

IN THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO

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Broken Acres Enterprises, Inc. : Case No. 2012-CV-0371
Plaintiff :
vs : Judge Roger E. Binette
Timothy S. Hoff, et al. : **JUDGMENT ENTRY**
Defendant ::::

This matter is before this Court on an appeal from a decision of the Ohio Unemployment Review Commission ("Commission") granting Timothy Hoff ("Hoff") Unemployment Benefits after his termination from Broken Acres Enterprises, Inc. ("Broken Acres"). This Court has reviewed the briefs of the parties and the entire record, including the transcript of testimony.

This Court's review of the Commission's decision is limited to determining whether it is "unlawful, unreasonable or against the manifest weight of the evidence." Otherwise, the Court must affirm the Commission's decision. R.C. 4141.282 (H); *Tzangas, Plakas and Mannos v. Ohio Bur. Of Emp. Services* (1995), 73 Ohio St. 3d 694, 696; *Geretz v. Ohio Dept. of Job & Family Services* 114 Ohio St. 3d 89, 2007-Ohio-2941, ¶ 10. *Williams v. Ohio Dept. of Job & Family Services* 2011-Ohio-2897, ¶ 19. A reviewing Court cannot usurp the function of the trier of fact by substituting its judgment for the Commission's. *Simon v. Lake Geauga Printing Co.* (1982), 69 Ohio St. 2d 41, 45. The decision of purely factual questions is within the Commission's purview. *Id.*; *Brown-Brokmeyer v. Roach* (1947), 148 Ohio St. 511, 518. The role of this Court is limited to determining whether the Commission's decision is supported by evidence in the record. This Court is required to accord deference to the factual and credibility determinations of the Commission. *Geretz v. Ohio Dept. of Job & Family Services* 2006-Ohio-321, ¶ 20 and 23, rev'd. on other grounds, 114 Ohio St. 3d 89. This Court is not empowered to "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." *Williams*, supra ¶ 19. This Court may not reverse the Commission's decision simply because reasonable minds might reach different conclusions. *Id.*

Hoff was employed by Broken Acres as a technician for copiers and business equipment from June 13, 2001 through September 6, 2011. He was terminated on September 6, 2011.

The essential question in this case is whether Hoff was terminated for "just cause." Again, this Court's role is to review whether the Commission's decision that there was not "just cause" for termination was unlawful, unreasonable or against the manifest weight of the evidence.

"Just cause" has been defined as "that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act." *Irvine v. Unemployment Comp. Bd. Of Rev.* (1985), 19 Ohio St. 3d 17, 19. It is well established that "fault" is essential to the unique chemistry of a just cause termination. *Tzangas*, supra at 698. "The critical issue is not whether an employee has technically violated some company rule, but rather whether the employer, by his (or her) actions, demonstrated an unreasonable disregard for the employer's best interests. *Kiikka v. Ohio Bur. Of Emp. Serv.* (1985), 21 Ohio App. 3d 168, 169; *Binger v. Whirlpool Corp.* (1996), 110 Ohio App. 3d 583, 590.

Broken Acres makes two essential arguments: 1) The Commission's decision is against the manifest weight and 2) There was also "just cause" based on Hoff's failure to return to work promptly after paid medical leave.

Broken Acres argues that there was clear evidence Hoff was competing with Broken Acres and therefore "just cause" exists. While this Court agrees that there is significant evidence which would support a finding that Hoff was assisting Capodice ("Capodice" - a former Broken Acres employee and friend of Hoff, who had just left Broken Acres and established a competing business) to set up North Coast Copiers ("North Coast"); there is also evidence and case authority to support that the manner and method of terminating Hoff did not establish "just cause."

The Commission Hearing Officer specifically found that Hoff gave "credible, first-hand testimony establishing that he was not an employee of the employer's competitor." The record unequivocally establishes that Joe Schell ("Schell") called Hoff into a sales office when Hoff reported to work on September 6, 2011. At that time, Schell presented Hoff with a document - a Letter of Affirmation ("Affirmation"). This document affirmed that the signing party was not an owner, officer, partner, principal, shareholder, consultant, employee, board member or other official of Capodice Limited Inc. dba North Coast Copiers or any other business entity owned and operated by Capodice Limited Inc. The Affirmation also acknowledged a prohibition against divulging any confidential information. Hoff did not refuse to sign the Affirmation. Hoff asked to first review it with legal counsel. Schell demanded Hoff sign it immediately and would not permit Hoff to confer with legal counsel. Then Schell presented Hoff with a Letter of Resignation ("Resignation"). When Hoff refused to sign the Resignation, Hoff was immediately terminated.

The evidence also establishes that as a condition of employment, Hoff was not required to sign a Non-compete Agreement. So executing the Affirmation was a new condition of employment first sprung on Hoff as he reported for work September 6, 2011.

Hoff was concerned and requested an opportunity to confer with legal counsel. Not only was the Affirmation aimed solely at, and specifically named only Capodice's business venture; Hoff also did help (without any compensation) his friend (Capodice) by repairing washing machines at his laundromat. Hoff was apparently concerned about the breadth of the Affirmation. This Court finds that the Commission's determination that "just cause" did not exist under these circumstances is supported by some competent, credible evidence.

Hoff gave reasonable explanations for what assistance he gave Capodice. None of this involved sharing of "trade secrets" or confidential information. Hoff testified he told Capodice he wanted to keep his job with Broken Acres and would not do anything to jeopardize that. Hoff acknowledged helping with the Secretary of State filings and giving Capodice the phone line Hoff previously acquired when Hoff and Capodice were in discussions to purchase Broken Acres. The reference to the use of the pronoun "we" in North Coast was disavowed by Hoff. The most damaging evidence was that the service number on North Coast's promotional material contained the last four digits of Hoff's telephone number. The Hearing Officer found Hoff's testimony that he was not working for North Coast credible. It is not this Court's role to second guess the Commission's credibility determinations.

The Commission found that Hoff's request to review the Affirmation with legal counsel a reasonable one and discharging Hoff based on his immediate refusal to sign without conferring with counsel not "just cause." Again, this Court notes this was not previously a condition of employment; was sprung on Hoff without any warning; and there were reasons why Hoff wanted to seek legal advice. Under these circumstances, this Court cannot find that the Commission's decision was unlawful, unreasonable or against the manifest weight of the evidence.

There is case law which supports the concept that an employee's refusal to sign an acknowledgment form which changes conditions of employment is not "just cause." See e.g. *NTA Graphics, Inc. v. Lonchyna* Lucas App. No. L-90-271 (unrep.) (June 21, 1991); *Johnson v. SK Tech* 2010-Ohio-3449, ¶ 48.

The second argument Broken Acres makes is that the Commission erred in finding that there was not "just cause" because Hoff failed to return to work after paid medical leave. While there is case law authority which establishes that failure to return to work after paid medical leave constitutes "just cause" for termination, that clearly wasn't the reason Hoff was terminated.

The record is clear that Hoff was terminated because he did not sign the Affirmation. Cheryl Schell ("Ms. Schell") testified that had Hoff signed the Affirmation, he wouldn't have been discharged. (TR. March 9, 2012 Hrg. p. 16, lines 5-7). Schell's testimony was also that Hoff wouldn't have been fired if he had signed the "loyalty oath." (Tr. March 9, 2012 Hrg., p. 34, lines 2-4). Moreover, Schell reached Hoff by telephone on September 2, 2011, the day after Hoff was to return. Hoff told Schell he didn't think he needed to be back until September 6th and that he was not informed by Broken Acres he was supposed to be back sooner. (Tr. March 9, 2012 Hrg., p. 37, lines 4-9). There's no evidence Schell was intending to terminate Hoff when he finally reached him on September 2nd. Schell had his mind made up that if Hoff did not sign the Affirmation, Hoff would be terminated, if he did not resign. (Tr. March 9, 2012 Hrg., p 38, lines 21-26). Hoff's testimony is consistent with the Schell's: he was fired because he wouldn't sign the document Schell gave him. (Tr. march 28, 2012 Hrg, p. 7 lines 10-12). No mention of the medical leave issue was made on September 6th, when Hoff was terminated. (Tr. March 28, 2012 Hrg., p. 12 Lines 20-24). Furthermore, Hoff testified that he was first told of issues with his medical leave on September 2nd and said he'd be back the next working day, September 6th. He was told by someone he had spoken with at Broken Acres, prior to his conversation with Schell, that if they needed anything further, they (Broken Acres) would follow up with the doctor. (Tr. March 28, 2012 Hrg., p 15).

Based upon the evidence in the record, this Court cannot find that the Commission erred by not finding that there was "just cause" for termination for failing to return on time from paid medical leave. Not only is there evidence to support that the precise date of return was unclear and that if additional information was needed, Broken Acres would follow up with the physician; the overwhelming evidence was that this was not a basis for terminating Hoff.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that, based on the foregoing, the decision of the Ohio Unemployment Review Commission must be **AFFIRMED**. This appeal is **DISMISSED** with prejudice.

IT IS FURTHER ORDERED that Plaintiff shall bear the 'costs' of this action.

IT IS SO ORDERED.


JUDGE

"The Erie County Clerk Of Courts Is ORDERED to enter this Judgment Entry on its journals, and shall serve upon all parties not in default for failure to appear Notice of this Judgment Entry and its date of entry upon the journal. Within 3 days of journalizing this Judgment Entry, the Clerk shall serve the parties. Civ. R. 58(B) & 5(B)"