

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

JOHN M. CARY,

Case No: 12CVF-06-7987

Appellant,

JUDGE BENDER

-vs-

**OHIO STATE DEPARTMENT OF
JOB AND FAMILY SERVICES, ET AL.,**

Appellees.

DECISION AND ENTRY
AFFIRMING THE DECISION DISALLOWING REQUEST
FOR REVIEW AS MAILED ON MAY 31, 2012

BENDER, JUDGE

The above-styled case is before the Court on an appeal of the Decision Disallowing Request for Review issued by the Unemployment Compensation Review Commission (hereinafter referred to as Commission) that denied John M. Cary’s (hereinafter referred to as Appellant) administrative appeal. The Commission disallowed the Appellant’s administrative appeal by its Decision mailed December 15, 2011. In this appeal, the Appellant named the Ohio Department of Job and Family Services (hereinafter referred to as the Appellee) and his former employee Lowes Home Centers, Inc. (hereinafter referred to as Lowes). Appellant filed his Brief on September 28, 2012. The Appellee requested more time and filed its Brief on November 28, 2012. Lowes has not otherwise moved or pled.

After a review of the pleadings and the certified record, this Court holds that the Commission’s Decision Disallowing Request for Review of May 31, 2012 is **AFFIRMED**.

I. STATEMENT OF THE CASE

This appeal arises as a result of the Commission’s Decision that denied unemployment compensation benefits to the Appellant.

II. STATEMENT OF THE FACTS

Appellant was employed by Lowes from February 7, 2008 until November 22, 2011 when he was terminated for cause. Appellant worked as a commercial sales specialist and he held that job at the time of his termination. Appellant lost his job because he came into work on a day off and he used a contractor's account to purchase supplies; he handled the transaction himself; and then left the store. He was terminated for that conduct.

The following admission was contained within the file that was reviewed by the Hearing Officer:¹

At this point, I realize that this was a mistake to do this, because I am not an authorized buyer for this account, and I did not approach management for authorization.

On the date of the unauthorized purchase, the Appellant was not working for Lowes but was in fact working for the contractor that had a business account with Lowes.²

On 11/05/11 I delivered a fan replacement to one of Roy's houses on Alasca Loop in Dublin. I was going there to repair drywall and was asked to pick it up on the way.

During the hearing that was conducted on April 23, 2012, the Appellant acknowledged his

¹ The darker text is a 'copy image' taken at page 18 of the certified record filed electronically with this Court.

² Page 18 of the certified record filed electronically with this Court.

admissions:³

11 || Q: And Mr. Cary looking in the file you wrote a statement to which you
12 || admit doing what Mr. Shepherd has said that you did with regards to the
13 || purchase on this account, is that correct?
14 || A: Yes I did.

Appellant attempted to justify his actions by testifying that he was aware that other contractors authorized Lowes to allow other individuals to purchase goods using the contractors' credit card accounts. Appellant also offered evidence that the contractor/buyer had given him explicit verbal authorization to make the purchase on November 5, 2012.

The Appellant filed for benefits on November 28, 2011. Initially the request was granted. Lowes sought a redetermination. The Director issued a Redetermination disallowing the claim on February 23, 2012. The Appellant timely appealed that determination to the Review Commission. On March 7, 2012 the matter was transferred to the Commission.

A phone hearing was scheduled for March 23, 2012 but the Appellant failed to call in. His case was dismissed. On April 5, 2012 the Appellant timely filed a request to explain his failure to appear. Appellant asserted that he had a medical emergency and he was granted another hearing date.

The new hearing date was April 9, 2012. Appellant, with counsel, attended that hearing and so did a representative of Lowes. The Hearing Officer asked Lowes' representative why the Appellant had been terminated. The following is from the page 5 of the hearing transcript:⁴

³ Page 232 of the certified record filed electronically with this Court.

⁴ Page 226 of the certified record filed electronically with this Court.

11 Q: Can you explain what it was that he did that violated these
12 policies?

13 A: Absolutely. Mr. Cary was found to have entered the building on his
14 day off. He went into the building. He was not working or on the clock.
15 He did, uh, take product up front to the commercial desk, rang himself
16 out at a register, um, purchased the product on an AR account that he
17 was not an authorized buyer for and then proceeded to take the product
18 out of the store. During a loss prevention investigation they did find
19 that Mr. Cary was doing side work for that contractor and was getting
20 paid to do installation for that contractor which is why the product
21 was being taken out of the store.

The following testimony established the issue that Lowes had with the Appellant's conduct.⁵

5 Q: Are employees allowed to ring themselves up even if they're putting
6 it onto an account such as that?

7 A: No.

8 Q: Did Mr. Cary give any explanation as to why he did this?

9 A: Um, he didn't think that it was a conflict of interest at the time.
10 He did admit that if he did know that, that he probably would not have
11 done that nor do side work for additional money for accounts that he
12 was servicing.

13 Q: So is it policy that employees are not allowed to do that type of
14 side work for customers?

15 A: Correct.

Lowes' representative went on to establish that the Appellant would have known that Appellant's conduct was a clear conflict of interest.

The Hearing Officer found against the Appellant. The Hearing Officer provided the

⁵ Page 227 of the certified record filed electronically with this Court.

following reasoning within the May 8, 2012 Decision:⁶

Although claimant said that it is common for a customer to call in and authorize someone to make a purchase for them, there is a big difference between a working associate taking a customer phone call and an associate coming in on his day off, ringing up his own purchase and charging it to a customer's accounts receivable account. No one who was actually working on the day in question knew that the customer wanted the purchase to be made. Claimant admitted that doing this was a violation of policy. The employer has shown that claimant violated a known and reasonable policy, and that he was discharged for good cause.

Appellant timely objected to said Decision. The Commission issued its Decision

Disallowing Request for Review on May 31, 2012.

Appellant timely appealed that Decision to this Court. The Court has conducted a review of the pleadings, briefs and the certified record. This appeal is ready for a determination.

III. STANDARD OF REVIEW

R.C. §4141.282(H) sets forth the standard of review that this Court must apply when considering appeals of decisions rendered by the Commission. Please note the following:

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 remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission. R.C. §4141.282(H)

The Ohio Supreme Court stated that “[t]he board’s role as fact finder is intact; a reviewing court may reverse the board’s determination only if it is unlawful, unreasonable, or against the manifest weight of the evidence.” *Tzangas, Plakas & Mannos v. Ohio Bur. Of Emp. Serv.* (1995), 73 Ohio St.3d 694,697. The Hearing Officer and the Commission are primarily responsible for the factual determinations and judging the credibility of the witnesses. *Brown-Brockmeyer Co. v. Roach* (1947), 148 Ohio St. 511; *Angelkovski v. Buckeye Potato Chips* (1983), 11 Ohio App.3d 159,162.

⁶ Page 258 of the certified record filed electronically with this Court.

More specifically:

The Commission and its referees are the triers of fact. See *Feldman v. Loeb* (1987), 37 Ohio App.3d 188, 190, 525 N.E.2d 496. Therefore, the common pleas court acts as an appellate court and is limited to determining whether the Commission's decision was supported by some competent and credible evidence. *Id.* The common pleas court may not substitute its judgment for that of the hearing officer or the board. *Simon v. Lake Geauga Printing Co.*(1982), 69 Ohio St.2d 41, 45, 23 O.O.3d 57, 430 N.E.2d 468.

Hence, this Court will defer to the Hearing Officer's and the Commission's determination of purely factual issues when said issues address the credibility of the witnesses and the weight of the evidence. *Angelkovski v. Buckeye Potato Chips, Id.*, at 162.

This case also deals with the concept of a 'just cause' termination. Please note the following statutory language:

D) Notwithstanding division (A) of this section, no 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,

Just cause has been explained as follows:

"Just cause" is not defined by statute. The Supreme Court of Ohio has indicated that there is no "slide rule definition of just cause," but that the phrase could be considered "that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act." See *Irvine v. State Unemployment Comp. Bd. of Review* (1985), 19 Ohio St.3d 15, 17, citing *Peyton v. Sun T.V. and Appliances* (1975), 44 Ohio App.2d 10, 12.

From within this framework, this Court will render its decision.

IV. ANALYSIS:

There is not a real controversy concerning the facts of this case. On a day off from work, the Appellant, while in the employ of another, came into Lowes and he made a purchase on an account that was not his. Appellant also 'rang' up his own transaction.

Clearly, at that point in time, he was violating the company's policy. He acknowledged as

much.

His only defense was his testimony that it occurred all of the time. However, there were no facts in evidence that what Appellant did on November 5, 2011 was done all of the time. Appellant established that a Lowes employee would get a call from a contractor. The contractor would have an account with Lowes. That contractor would tell the Lowes employee that one of the contractor's employees were on their way in to purchase some item or supply and that the contractor wanted its employee to charge the purchase to the account. That was the norm as established by the Appellant.

However, the Appellant's conduct removed Lowes from the equation. While he was not working for Lowes he entered the store and purchased goods using his contractor employer's account. The evidence was the he did not remember ringing himself out but that testimony was in conflict with the testimony from Lowes' representative. Appellant claimed that what he did happened all of the time. Even if that was a defense, he never established a similar event; i.e., an off duty Lowes' employee ringing up his own purchase for another employer.

There is ample evidence in the certified record that supports the Decision of the Commission. Appellant's own statement supports the fact that the Appellant violated company polices and that he knew or should have known that the policy existed and he was violating it. The Commission's Decision of May 31, 2012 is lawful, reasonable, and not against the manifest weight of the evidence, therefore it must be **AFFIRMED**.

V. DECISION:

The Commission's Decision Disallowing Request for Review of May 31, 2012 is **AFFIRMED**.

THIS IS A FINAL APPEALABLE ORDER

Copies to:

ROBERT G BYROM
1108 CITY PARK AVE
COLUMBUS, OH 43206
Counsel for the Appellant

Michael DeWine, Esq.
Ohio Attorney General
Patria V. Hoskins, Esq.
Assistant Attorney General
30 E. Broad Street, 26th Floor
COLUMBUS, OH 43215-3428
Counsel for Appellee Ohio Department of Job
And Family Services

LOWES HOME CENTERS INC
1000 LOWES BLVD
MOORESVILLE, NC 28117
Appellee *pro se*

Franklin County Court of Common Pleas

Date: 12-06-2012
Case Title: JOHN M CARY -VS- OHIO STATE DEPT JOB FAMILY
SERVICES DIRE ET AL
Case Number: 12CV007987
Type: DECISION/ENTRY

It Is So Ordered.

The image shows a handwritten signature in cursive that reads "J. Bender". To the right of the signature is a circular official seal. The seal contains the text "FRANKLIN COUNTY OHIO" around the top edge and "ALL CRIMES ARE 1 TIME" around the bottom edge. In the center of the seal, there is a smaller emblem with the words "COMMON PLEAS COURT" and "OHIO".

/s/ Judge John F. Bender

Court Disposition

Case Number: 12CV007987

Case Style: JOHN M CARY -VS- OHIO STATE DEPT JOB FAMILY
SERVICES DIRE ET AL

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes