. *Cittadini* reversed the commission's decision, which found just cause for termination.

For the foregoing reasons, the Court determines the decision of the Review Commission is unlawful, unreasonable, or against the manifest weight of the evidence. The decision is reversed.



Judge Peter J. Corrigan

DATE: March _____, 2012

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