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COMMON PLEAS COURT
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THIS IS A FINAL APPEALABLE ORDER

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

John E. Ostrander,

Plaintiff-Appellant,

-vs-

Berner Trucking, Inc., et. al.,

Defendants-Appellees.

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Case No. CI 201106628

Judge Ruth Ann Franks

OPINION AND JUDGMENT ENTRY

This cause is before the Court upon an administrative appeal filed by Appellant, John E. Ostrander ("Appellant") relative to a decision rendered by the State of Ohio's Unemployment Compensation Review Commission. Upon consideration of the pleadings, record, written arguments of the parties and the applicable law, the Court finds that the decision of the Ohio's Unemployment Compensation Review Commission must be affirmed.

I. Facts

John E. Ostrander ("Appellant") was a commercial truck driver for Berner Trucking, Inc.

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The Appellant was subsequently terminated from employment. Appellant filed an application for unemployment benefits which was denied by the Ohio Department of Job and Family Services ("Appellee") initially and upon redetermination. Appellant appealed the denial. On April 11, 2011, Appellant was notified that jurisdiction had been transferred to the Ohio Unemployment Compensation Review Commission.

On September 7, 2011, Appellant was notified that a telephone hearing was scheduled for September 19, 2011. The hearing was held on September 19, 2011. The hearing officer subsequently affirmed the Director's denial of benefits to Appellant. The Appellant submitted a request for final administrative review. Further appeal was disallowed by the Unemployment Compensation Review Commission, and Appellant filed the action within.

The parties have briefed the issues and the Director's record is on file. The matter is now decisional.

II. Standard

The standard of review to be applied by the court of common pleas in appeals from decisions of the board of review is prescribed by statute. R.C. 4141.282(H) provides, in pertinent part:

The court shall hear the appeal on the certified record provided by the commission. 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

The Ohio Supreme Court held that reviewing courts may reverse just cause determinations "if they are unlawful, unreasonable, or against the manifest weight of the

evidence."¹ The Ohio Supreme Court noted that while courts are not permitted to make factual findings or to determine the credibility of witnesses, they do have the duty to determine whether the board's decision is supported by the evidence in the record. Id.

On review of purely factual questions, the common pleas court is limited to determining whether the Review Commission hearing officer's determination is supported by the evidence in the record.² Factual findings supported by some competent, credible evidence going to the essential elements of the controversy must be affirmed.³ However, the common pleas court has a duty to reverse the Review Commission's determination if it is contrary to law. Whether, considering all circumstances, a reason for terminating a claimant's employment constitutes "just cause" is a question of law.⁴

III. Discussion

Pursuant to R.C. 4141.29(D)(2)(a), an employee is ineligible for unemployment compensation benefits if he was terminated for just cause. "Just cause" is conduct that would lead a person of ordinary intelligence to conclude the surrounding circumstances justified the employee's discharge."⁵ When an employee, by his or her actions, demonstrates an unreasonable

¹ Tzangas, Plakas & Mannos, Attorneys v Administrator, Ohio Bureau of Employment Services (1995), 73 Ohio St. 3d 694, 1995 Ohio 206, citing Irvine v. Unemp. Comp. Bd. of Review (1985), 19 Ohio St.3d 15, 17-18.

² Thompson v Aeroquip Inoac Co., 2003 Ohio 1859. Sandusky App. No. S-02-022 citing Angelkovski v. Buckeye Potato Chips Co. (1983), 11 Ohio App.3d 159, 162.

³ Thompson, citing C.E. Morris v. Foley Constr. Co. (1978), 54 Ohio St.2d 279.

⁴ Lombardo v Ohio Bureau of Employment Services (1997), 119 Ohio App. 3d 217, 221.

⁵ LaChappelle, Appellant v. Director, Ohio Department of Job and Family Services, 2009 Ohio 3399, Lucas App. No. L-08-1446 citing Carter v. Univ. of Toledo, 2008 Ohio 1958,

disregard for his or her employer's best interest, there is just cause for his discharge.⁶ Whether the employee technically violated some company rule is not the critical issue for determining whether there was just cause or not in the unemployment compensation context. Id.

The hearing from which the Appellant appeals was held on September 19, 2011, before Hearing Officer, Robert S. Bush. Kathy Brinkerhoff, human resources manager at Berner Trucking, Inc., testified that Appellant was employed at Berner Trucking, Inc. as a commercial truck driver from September 17, 2010, to December 21, 2010. Ms. Brinkerhoff further testified that Appellant was discharged for having two accidents in one week⁷. The first accident, on December 9, 2010, occurred as a result of Appellant making an improper lane change, during which he side-swiped a passenger car. Ms. Brinkerhoff further testified that after the December 9, 2010, accident, Appellant was given a written warning which notified Appellant that if he sustained another infraction of this type that Appellant would receive a three (3) suspension and possible termination.⁸

The second accident happened on December 15, 2010. Appellant was at a customer's business when Appellant backed off a scale and backed into one of the customer's buildings. As a result of backing into the building, the customer's building sustained damages totaling

Lucas App. No. L-08-1446, ¶10.

⁶ LaChappelle citing Kiikka v. Administrator, Ohio Bureau of Employment Services (1985), 21 Ohio App.3d 168, 21 Ohio B. 178, 486 N.E.2d 1233, paragraph two of the syllabus.

⁷ Transcript of appeal before the Ohio Unemployment Compensation Review Commission of the redetermination decision issued by the Ohio Department of Job and Family Services Commission, held on September 19, 2011, p. 5- 6.

⁸ Id. at 6-7.

\$3,604.00.⁹

Ms. Brinkerhoff also testified to the safety procedures that it's drivers must perform. Drivers are required to perform a pre-trip and post-trip inspection of the truck every day. If there are safety issues, the driver must take the truck to the company garage either for repair or, if the repairs are extensive, the driver must switch to another truck.¹⁰

The testimony by the Appellant at the review hearing indicates that Appellant agreed with the testimony of the Berner Trucking's human resources manager, Kathy Brinkerhoff that, while operating a commercial truck for Berner Trucking, Inc., he had an accident on December 9, 2010. Appellant further acknowledged that he was cited for the collision. Appellant also confirmed that he was warned by Berner Trucking that he could be terminated in the future if, there " * * * was a driving accident again or something of that nature"¹¹¹².

As to the second incident on December 15, 2010, Appellant did not dispute that there was an incident in which a customer's building sustained damage. However, the Appellant testified that he was not driving the truck when the customer's building was damaged. Appellant denied backing the truck into the building, and explained that he was operating the lift arms of the tarp on his truck when the arms hit the roof of the customer's building. Appellant testified that the lift arms of the tarp were bent. Appellant testified further that he was operating the lift arms on the left side of the truck, and could not see what was happening on the right side, where the accident

⁹ Id. at p. 7-8.

¹⁰ Id. at p. 8.

¹¹ Id. at p. 10.

¹² Appellant testified that the notice was orally told to him, not through written notice.

occurred. Appellant further testified that he tried to get the lift arms repaired because of their width.¹³ Lastly, Appellant testified that the accident was not his fault and the customer agreed with him that it was not his fault.¹⁴

Appellant argues that the December 15, 2010, incident was not his fault and further states that "Appellant does not believe that he has been heard, because there has not been any understanding of how hydraulic tarping systems work, and the (force) behind the hydraulics".¹⁵

Contrary to the claim of the Appellant that "he has not been heard" concerning the operation of the hydraulic tarp system, the record establishes that the Hearing Officer allowed the Appellant great latitude to explain how the hydraulic tarping systems work. The transcript of the hearing includes the following testimony of Appellant:

Appellant: "There was an incident but I wouldn't call it a driving accident because I was not in the truck. I was operating the uh lift arms on the back over a building. If you have uh the picture uh in front of you, its titled page 7 of 8, uh it shows the actual building. They set it back up and uh you see those posts, uh were, are approximately 4 foot high there. They're steel posts uh supported between one another with a bar and uh they're filled with concrete also. Those are the exact same posts. They are not damaged and uh arms hit the roof part that sticks out somewhat yeah because they were bent which was written up uh.

Hearing Officer: Okay, I hear somebody talking in the background. Is that someone on your end?

Appellant: Yeah that's my wife.

Hearing Officer: Tell your wife to get out of the room, sir. She

¹³ Id. at p. 11.

¹⁴ Id. at p. 12.

¹⁵ Appellant's Reply Brief filed on May 18, 2012, pp 4-5.

can't feed you information

Appellant : Yeah, he's, you have to get out of the room. She's a typical woman.

Hearing Officer: Well, she didn't, well sir, I won't accept comments like that either tonight.

Appellant : I'm sorry. I didn't mean it in any detrimental way.

Hearing Officer: So were you the only one operating the tarp arm?

Appellant: Yes, I was standing on the right ha, or left hand side of the truck with the engine running uh making noise and stuff so I could not see what was going on the right hand side or hear anything that happened, anything that I know or hear of what actually happened was told to me by the people in the scale tower.

Hearing Officer: You're responsible for that truck does (sp.) aren't you?

Appellant: Uh Yes you are.

Hearing Officer: And what's the purpose of the tarp arm?

Appellant: Uh, they, they have a tarp that does over top of the load so that uh there's not debris and steel and stuff that blowing out of the top of the truck and uh they are hydraulically uh again from the left hand side of the truck and they pick up the tarp. You just watch the tarp up on top so you don't catch any wires or anything overhead but like I say you can't see anything going on on (sp.) the left side of the truck. ¹⁶

The record of the hearing before the Hearing Officer fails to support Appellant's claim that he was precluded from presenting relevant evidence concerning his claim.

The Appellant additionally claims in his Reply Brief that he was not required to check the tarping system on the pre-trip and/or the post-trip. Appellant therefore argues because checking

¹⁶ Hearing Transcript, pp. 10-11.

the tarping system was not listed on Appellee's safety checklist, it was not Appellant's responsibility to check that it was properly functioning. Appellant further argues that he has a copy of the checklist to support his argument.

A careful review of the record does not support that such evidence was presented to the Hearing Officer. The only testimony presented concerning duty to inspect the vehicle was presented by Berner Trucking's Human Resource Manger, Ms. Brinkerhoff. Ms Brinkerhoof testified as follows:

Hearing Officer: "How many drivers do you have?"

Ms. Brinkerhoff: Right now we have approximately 120 company drivers between our two locations.

Hearing Officer: Do they all drive your equipment?

Ms. Brinkerhoff: Yes.

Hearing Officer: Even if they're driving your equipment are they still responsible for making sure when that truck goes off your lot that it's a safe vehicle?

Ms. Brinkerhoff: Correct, they do a pre-trip and a post-trip inspection every day.

Hearing Officer: And uh are they supposed, if they find a problem that makes that vehicle dangerous for whatever reason are they supposed to drive it off the lot?

Ms. Brinkerhoff: No they are to take it, both locations have a garage. If it is unsafe in anyway they are to take that into the garage and have it corrected or switch to another piece of equipment if it's not easily corrected."¹⁷

Appellant further argues in his Reply Brief that certain evidence presented at the hearing

¹⁷ Id. at p. 8.

is hearsay. This Court notes that "evidence which might constitute inadmissible hearsay where stringent rules of evidence are followed must be taken into account in proceedings such as [commission hearings] where relaxed rules of evidence are applied."¹⁸. Further, R.C. 4141.281(C)(2) states that "Hearing officers are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure". Therefore, a Hearing Officer can accept hearsay evidence, and the commission can rely upon that evidence in rendering its decision.

The record further reveals in the case subjudice, that the Hearing Officer, Robert S. Bush, subsequently filed his decision, which included the following findings of fact:

"Claimant [Appellant] worked for Berner as a Commercial Truck Driver from September 17, 2010 to December 5, 2010.

On December 9, 2010, the claimant side swiped a passenger vehicle as he was making an illegal lane change. He was told that any further actions could result in his discharge.

Six days later, on December 5, 2010, the claimant was backing his vehicle off a scale. He backed the employer's vehicle into one of the customer's buildings resulting in damages in the amount of \$3,604.00. The employer was held liable by the customer.

Claimant was suspended and subsequently discharged on December 21, 2010."¹⁹

Based upon the foregoing, Hearing Officer Bush found that Appellant was terminated for just cause. Specifically, Hearing Officer Bush found:

"In less than a week the claimant had two accidents. The first accident was the result of an illegal lane change. The second was when he failed to properly control the vehicle he was driving and

¹⁸ Simon v. Lake Geauga Printing Co., 69 Ohio St.2d 41, 44, 430 N.E.2d 468 (1982)

¹⁹ Hearing Officer Robert S. Bush's Decision, p. 5.

caused \$3,604.00 in damages to a customer's building. As the claimant was discharged for his negligence as evidenced by two accidents in less than a week, and financial loss to the employer, the claimant was discharged by Berner for just cause in connection with work."²⁰

The standard of review to be applied by the court of common pleas in appeals from decisions of the board of review is prescribed by statute. R.C. 4141.28(O) provides, in pertinent part:

The court shall hear the appeal on the certified record provided by the commission. 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

The relevant law applicable to this appeal is as follows. The Ohio Supreme Court has held that reviewing courts may reverse just cause determinations "if they are unlawful, unreasonable, or against the manifest weight of the evidence."²¹ The law is also clear that this Court may not make factual findings or determinations regarding the credibility of the evidence.²² In other words, while common pleas court is not permitted to make factual findings or to determine the credibility of witnesses, the court does have the duty to determine whether the board's decision is supported by the evidence in the record. Id.

²⁰ Id. at p. 4.

²¹ Tzangas, Plakas & Mannos, Attorneys v Administrator, Ohio Bureau of Employment Services (1995), 73 Ohio St. 3d 694, 1995 Ohio 206, citing Irvine v. Unemp. Comp. Bd. of Review (1985), 19 Ohio St.3d 15, 17-18.

²² See, Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Serv., 73 Ohio St. 3d 694, 696, 1995 Ohio 206.

On review of purely factual questions, the common pleas court is limited to determining whether the Review Commission hearing officer's determination is supported by the evidence in the record.²³ Factual findings supported by some competent, credible evidence going to the essential elements of the controversy must be affirmed.²⁴ However, the common pleas court has a duty to reverse the Review Commission's determination if it is contrary to law. Whether, considering all circumstances, a reason for terminating a claimant's employment constitutes "just cause" is a question of law.²⁵

Pursuant to R.C. 4141.29(D)(2)(a), an employee is ineligible for unemployment compensation benefits if he was terminated for just cause. "Just cause is 'conduct that would lead a person of ordinary intelligence to conclude the surrounding circumstances justified the employee's discharge.'²⁶ When an employee, by his actions, demonstrates an unreasonable disregard for his employer's best interest, there is just cause for his discharge.²⁷

In Williams v. Ohio Dep't of Job & Family Servs., 129 Ohio St. 3d 332, PP 22-24, (Ohio 2011), the Ohio Supreme Court addressed the issue of "just cause". The Court held:

²³ Thompson v Aeroquip Inoac Co., 2003 Ohio 1859. Sandusky App. No. S-02-022 citing Angelkovski v. Buckeye Potato Chips Co. (1983), 11 Ohio App.3d 159, 162.

²⁴ Thompson, citing C.E. Morris v. Foley Constr. Co. (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

²⁵ Lombardo v Ohio Bureau of Employment Services (1997), 119 Ohio App. 3d 217, 221.

²⁶ LaChappelle, Appellant v. Director, Ohio Department of Job and Family Services, 2009 Ohio 3399, Lucas App. No. L-08-1446 citing Carter v. Univ. of Toledo, 2008 Ohio 1958, Lucas App. No. L-08-1446, ¶10.

²⁷ LaChappelle citing Kiikka v. Administrator, Ohio Bureau of Employment Services (1985), 21 Ohio App.3d 168, 21 Ohio B. 178, 486 N.E.2d 1233, paragraph two of the syllabus.

"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 establishing for that

particular position." Id. at paragraph four of establish."

Applying the relevant law to the record in the case subjudice, the Court finds that the preponderance of substantial, reliable and probative evidence establishes that on December 9, 2010, while operating the truck belonging to Berner Trucking, Inc., Appellant side swiped a passenger vehicle as he was making an illegal lane change. Further, the preponderance of substantial, reliable and probative evidence establishes that Appellant was informed that any further actions could result in his discharge.

The preponderance of substantial, reliable and probative evidence further establishes that six days later, on December 15, 2010, the Appellant, in the course of his employment with Berner Trucking, Inc., struck a customer's building which resulted in damages totaling \$3,604.00. Berner Trucking, Inc. was held liable by the customer for the damages to the customer's building.

The Court further finds that the Ohio Unemployment Compensation Review Commission's decision to deny Williams unemployment benefits was not unlawful, unreasonable, or against the manifest weight of the evidence.

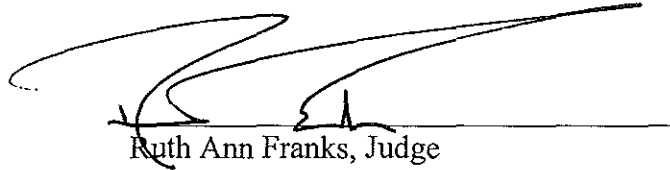
Based upon the foregoing, the record and relevant law the Court finds that Appellant, John E. Ostrander was discharged by Berner Trucking, Inc. for just cause in connection with his employment at Berner Trucking, Inc.

The Court further finds that the Unemployment Compensation Review Commission's decision finding the Appellant is not entitled to unemployment benefits is supported by preponderance of credible, reliable and probative evidence. Therefore, the Ohio Unemployment Compensation Review Commission's decision is affirmed.

JUDGMENT ENTRY

It is therefore, ORDERED, ADJUDGED and DECREED that the Unemployment Compensation Review Commission's decision is affirmed.

July 25, 2012



Ruth Ann Franks, Judge

cc: John E. Ostrander
Eric A. Baum
Kevin J. Cooper