IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

CHARDON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION	:	CASE NO: 12A001109
Plaintiff	:	JUDGE DAVID L. FUHRY
-vs-	:	
PERRY T YOWELL et al	:	**ORDER OF THE COURT**
Defendants	:	

A-18

This matter comes on for consideration on as an Administrative Appeal filed pursuant to Ohio Revised Code §4141.282(H) of the October 10, 2012 decision of the Unemployment Compensation Review Commission ("UCRC"). That decision affirmed the decision of the hearing officer rendered on August 23, 2012. The hearing officer is alleged to have erred in determining that claimant Perry Yowell ("Appellee") was entitled to unemployment compensation because his employer, Chardon Local School District ("Board" or "District"), terminated him without just cause.

FACTS

On February 27, 2012, three Chardon High School students were fatally shot in the high school cafeteria. Three others were injured. The tragedy was highly publicized.

Appellee was a maintenance repairman for the Board. He was called to the high school to shut off a water supply line that was leaking into the cafeteria. Using his cell phone, he took a picture of the area in the school cafeteria where the three fatally injured students died. Appellee took this photograph without the knowledge or consent of the Board. The cafeteria was taped off because of its status as a crime scene. It is undisputed that the tape was part of a law enforcement effort to restrict access to the area. Appellee did not violate the boundaries of the taped off area. He took the picture from outside of the tape.

The Appellee testified that the picture was low resolution and that it appeared in the screen of his cell phone which dimensions are about 1 ¼" x 2".

Appellee displayed the picture to several others including co-workers, community members, and a student. The picture depicted blood and apparent tissue residue associated with the murder of the three students and/or the maiming of three others who survived the assault.

It is apparent from the record that the display of the photo to others served no legitimate school related purpose.

The Chardon Police inquired of Appellee when it learned of the photograph. The Chardon Police Chief alerted the Superintendent of the District of the nature of the photograph. This occurred sometime in March, 2012.

Upon learning of the photograph the Superintendent conducted an investigation that included an interview of Appellee on March 12, 2012. The Board claims that Appellee was dishonest in failing to disclose some information to the Superintendent, notably the names of all those who he had shown the photo to. Five days earlier Appellee had revealed to an Assistant Geauga County Prosecutor that he had shown the photo to two of his co-workers. This he confirmed in a written statement given to the Prosecutor. When interviewed by the Superintendent the Appellee failed to disclose that he had shown the photograph to the co-workers and to two other district employees. The Board points to the inconsistencies in Appellee's reports as to whom the photo was shown as evidence of his dishonesty.

The Appellee described the photo as not gruesome. During the telephone hearing he referred to the photo as showing a "black spot" that was difficult to see. Others who had given statements to the Assistant Prosecutor had indicated to her that the photograph captured pools of blood on the cafeteria floor. One stated that Appellee pointed out to her and described for her two pools of blood on the floor and brain matter on the table.

Appellee points out that another employee, Dana Sterns, took a picture of a spent bullet from the crime scene and showed it to Appellee and others. That employee was not disciplined for his conduct. The Board notes that the other employee was instructed to find a spent bullet. The photo of the bullet was a close up.

The Board argues that Appellee was on Step 5 of the progressive discipline scale of the collective bargaining agreement governing his employment with the District. The history of Appellee's infractions, it maintains, lends further support to the argument that Appellee's termination was with just cause.

The Board's resolution terminating Appellee identifies five grounds for his termination: 1) photographing the crime scene for improper purposes; 2) showing the photograph to district staff, students and community members for improper purposes; 3) Appellee's dishonesty; 4) Appellee's violation of board policy; and 5) Appellee's pattern of misconduct placing him on step 5, the last step of the progressive discipline scale.

STANDARD OF REVIEW

Ohio Revised Code §4141.282(H) sets forth the standard of review upon an appeal from an un-employment compensation review commission decision to the Court of Common Pleas:

> The court shall the 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.

An eligible individual is entitled to un-employment compensation due to involuntary total or partial un-employment provided by Ohio's Unemployment Compensation Laws. R.C. 4141.29. However, "no individual may . . . . be paid benefits [f]or the duration of the individual's unemployment if the director of [job and family services] finds that . . . [t]he individual quit for work without just cause or has been discharged for just caused in connection with the individual's work . . .." *Groves v. Ohio Dept. of Job & Family Servs.*, 11th Dist. No. 2008-A-0066, 2009-Ohio-2085, at ¶12 quoting R.C. 4141.29(D)(2)(a).

"Traditionally, just cause, in a statutory sense, is that which, to an ordinary intelligent person is a justifiable reason for doing or not doing a particular act." *Id. Irvine v. Unemployment Comp Bd. of Rev.* (1985), 19 Ohio St. 3d 15, 17, 482 N.E. 2d 587.

"The determination of whether just cause exists depends upon the factual circumstances of each case. Purely factual determinations are primarily within the province of the hearing officer and commission." *Adkins v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 08 AP-182, 2008-Ohio-4109 at ¶12 (citation omitted). The conduct need not constitute misconduct, but there must be a showing of some fault on the part of the employee. *Sellers v. Bd of Review*, (1981), 1 Ohio App 3d 161, 440 N.E. 550 at ¶2 of the syllabus; *Schienda v. Transp. v. Ctr.* (1984) 17 Ohio App. 3d 119, 477 N.E. 2d 675, at ¶2 of the syllabus. "If an employer has been reasonable in finding fault

on behalf of the employee, the employer may terminate the employee with just cause. Fault on behalf of the employee remains an essential component of a just cause termination." *Tzangas, Plakas & Mannons v. Ohio Bur. Of Emp. Servs.*, 73 Ohio St. 3d 694, 653 N.E. 2d 1207, 1995-Ohio-206.

The Unemployment Compensation Board of Review's "just cause" determination maybe reversed only if it is unlawful, unreasonable, or against the manifest weight of the evidence. There is not a *de novo* review standard in connection with the court's decision of an appeal from the UCRC. "Every reasonable presumption must be made in favor of the [decision] and the findings of facts [of the UCRC] *Karches v. Cincinnati* (1988), 38 Ohio St. 312 19, 526 N.E. 2d 1350; see, also, *Long v. Hurles* (1996), 113 Ohio App. 3d 228, 233. If the record reveals evidence to support the UCRC's findings, the reviewing court cannot substitute its own findings of fact for those of the UCRC. *Dolson v. Unemployment Comp. Bd. of Rev.* (1984), 14 Ohio App. 3d 309, 310, 471 N.E. 2d 168.

"The fact that reasonable minds might reach different conclusions is not a basis for reversal" of the UCRC's decision. *Irvine,* 19 Ohio St. 3d at 18, 482 N.E. 2d 587; *Tzangas,* 73 Ohio St. 3d at 696. The court's role is to determine whether the decision of the Review Commission is supported by evidence in the certified record. If the reviewing court finds that such support is found, then the court cannot substitute its judgment for that of the Review Commission.

The reviewing court is not to make factual findings or determine the credibility of witnesses. Rather the Court "is to determine whether the evidence of the Board is supported by the evidence in the record." *Irvine,* 19 Ohio St. 3d at 18, 482 N.E. 2d 587.

The UCRC must not be reversed on the weight of the evidence if reasonable minds could weigh the evidence and come to contrary conclusions. . . . "the UCRC's decision should remain undisturbed on close calls." *McCarthy v. Connectronics Corp.*, 183 Ohio App. 3d 248, 916 N.E. 2d 871, 2009-Ohio-3392, at ¶10. "Judgments that are supported by some competent evidence will not be reversed by a reviewing court as being against the manifest weight of the evidence". Id. at ¶9, 916 N.E. 2d 871.

APPLICATION OF STANDARDS

THE COURT FINDS THAT the Board failed to establish that they had just cause to terminate Appellee's employment due to dishonesty. The hearing officer at the UCRC was presented with conflicting evidence as to the issue of Appellee's honesty. While the District claims that Appellee was dishonest, there is evidence that he simply did not remember all those that he had displayed the photo to.

During the telephone hearing before the Review Commission on August 8, 2012 the following exchange took place with Appellee answering questions posed by the hearing officer:

Q: Okay, alright and he asked you who you had shown the picture to.

A: That's correct.

Q: Did you, were you, did you tell him all the people that you sh, I mean did you identify all the people you showed, you showed it to?

A: That I could remember at the time, yes.

(T., p. 40, l 21-25.)

The Appellee then goes on in the transcript to testify that he may have forgot all of those that he had shown the picture to.

Based on the evidence the hearing officer had ample evidence to conclude that Appellee was honest to both the Assistant Prosecutor and to the Superintendent when describing those who he showed the picture to.

THE COURT FURTHER FINDS THAT the Board failed to establish that the incident justified termination because Appellee was at Step 5 of the disciplinary scale. The previous discipline is not relevant as to the determination as to the reason given by the Board for separation of Appellee from his employment. If the evidence does not demonstrate that the Appellee was at fault in the final incident, a discharge must be found to be without just cause regardless of prior discipline.

This Court does, however, find that the discharge was with just cause. Not because Appellee was dishonest or because he attained the last step on the disciplinary scale.

The reason this court finds that the Appellee was at fault was because of his outrageous and egregious conduct.

The hearing officer found that the Appellee's photographing of the crime scene was "insensitive . . . [I]t showed a lack of respect for shooting victims and their families. The claimant used poor judgment in deciding to take the picture without obtaining permission. Further, he demonstrated a lack of tact by showing it to other individuals."

The foregoing conclusion reached by the hearing officer is not reasonable. To characterize what Appellee did in this case as exercising poor judgment, as insensitive, or not being tactful, is grossly disproportionate.

The Superintendent at the August 8, 2012 Review Commission hearing clearly expressed the policies of the Board. Those included the requirement that staff

employees work with the administration and peers in an open and honest fashion, keeping the welfare of students in mind. The policy includes the requirement that the employee maintain information about students that is confidential.

The employer need not have any particular rule concerning photographing the school cafeteria in order for an employee to be discharged with just cause for photographing the aftermath of the incident that occurred here. As argued by the Appellant in this case there can't conceivably be a code of conduct that details every specific action and rule which is against the interests of the employer.

In this case the Appellee provided just cause for his own discharge because he did ". . . that which, to an ordinary intelligent person, is a justifiable reason for doing or not doing a particular act". *Irvine*, at page 17.

"A discharge is considered for just cause when an employee demonstrates an unreasonable disregard for the employer's best interest." *Kiikka v. Ohio Bur. Of Emp. Serv.*, 21 Ohio App. 3d 168 (8th Dist. 1985). See *Court's Scientific, Inc. v. Ohio Bureau of Unemployment Compensation, et al.*, No. 2012-L-090, 2013-Ohio-1100 11th Dist. COA (Decided 3/25/13).

In this case it doesn't matter that the Appellee did not interfere with the police investigation or that he took the photo without crossing a police barrier. It doesn't matter that the Appellee characterizes the picture as "not gruesome". It doesn't matter that the employer has apparently not suffered any detrimental effect to date by virtue of the employee's conduct, or that the picture was not widely disseminated or reported on by the news media. Appellee here went beyond the line of insensitivity or lack of tact. Appellee's conduct was profoundly troubling. The photograph is inherently gruesome. It shocks the sensibilities of any reasonable person.

THE COURT FINDS THAT the Review Commission's finding that the record does not establish that there was sufficient fault attributable to the Appellee to disqualify him from receiving unemployment compensation benefits is unreasonable. Appellee's conduct was blatantly outrageous. It subjected the employer to possible liability. An ordinary intelligent person would find that the Board was justified in terminating Appellee.

WHEREFORE, the decision of the Unemployment Compensation Review Commission decision is reversed. Costs to Appellee.

IT IS SO ORDERED.

DAVID L. FUHRY, JUDGE

cc: Eric Johnson, Esq.
Ira Mirkin, Esq.
Laurence R. Snyder, Esq.
William Cole, Esq.

sb

TO THE CLERK:
Serve upon all parties, not in default for failure to appear (per Civil Rule 5-(B), notice of this judgment and its date of journalization.