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LUCAS COUNTY

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COMMON PLEAS COURT  
BERNIE QUILTER  
CLERK OF COURTS

**THIS IS A FINAL  
APPEALABLE ORDER**

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Joseph A. Wells,  
Appellant,

vs.

Clinton Foundry, Ltd., et al.,  
Appellees.

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Case No. CI12-5166

**OPINION AND JUDGMENT ENTRY**

Hon. Linda J. Jennings

In this administrative appeal under R.C. 4141.282, Appellant Joseph A. Wells (Wells) asks the Court to reverse a final decision made by Appellee State of Ohio Unemployment Compensation Review Commission (the Commission).

In the decision under review, the Commission denied Wells' request for review and affirmed a local hearing officer's decision that affirmed the redetermination of benefits issued by Appellee Director (Director) of the Ohio Department of Job and Family Services (ODJFS) and found that Appellee Clinton Foundry, Ltd. (Clinton) discharged Wells with just cause.

The Director's redetermination affirmed the initial determination disallowing Wells's application for unemployment compensation benefits on the ground that Clinton had discharged Wells for just cause because the facts established that Wells violated Clinton's absenteeism policy and procedures.

**E-JOURNALIZED**

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Upon review of the certified administrative record, the briefs filed by Wells and the Director, and the applicable law, the Court affirms the Commission's decision, as discussed below.

### **PROCEDURAL HISTORY**

Clinton employed Wells as a general laborer from August 7, 2006 until March 21, 2012, when Clinton discharged Wells for violating the company's absenteeism policy by repeatedly failing to show up or notify the company that he would be absent from work.

ODJFS denied Wells's initial application for unemployment compensation. On redetermination, the Director affirmed that decision.

The Commission's hearing officer affirmed the redetermination.

The Commission's disallowance of Wells's request for review of the hearing officer's decision prompted his appeal to the Court.

### **APPELLATE ARGUMENTS**

Wells contends that the hearing officer erred by mistaking certain facts and failing to consider other relevant facts in concluding that Clinton discharged him for cause, making several points in that regard.

First, Wells disputes the hearing officer's assertion that he had a history of not showing up for work without calling in that would have justified his termination, pointing to his testimony that he attempted to contact Clinton about each of his absences and left messages on an answering machine. Wells also points to his testimony that he signed warnings presented to him by Tim Heninger without reviewing them and later disputed the contents of the warnings in conversations with Jim Heninger.

Wells also questions why Tim Heninger chose not to testify at the hearing and why the hearing officer relied on the testimony of officer manager Kimberly Heninger. According to Wells, Kimberly not only had little knowledge of company absenteeism and disciplinary policies but also had no direct knowledge about his communications with management with respect to the alleged no call, no shows or their affect on his continued employment.

Next, Wells challenges the reliability of the written warnings as evidence, suggesting that he did not enter the date next to his signature on one of the warnings and suggesting that the warning related to the alleged May 11, 2011 incident was apparently not addressed with him until February 29, 2012. Wells concludes that Clinton's failure to make timely warnings and document any discussions about how the warnings would affect continued employment calls into questions Clinton's motives for terminating him.

Wells then insists that no actual evidence support's the hearing officer's finding that he was told that his job was in jeopardy if he continued to fail to call off when he was not going to be at work. Tim Heninger, who had the duty to provide the written warnings to Wells, was available to testify but did not do so. Kimberly Heninger's testimony to that effect was unavailing. She was unable to provide any specific references to any conversations she had with Wells. Moreover, she did not provide any specific dates or documentation with respect to conversations with other Clinton personnel and did not even identify any of the other personnel.

In further support of his claim that he was unaware that his job was in jeopardy, Wells refers to the Employee Handbook's mandatory language with respect to the imposition of a three-day suspension prior to termination.

Summarizing his arguments, Wells asserts:

The incidents alleged to have occurred in February and March 2012, have been disputed by Wells. He testified that he was aware of the company policy and adhered to that policy. In addition, there is no evidence contained in the record indicating that Wells was aware that the alleged no call no shows would result in the termination of his employment even where Clinton's allegations are true. They not only failed to document any contact with Wells to support this claim, but they failed to follow their employee disciplinary policies. The evidence would indicate that wells was discharged without cause. When considering these facts, an ordinary person would find the discharge to be not justifiable

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<sup>1</sup> Wells's Brief, filed Jan. 28, 2013, at page 11.

The Director maintains, generally, that the Court should affirm the Commission's final decision denying unemployment benefits to Wells because the decision is supported by competent, credible record evidence and thus was not unlawful, unreasonable, or against the manifest weight of the evidence.

In arguing that Clinton terminated Wells for just cause, the Director notes that absenteeism can be the basis for a "just cause" termination if it undercuts the employer's best interest. The Director then points to record evidence establishing that: (1) Wells was aware of Clinton's attendance policy and the potential consequences of violating it; and (2) Clinton substantially complied with the policy by repeatedly warning Wells about his attendance lapses and putting him on notice that he would be discharged if the lapses continued.

Clinton characterizes Wells's denials of his attendance lapses as absurd, noting that Wells signed written warnings for five such instances. Clinton also posits that Wells's claim "that he signed the warnings without reviewing them \* \* \* strains credulity to unprecedented levels and does not merit a response."<sup>2</sup>

Next, Clinton challenges Wells's argument that the hearing officer wrongly relied on Kimberly Heninger's testimony and that Tim Heninger should have testified. Clinton refers to the transcript of the hearing, which shows that Kimberly offered to have Tim testify, but the hearing officer reminded her that Tim could not testify because he was observing.<sup>3</sup>

Wells has not filed any reply brief.

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<sup>2</sup> Director's Brief, filed March 11, 2013, at page 13.

<sup>3</sup> Transcript at 16.

## LEGAL STANDARD GOVERNING WELLS'S ADMINISTRATIVE APPEAL

R.C. 4141.282 requires the Court to base its review on the certified record provided by the Review Commission and to affirm the Commission's decision unless it is unlawful, unreasonable, or against the manifest weight of the evidence.<sup>4</sup>

The scope of the Court's review is extremely limited.<sup>5</sup> The Court should defer to the determinations of the Commission and its hearing officers with respect to factual matters, the credibility of witnesses, and the weight of conflicting evidence<sup>6</sup>; and the Court must determine whether evidence in the record supports the Commission's decision.<sup>7</sup> Only a decision that is "so manifestly contrary to the natural and reasonable inferences to be drawn from the evidence as to produce a result in complete violation of substantial justice" is deemed to be against the manifest weight of the evidence.<sup>8</sup> Therefore, if some competent, credible evidence going to all the essential elements of the case supports the Commission's decision, the decision must stand,<sup>9</sup> and the Court cannot reverse it as being against the manifest weight of the evidence.<sup>10</sup>

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<sup>4</sup> See, also, *Tzangas, Plakas, & Mannos v. Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 696 (1995); *Irvine v. Unemp. Comp. Bd. of Rev.*, 19 Ohio St.3d 15, 17-18 (1985) (citation omitted); *Hall v. American Brake Shoe Co.*, 13 Ohio St.2nd 11, 13-14 (1968).

<sup>5</sup> *Perry v. Buckeye Community Services*, 48 Ohio App.3d 140, 141 (1988).

<sup>6</sup> *Tzangas*, 73 Ohio St.3d at 696; *Myers v. Garson*, 66 Ohio St.3d 610, 615 (1993); *Brown-Brockmeyer Co. v. Roach*, 148 Ohio St. 511, 518 (1947); *Angelkovski v. Buckeye Potato Chips Co.*, 11 Ohio App.3d 159, 161 (1983), overruled on other grounds by *Galluzzo v. Ohio Bur. of Emp. Services*, 2d Dist. No. 95-CA-6 (Nov. 29, 1995).

<sup>7</sup> *Tzangas*, 73 Ohio St.3d at 696 (citation omitted); *Irvine*, 19 Ohio St.3d at 18 (citations omitted); *Reef v. Ohio Bur. of Emp. Services*, 6th Dist. No. WD-95-070 (Mar. 1, 1996).

<sup>8</sup> *Phillips v. Ohio Bur. of Emp. Servs.*, 6th Dist. No. 5-88-8 (Aug. 26, 1988).

<sup>9</sup> *Phillips*, 1988 WL 88787, at \*1 (citation omitted). *Accord C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus.

<sup>10</sup> *Angelkovski*, 11 Ohio App.3d at 161; *Shaffer v. Ohio Unemp. Rev. Comm.*, 11th Dist. No. 2003-A-0126, 2004-Ohio-6956, at ¶19 (citations omitted). *Accord Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

Nor can the court reverse merely because it would make a different decision based on the evidence, or reasonable minds could weigh the evidence and arrive at contrary conclusions, or the Commission might reasonably have decided either way.<sup>11</sup> A decision is unreasonable if it is irrational or capricious, where it is clearly not guided by reason.<sup>12</sup>

### **LAW, ANALYSIS, AND DECISION**

#### **1. Clinton had "just cause" to discharge Wells for excessive absenteeism that violated the company's attendance policy.**

An employee who is discharged from work "for just cause" is ineligible for unemployment benefits.<sup>13</sup> "Traditionally, just cause, in the statutory sense, is that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act."<sup>14</sup> However, just cause determinations in the unemployment compensation context must also be consistent with the legislative purpose that underlies the Unemployment Act.

The Act exists to enable employees who become and remain involuntarily unemployed, through no fault of their own, to subsist on a reasonably decent level. Thus, the Act exists to protect employees from economic forces over which they have no control, not to protect them from themselves. Fault on the employee's part separates him or her from the Act's intent and protection.<sup>15</sup>

Whether or not just cause exists necessarily depends on the factual considerations of each particular case.<sup>16</sup> However, an employer has just cause to fire an employee only when

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<sup>11</sup> *Tzangas*, 73 Ohio St.3d at 697; *Irvine*, 19 Ohio St.3d at 18 (citation omitted); *Angelkouski*, 11 Ohio App.3d at 161; *Irvine*, 19 Ohio St.3d at 18 (citations omitted).

<sup>12</sup> Black's Law Dictionary, 8<sup>th</sup> Ed.

<sup>13</sup> See R.C. 4141.29(D)(2)(a).

<sup>14</sup> *Irvine*, 19 Ohio St.3d at 17 (citation omitted).

<sup>15</sup> *Tzangas*, 73 Ohio St.3d at 697-698.

<sup>16</sup> *Irvine*, 19 Ohio St.3d at 17.

the employee is culpable or at fault. In other words, "[f]ault on behalf of the employee is an essential component of a just cause termination,"<sup>17</sup> and the employer must be reasonable in finding fault in order to terminate the employee for just cause.<sup>18</sup>

In *Mohawk Tools v. Admr., Ohio Bur. of Emp. Servs.*,<sup>19</sup> the Sixth District Court of Appeals noted that in Ohio, excessive absenteeism and tardiness can be the basis for a "just cause" discharge.<sup>20</sup> The *Mohawk* court quoted from *Ohio-Ferro-Alloys Corp. v. Tichnor*,<sup>21</sup> in which the Muskingum County Common Pleas Court "acknowledged the employer's right to establish a standard of punctuality and consistent attendance"<sup>22</sup> by stating: "The reasons for promptness or the effect of lateness were matters for the consideration and determination of the employing company in the absence of any known or discernible evidence to the contrary and established policy in this regard is understandable and should be unequivocal. Determination and control in such respect clearly lies in the field of management and its considered judgment is a part of the authority that underlies its responsibility as a private enterprise and answerable to its directors, stockholders and to its other employees in the plant's operation."<sup>23</sup>

In the 2009 case of *McCarthy v. Connectronics Corp.*,<sup>24</sup> the Sixth District reiterated the Ohio rule that excessive absenteeism and tardiness can be the bases for a "just cause"

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<sup>17</sup> *Tzangas*, at paragraph two of the syllabus.

<sup>18</sup> *Id.* at 698.

<sup>19</sup> 6th Dist. No. WMS-85-15 (Mar. 14, 1986), 1986 Ohio App. LEXIS 5978.

<sup>20</sup> *Id.* at \* 6-7.

<sup>21</sup> 83 Ohio L.Abs. 254 (1959).

<sup>22</sup> *Mohawk*, at \* 7.

<sup>23</sup> *Tichnor*, at 255-256, quoted in *Mohawk*, at \* 7.

<sup>24</sup> 183 Ohio App.3d 248, 2009-Ohio-3392.

discharge.<sup>25</sup> The *McCarthy* court also cited the rule that what matters in just cause determinations is not whether the employee technically violated some company rule, but whether the employee's actions demonstrated an unreasonable disregard for the employer's best interest.<sup>26</sup>

Thus, Clinton had "just cause" to discharge Wells, and he was ineligible to receive unemployment compensation benefits, if his absenteeism violated the company's attendance policy and demonstrated an unreasonable disregard for Clinton's best interest.

The Hearing Officer affirmed the Director's redetermination and disallowed Wells's application for unemployment benefits on the ground that Wells was separated from employment under disqualifying conditions (for "just cause" in connection with work).<sup>27</sup>

The hearing officer made the following findings of fact:

Claimant was employed by Clinton Foundry Ltd. from August 7, 2006 until March 21, 2012. At the time of his separation, he was employed as a general laborer.

Claimant had received numerous warnings during his employment for his attendance. He received warnings for no call, no shows on May 11, 2011, June 28, 2011, and three warnings on February 29, 2012, for three separate incidents. He was told that his job was in jeopardy if he continued to fail to call off when he was not going to be at work. The employer's policy states that an employee may receive a written warning and a 3 day suspension before they are discharged.

Claimant was a no call, no show on March 20, 2012. He was discharged on March 21, 2012, for continued attendance problems.<sup>28</sup>

The Hearing officer reasoned:

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<sup>25</sup> *Id.* at ¶ 14, citing *Mohawk*.

<sup>26</sup> *Id.* at ¶ 18, citing *Kikka v. Admr., Ohio Bur. of Emp. Servs.*, 21 Ohio App.3d 168, 168 (8th Dist. 1985).

<sup>27</sup> Review Commission's File Document 6 (Decision of the Hearing Officer), at page 5 of 6.

<sup>28</sup> *Id.* at pages 3-4 of 6.



The employer policy states that an employee may receive a suspension prior to being discharged. This means that the employer has the option of whether or not they want to give an employee a suspension based on the circumstances of the situation. If they had intended that they would have to give every employee a suspension regardless of the specific situation, they would have said that employees will receive a written warning and a 3 day suspension before discharge.

Claimant had received 5 warnings for his no call, no shows prior to his discharge. He was aware that he needed to call the employer if he was not going to be at work, but chose not to do so. He knew that if he continued to accrue no call, no shows, he would be discharged. Claimant willfully failed to follow the employer's policy, and was discharged for just cause in connection with work.<sup>29</sup>

Here, it is undisputed that Clinton had an attendance policy that required employees who did not intend to report to work to notify the company as soon as possible and that Wells was aware of the policy.<sup>30</sup>

It is also undisputed that the Employee Handbook states as follows with respect to Clinton's Absentee Control Program:

I. PURPOSE.

There have been a significant and continually increasing number of unexcused absences from work. Each employee has a responsibility to himself, to his fellow employees and Clinton Foundry, Ltd. to report to work. Failure to do so works a hardship on fellow employees who have to be temporarily transferred to cover the job; and the Company experiences a delay in production, which affects our ability to provide employment.

II. ABSENTEE RULES

1. Each employee is expected and required to maintain an acceptable record of attendance and promptness.
2. In order to help Clinton Foundry, Ltd. plan its daily work schedule, an employee who does not intend to report to work on his regularly scheduled workshift shall report his absence to Tim and or Jim Heninger, or if not obtainable, to the office voice mail system, as soon

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<sup>29</sup> *Id.* at page 4 of 6.

<sup>30</sup> Transcript at 5, 14-15, 17.

as possible preferable [sic] before, but not later than one (1) hour after the commencement of his shift; and also to the office between the hours of 8:00 a.m. and 4:00 p.m. The number is 419-243-0855.

3. Absences will be considered "excused absences" if they are for the following reasons:
  - (a) Sickness or injury when excused by a Physician. All sickness or injury should be documented to the front office by the attending physician. In some instances, mere written documentation will not be sufficient.
  - (b) The employee has been excused in advance from work by written permission of Tim and/or Jim Heninger.
  - (c) ALL OTHER ABSENCES WILL BE UNEXCUSED ABSENCES.
4. An unacceptable record of attendance shall be any of the following:
  - (a) Patterns of absenteeism or tardiness.
  - (b) More than one (1) unexcused absence in a one (1) month period.
  - (c) More than two (2) tardy in a one (1) month period.

The company will consider combinations of absenteeism and tardiness for the purposes of disciplinary actions.

5. The following guidelines shall apply for violation of these rules and may result in the following disciplinary action being taken:
  - (a) A written warning shall be given to the employee by Tim and or [sic] Jim Heninger for the first offense.
  - (b) A three (3) day suspension shall be given to the employee without pay for the second offense.
  - (c) Termination of employment shall result for the third offense.<sup>31</sup>

It is also undisputed that Wells signed warnings for failing to report to work or call the company on May 11, 2011, June 21, 2011, and February 20 and 22, 2012, and for leaving work after lunch and failing to return or call in on February 24, 2012.

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<sup>31</sup> Director's Brief at Exhibit A.

It is also undisputed that the written warnings stated that three warnings within a 30-day period rendered the employee subject to a three-day suspension without pay and possible discharge.<sup>32</sup>

In addition, Kimberly Heninger testified that Wells walked off the job at 8:30 a.m. on June 28, 2011, after being given the warning about his June 21, 2011 "no call, no show," and was a "no show" on March 20, 2012, which resulted in his termination on March 21, 2012.<sup>33</sup>

Kimberly also testified that when company owner Timothy Heninger approached Wells to discuss "his continuous no show and no contacts," Wells stated that he did not want to work anymore because he was not making enough money.<sup>34</sup>

It is also undisputed that Wells signed the warnings even though he purportedly called in on the days in question, had excuses for some of his absences, and/or told Jim Heninger that he did not agree with the warnings.<sup>35</sup>

Finally, it is undisputed that Wells claims that he had doctor's excuses for most of his absences but failed to submit any such documentation to unemployment.<sup>36</sup>

Based on the above, the Court finds that Clinton had "just cause" to discharge Wells, and Wells was ineligible to receive unemployment compensation benefits, because his pattern of absenteeism violated the company's attendance policy and demonstrated an unreasonable disregard for Clinton's best interest.

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<sup>32</sup> Transcript at 5-6, 8-10.

<sup>33</sup> Transcript at 9-11.

<sup>34</sup> Transcript at 10.

<sup>35</sup> Transcript at 17-18.

<sup>36</sup> Transcript at 19-20.

**2. The Hearing officer's Decision is not unreasonable, unlawful, or against the manifest weight of the evidence.**

As also discussed above, the Court should defer to the Hearing officer's determinations with respect to factual matters, the credibility of witnesses, and the weight of conflicting evidence and must determine whether evidence in the record supports the Commission's decision. Thus, if there is some competent, credible evidence that supports the Commission's decision, the Court cannot reverse it as being against the manifest weight of the evidence.

A review of the record leaves no doubt in the Court's mind that there is ample competent, credible evidence that supports the Hearing officer's findings of fact, reasoning, and decision to affirm the Director's Redetermination and disallow Wells's application for benefits because Clinton discharged Wells for "just cause" for excessive unexcused absences that violated the company's attendance policy and demonstrated an unreasonable disregard for the company's interests. Moreover, the decision is clearly not so manifestly contrary to the natural and reasonable inferences that may be drawn from the evidence that it completely violates substantial justice. Therefore, although the decision is contrary to Wells's testimony and appellate arguments, it is not against the manifest weight of the evidence and must stand.

Moreover, there is no basis for a finding that the Hearing officer's decision is either unlawful or unreasonable.

Accordingly, the Court must affirm it.

**3. Decision**

The Court has reviewed the certified administrative record and the parties appellate briefs. Notwithstanding Wells's testimony, the Court finds that competent, credible evidence supports the hearing officer's findings of fact, reasoning, and ultimate conclusion that Clinton discharged Wells for just cause in connection with his work, specifically Well's

failure to comply with Clinton's attendance policy. Thus, the decisions under review are not against the manifest weight of the evidence.

The Court further finds that the decisions are not unlawful or unreasonable.

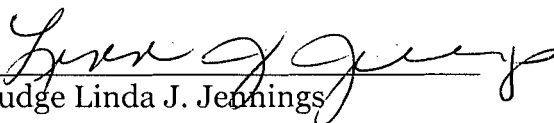
Accordingly, R.C. 4141.282(H) and the applicable case law mandate that the Court affirm the Review Commission's decisions, as set forth in the Judgment Entry below.

### **JUDGMENT ENTRY**

It is ORDERED that both the Ohio Unemployment Compensation Review Commission's "Decision Disallowing Request for Review" (mailed on August 8, 2012) and the Commission's "Decision" affirming the Director's May 21, 2012 Redetermination and finding that Appellee Clinton Foundry, Ltd. discharged Appellant Joseph A. Wells for just cause (mailed on June 21, 2012) are AFFIRMED.

**THIS IS A FINAL APPEALABLE ORDER.**

June 13, 2013

  
Judge Linda J. Jennings

cc: Christopher S. Clark, Esq. (Counsel for Appellant Joseph A. Wells)  
Eric A. Baum, Esq. (Counsel for Appellee Director of ODJFS)  
Clinton Foundry, Ltd. (Appellee)