IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Charles Yarnell,

Appellant,

vs.

Flower Hospital, Inc., et al.,

Appellees.

Case No. CI11-4968

Judge James D. Bates

OPINION AND JUDGMENT ENTRY

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This is an appeal from a decision of the State of Ohio Unemployment Compensation Board of Review (hereinafter "Review Commission") which disallowed appellant Charles R. Yarnell's Request for Review of a Decision of a Hearing Officer which found that appellant was discharged from his employment for just cause. Upon a review of the parties' memoranda, the record of the administrative proceedings, and the applicable law, the board's decision is affirmed for the reasons that follow.

I. ASSIGNMENTS OF ERROR

"ASSIGNMENT OF ERROR NUMBER 1: The Unemployment Compensation Review Commission's Decision was unlawful, unreasonable, or against the manifest weight of the evidence in that the Hearing Officer did not grant Appellant a fair and impartial hearing."

"ASSIGNMENT OF ERROR NUMBER 2: The Unemployment Compensation Review Commission's Decision was unlawful, unreasonable, or against the manifest weight of the evidence in that the Hearing Officer determined that Appellant was discharged with just cause."

II. STATEMENT OF FACTS

Appellant was employed at Flower Hospital from June 2, 1986 until he was terminated on January 10, 2011, allegedly as a result of appellant's theft of three bags of rock salt.

On January 18, 2011, appellant applied for unemployment benefits. The application was denied and that denial was affirmed in a Director's Redetermination issued by the Ohio Department of Job and Family Services ("ODJFS"). Appellant appealed the Director's Redetermination and the ODJFS transferred jurisdiction to the Review Commission. A telephone hearing was held with hearing officer, Leanne Colton, at which appellant testified. Ms. Colton issued a decision affirming the Director's Redetermination, and finding that appellant was terminated for just cause. Appellant filed a Request for Review to the Review Commission, which was denied. Appellant then appealed that decision to this court. Appellant and ODJFS have filed their briefs and the appeal is now before the court for determination.

III. LAW AND APPLICABLE DISCUSSION

A party may appeal a decision of the review commission to the appropriate court of common pleas. R.C. 4141.282(A). The review commission's decision can be reversed only if it was

"unlawful, unreasonable, or against the manifest weight of the evidence." R.C. 4141.282(H). *Also, see, Lombardo v. Ohio Bureau of Employment Services*, 119 Ohio App.3d 217, 220 (6th Dist.1997). "In reviewing the commission's decision, an appellate court has the duty to determine whether the decision is supported by the evidence in the record; however, it is not permitted to make factual findings or determine the credibility of witnesses. *** A reviewing court, whether it be the common pleas court or the Ohio Supreme Court, may only overturn the commission's decision if it was 'unlawful, unreasonable, or against the manifest weight of the evidence.'" *Stoll v. Owens Brockway Glass Container, Inc.*, 6th Dist. No. L-02-1049, 2002-Ohio-3822 (citations omitted).

A person is not entitled to unemployment benefits in Ohio if it is found that "[h]e quit his work without just cause or has been discharged for just cause in connection with his work." R.C. 4141.29(D)(2)(a). "'Just cause' is 'conduct that would lead a person of ordinary intelligence to conclude the surrounding circumstances justified the employee's discharge.' An employee's conduct need not rise to the level of misconduct for there to be just cause, but there must be some fault by the employee." *McCarthy v. Connectronics Corp.*, 183 Ohio App.3d 248, 2009-Ohio-3392 (6th Dist.) (citations omitted). The Sixth District Court of Appeals has stated that "[i]n just cause determinations, what matters is not whether the employee technically violated some company rule, but whether the employee, by her actions, demonstrated an unreasonable disregard for her employer's best interest." *McCarthy*, at ¶ 18.

In his first assignment of error, appellant argues that the hearing officer did not grant him a fair and impartial hearing. He explained that "(1) the hearing officer employed an unfair 'corroboration' standard, (2) [appellant's] sworn testimony, the only testimony provided, was discounted by a single, anonymous, unsworn statement from an employee of [Flower Hospital], and

(3) [appellant] was given no opportunity to cross-examine, nor was he even privy to the identity of the person whom allegedly witnessed a 'theft.'"

Appellant first contends that the hearing officer unfairly required him to corroborate his testimony. While the hearing officer did comment on the lack of corroborating evidence, requiring corroborating evidence does not impermissibly place the burden of proof on the claimant. *See Hansman v. Director, Ohio Dep't of Job & Family Services*, 12th Dist. NO. CA2003-09-224, 2004-Ohio-505, ¶ 19.

Appellant further maintains that the hearing officer erred in discounting his sworn testimony in favor of a "single, anonymous unsworn piece of hearsay." In support, appellant cites to *Taylor v. Bd. of Review,* 20 Ohio App.3d 297, 485 N.E.2d 827 (8th Dist.1984), where the court held that it was unreasonable to give credibility to a hearsay statement and deny credibility to the claimant's in person testimony. *Id.* at 299.

Initially, the court notes that there was more than an anonymous source. The record contains an attachment to a ProMedica Health System disciplinary form signed by appellant's supervisor, Dave Hayford, which states as follows.

> "On Saturday, January 8, 2011 at approximately 3:45 Chuck Yarnell was observed by a facilities maintenance person loading approx 4-5 bags of ice melt into the back of a hospital maintenance truck. A short time later the truck was checked by the maintenance person to see if the ice melt was still in the back but it was not. It appeared that the ice melt had been stolen and it was reported to Dave Hayford on Monday at 7 am. On Monday, January 10, 2011 Dave Hayford called Chuck Yarnell into his office along with Jim Collins, Grounds Supervisor and told him he had been seen loading ice melt into the back of the maintenance truck and he wanted an explanation of what he did with it and why. Chuck told Dave that he had taken it home to use it on his driveway. Chuck was immediately sent home and was told not to report back to work until Dave called him."

With regard to *Taylor*, the court notes that that same court subsequently ruled that the review

commission can find evidence in the record more credible than the claimant's testimony. Specifically, the Eighth District Court of Appeals has stated as follows. "Even where the employer does not send a representative to the hearing, the Review Commission may properly rely on any and all evidence incorporated in the certified record, including any disciplinary evidence *** submitted by the employer during the administrative claim process. Further, the Review Commission is free to find the evidence in the record submitted on behalf of the employer more credible than the sworn testimony of the claimant. Thus, it was within the province of the hearing officer to place greater weight on the documentary evidence submitted by MHS than on Barksdale's testimony." *Barksdale v. State*, 8th Dist. No. 93711, 2010-Ohio-267, ¶ 8. *Barksdale* based its reasoning on the Ohio Supreme Court case of *Simon v. Lake Geauga Printing Co.*, 69 Ohio St.2d 41, 430 N.E.2d 468 (1982). In *Simon*, the court held that evidence which would otherwise constitute inadmissable hearsay if stringent rules of evidence were applicable must be considered in proceedings such as these. Also, recently, Judge Linda Jennings, of this court, found that the hearing officer "did not err in considering, and was in fact required to consider, the hearsay evidence submitted by [the employer] notwithstanding the fact that [the employer] did not make an appearance at the review hearing." *Roesner v. Interstate Brands Corp.*, Lucas C.P. No. CI10-6681 (June 13, 2011). Judge Jennings further found that the hearing officer was not required to give the claimant's sworn testimony more weight than the documentary evidence submitted by the employer. *Id.* Based upon these cases, the court finds that Hearing Officer Colton did not err in finding hearsay evidence provided by the employer more credible than the sworn testimony of appellant.

Appellant also contends that he was not afforded a fair and impartial hearing as he was given no opportunity to cross-examine, nor was he informed as to the identity of the person who witnessed

the alleged theft. As discussed above, the hearing officer is entitled to consider hearsay evidence. As the hearsay declarants are not present at the hearing, it is clear from these cases that the fact that an employee is not given the opportunity to cross-examine these persons does not result in an unfair hearing. Moreover, Ohio Admin. Code 4146-7-02 gives each party to a hearing the right to subpoena witnesses. There is no evidence that appellant tried and was prevented from getting the names of any witnesses, or subpoenaing any witnesses.

In his second assignment of error, appellant contends that the court's finding that he was discharged with just cause is unlawful, unreasonable, or against the manifest weight of the evidence. Appellant gives three reasons in support of his argument that his termination was without just cause. First, appellant argues that the policy was not uniformly or fairly applied as others also used salt to weigh down their trucks, but were not disciplined, and further, there wasn't any written policy forbidding employees from using rock salt to weigh down their trucks. This argument presupposes that appellant took the salt to weigh down his truck. However, there was conflicting evidence regarding appellant's planned use of the salt. Appellant testified that he took the salt to weigh down his truck so that it did not slide, however, there is evidence in the record that appellant admitted that he was taking it home to use on his driveway.

Appellant's second and third arguments are both premised on the fact that appellant did not commit a theft. Appellant argues that appellee did not follow its own progressive discipline policy. The policy provides for termination for theft of facility property, however, appellant describes his actions as "inappropriate use of facility resources," which would require a verbal reminder. Appellant also argues that it was not a theft as he was given permission to weigh down the back of

his truck. As discussed above, there is evidence in the record that would support a finding of theft.[1]

Although there is evidence in the record that would support appellant's contention that he was not discharged for just cause, this court is not permitted to reverse the review commission's decision because "reasonable minds might reach different conclusions." *Irvine v. Unemp. Comp. Bd. of Review*, 19 Ohio St.3d 15, 482 N.E.2d 587 (1985). It is not the function of this court to make factual and credibility determinations. *Id.* After reviewing the record, this court finds that there is evidence in the record supporting the hearing officer's finding that appellant committed a theft when he took hospital property home for his own use, in violation of the employer's policy. The court is aware that "[i]n just cause determinations, what matters is not whether the employee technically violated some company rule, but whether the employee, by her actions, demonstrated an unreasonable disregard for her employer's best interest." *McCarthy*, at ¶ 18. However, in the present case, the allegations of theft clearly demonstrate an unreasonable disregard of the employer's best interest, and thus establish just cause. Accordingly, this court affirms the findings of the hearing officer.

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[1] Appellant contends that it was not a theft as R.C. 4141.29(D)(2)(e) defines dishonesty as "substantive theft, " which is a theft of any item or items with a total value of $50 or more. However, the review commission found that appellant was discharged for just cause under R.C. 4141.29(D)(2)(a), not dishonesty under R.C. 4141.29(D)(2)(e).

SCANNED

JUDGMENT ENTRY

It is **ORDERED, ADJUDGED, AND DECREED** that decision of the State of Ohio Unemployment Compensation Board of Review is hereby **AFFIRMED.**

March 5, 2013

James D. Bates, Judge

cc: Francis J. Landry, Esq.
Eric A. Baum, Esq.