IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

YASKAWA ELECTRIC AMERICA, INC.,	CASE NO.: 2013 CV 02212
Appellant,	JUDGE MARY WISEMAN
-vs-	**DECISION, ORDER AND ENTRY ON ADMINISTRATIVE APPEAL**
STEPHANIE A. FULKERSON, *et al.*,	**FINAL APPEALABLE ORDER**
Appellees.	

This matter is before the Court on Appellant Yaskawa Electric America, Inc.'s *Notice of Appeal* filed on April 10, 2013, challenging a March 12, 2013 decision of the State of Ohio's Unemployment Compensation Review Commission. The record before this Court includes a certified copy of the record of the administrative proceedings ["*Admin. Rec.*"], filed on May 16, 2013; the *Brief of Appellant Yaskawa Electric America, Inc.* ["*Appellant's Brief*"], filed on June 25, 2013; the *Brief of Appellee, Director, Ohio Department of Job and Family Services* ["*Appellee's Brief*"]; Appellee Stephanie Fulkerson's *Notice of Concurrence with Brief of Appellee, Director, Ohio Department of Job and Family Services*, filed on July 25, 2013; and the *Reply Brief of Appellant Yaskawa Electric America, Inc.* ["*Reply*"], filed on August 2, 2013.

For the reasons that follow, the March 12, 2013 decision of the Ohio Unemployment Compensation Review Commission is AFFIRMED.

FACTUAL AND PROCEDURAL BACKGROUND/THE PARTIES' CLAIMS

For over four years, Appellee Stephanie A. Fulkerson was employed by Appellant Yaskawa Electric America, Inc. ["Yaskawa" or "the company"], her last position being that of senior

administrator in the company's Motoman Robotics Division. (*Admin. Rec.*, Transcript of Testimony from 1/11/13 hearing ["Tr."], pp. 7, 25). By letter dated October 22, 2012, however, Yaskawa informed Fulkerson that she was considered to have voluntarily resigned her employment effective that date, based on her unexplained absence for several consecutive workdays and Yaskawa's formal company policy providing that "[e]mployees who are absent for two or more consecutive workdays without notifying their supervisor will be considered to have voluntarily resigned." (*Id.*, p. 8); (see also *Appellant's Brief*, Exh. A, Motoman Employee Handbook, § 5, & Exh. D, 10/22/12 letter).

When Yaskawa thereafter declined to reverse its decision regarding Fulkerson's presumed voluntary resignation, Fulkerson filed an application for unemployment compensation benefits to begin on October 28, 2012. (See *Appellant's Brief*, Exh. F, Unemployment Compensation Review Commission Decision, p. 1). On November 20, 2012, the Ohio Department of Job and Family Service's ["ODJFS"] Office of Unemployment Compensation issued a decision finding that Fulkerson was ineligible for unemployment compensation benefits because she "was discharged with just cause" and also "was physically unable to perform [her] customary job duties." (*Admin. Rec.*, 10/30/12 Determination of Unemployment Compensation Benefits). Fulkerson appealed that decision. The Director's redetermination decision issued on December 6, 2012 affirmed ODJFS's prior decision. (*Admin. Rec.*, 12/6/12 Director's Redetermination); (see also *Appellant's Brief*, Exh. F, Unemployment Compensation Review Commission Decision, p. 1).

Fulkerson challenged that redetermination through an appeal filed on December 10, 2012, resulting in a transfer of jurisdiction to the Unemployment Compensation Review Commission ["UCRC"]. (See *Appellant's Brief*, Exh. F, Unemployment Compensation Review Commission Decision, p. 1). On January 11, 2013, a hearing on Fulkerson's appeal was held via telephone before an UCRC hearing officer. (See *Admin. Rec.*, Tr., pp. 1-37). The witness testimony and other

evidence adduced at that hearing developed the following facts regarding the circumstances underlying Fulkerson's separation from employment.

Deonda Myers, Yaskawa's director of human resources, appeared on behalf of the company. (*Admin. Rec.*, Tr., pp. 3, 7-17). Myers testified that Fulkerson left work for a doctor's appointment on Wednesday, October 17, 2012, then neither called in nor returned to work that day. (*Id.*, p. 7). Again without calling, Fulkerson also failed to appear for work that Thursday and Friday, as well as the following Monday, October 22, 2012. (*Id.*, pp. 7-8). According to Myers, the company has "a policy in our [employee] handbook" providing that if an employee is unable to come to work on a scheduled workday, "[they're] supposed to notify their supervisor." (*Id.*. p. 8). On the afternoon of Friday, October 19, 2012, because "we were concerned" about not hearing from Fulkerson, Fulkerson's supervisor telephoned Fulkerson's home and left a message, but Fulkerson did not return that call. (*Id.*). After also not hearing from Fulkerson on Monday, October 22, 2012, Yaskawa "put together a letter and outlined the reasons for her discharge and sent that out to [Fulkerson] . . . on October 22nd so that she would receive it on October 23rd." (*Id.*; see also *Appellant's Brief*, Exh. D, 10/22/12 letter).

Myers indicated that Fulkerson did call in to Yaskawa at about 10 a.m. on Tuesday, October 23, 2012. (*Admin. Rec.*, Tr., p. 9). Although Fulkerson had not yet received the termination letter, she had learned secondhand of her separation from employment and "wanted to talk to someone about it." (*Id.*). Myers said that Fulkerson's call was routed through one of her co-workers and transferred to Myers. (*Id.*). Fulkerson told Myers that she had been unable to return to work after her October 17 doctor's appointment and was "so upset" that "she could not talk," so she had sent an email to both her supervisor, Sally Fairchild, and Dianne Williams, a Yaskawa human resource representative, explaining that her doctor had ordered Fulkerson off work for two weeks. (*Id.*). Fulkerson also referenced "a doctor's note" that she "forgot" to send on October 17 but had mailed to Williams thereafter. (*Id.*). Told by Myers that the first note "was not detailed enough,"

Fulkerson indicated that "she would send us something more," and also offered to forward Myers a copy of Fulkerson's purported prior email to Fairchild and Williams. (*Id.*).

Later that day, after receiving the email forwarded by Fulkerson, Myers questioned Williams and Fairchild, both of whom denied having received the subject email from Fulkerson in either their inboxes or spam folders. (*Id.*, pp. 9-10; see also p. 17). Myers then asked Jeff Magnuson of Yaskawa's information technology department to investigate whether that email "had come in through our system and somehow been[ ] missed." (*Id.*, p. 10). Myers said that Magnuson "verified that we did not receive that email" from Fulkerson. (*Id.*). During another telephone conversation with Fulkerson later that afternoon, Myers related to her that a check of Yaskawa's email system revealed "no record of the email that she claimed to have sent" to Williams and Fairchild. (*Id.*, p. 11). Myers also read to Fulkerson the content of the sent but not yet delivered termination letter. (*Id.*, pp. 11, 12). When Myers reminded Fulkerson that she had not returned Fairchild's call from Friday, October 19, Fulkerson "interrupted" to point out that Fairchild had asked "that [Fulkerson] call before four," but Fulkerson claimed to have been unable to do so, having been at a doctor's appointment until 6:00 p.m. (*Id.*, pp. 12-13). Citing Fulkerson's failure to call Fairchild back the following Monday and Yaskawa's lack of evidence that Fulkerson sent the claimed email, Myers then advised Fulkerson that the company stood by its termination decision. (*Id.*, p. 13).

Myers nonetheless acknowledged that if Yaskawa "had discovered that [Fulkerson] had sent emails" as Fulkerson claimed "and that we did not receive th[os]e emails," the company "would reconsider our decision." (*Id.*). Myers then equivocated somewhat, however, noting that even in that event, Fulkerson "was still responsible for calling her supervisor[,] which is why we called her on the 19th and gave her the opportunity to give us a call back." (*Id.*). Therefore, Fulkerson "possibly" still would have been discharged for failing to call her supervisor. (*Id.*). Asked about prior instances when Fulkerson allegedly communicated with her supervisor via email about an

absence and that email communication was accepted as sufficient notice, Myers responded that telephone communication still would have been required in this instance, because Fulkerson needed to complete paperwork with respect to disability benefits. (*Id.*, pp. 14-15).

Jeff Magnuson, who identified himself as "an IT architect" with Yaskawa, next appeared on the company's behalf. (*Id.*, pp. 17-19). Magnuson testified that Yaskawa's human resources department asked him to conduct forensic research regarding emails to or from Fulkerson during the relevant time period. (*Id.*, p. 18). Magnuson described how Yaskawa's email system "log[s] every transaction . . . going in and out of the company." (*Id.*). While Magnuson "can't necessarily see the emails in the logs," he "can see the transactions . . . to and from and the times that they occur." (*Id.*). For this assignment, Magnuson checked the company's email logs "from about probably [October] 15th through the 20 somethin[g] . . . looking for any . . . record of emails coming and going [from] both corporate email as well as personal email accounts" belonging to Fulkerson. (*Id.*). For October 17, 2012, Magnuson located an email that came through at 15:12 hours from safulker0652@gmail.com to Yaskawa employee Jennifer Kann's company email account. (*Id.*, pp. 18, 19). He said that was "the only email" from Fulkerson appearing on any of Yaskawa's logs during that time period. (*Id.*). He found no record of emails from Fulkerson arriving to either Fairchild's or Williams' email account. (*Id.*).

Next, Sally Fairchild testified as a senior marketing manager at Yaskawa and Fulkerson's former supervisor. (*Id.*, pp. 20-25). Fairchild stated that she did not receive the October 17, 2012 email from Fulkerson that supposedly notified Fairchild of Fulkerson's need to be on medical leave through at least October 31, 2012. (*Id.*, pp. 20-21); (see also *Admin. R.*, 11/17/12 letter from Fulkerson to ODJFS, attached copy of email from safulker0652@gmail.com addressed to sally.fairchild@motoman.com & dianne.williams@motoman.com, dated 10/17/12 at 4:35 p.m.). She confirmed that her email address as it appeared on the proffered email was her correct email address. (*Admin. Rec.*, Tr., p. 21). Fairchild said that she knew Fulkerson was leaving work for a

doctor's appointment on October 17, but expected her to return to work that same day. (*Id.*). Although Fulkerson also was expected to work on October 18 and 19, Fairchild received no communication from her on either of those days. (*Id.*, p. 22). Fairchild did not try to contact Fulkerson on Thursday, October 18, but did leave a telephone message for her on the afternoon of Friday, October 19. (*Id.*, pp. 22-23). Fairchild confirmed that a recorded message played by Fulkerson and transcribed into the hearing record as follows was the message that Fairchild left for Fulkerson on that date:

> Hi Stephanie this is Sally (inaudible) make sure, you're doing okay and um need to touch base with you if you can give me a call today before four I'd appreciate it. So again, hope you're okay (inaudible) okay bye bye.

(*Id.*, p. 24).

Fairchild also confirmed that Yaskawa decided to discharge Fulkerson when she again failed to report for work on Monday, October 22, 2012. (*Id.*, p. 23). The only communication that Fairchild had with Fulkerson after Fulkerson left work on October 17 was the telephone message Fairchild left for her on October 19, 2012. (*Id.*). She testified that at that time, she "was just calling to check on [Fulkerson] to make sure that . . . she was all right," and there was "no specific reason" that she did not mention Yaskawa's policy re unreported absences. (*Id.*, pp. 24-25).

Fulkerson herself then was questioned by the hearing officer. (*Id.*, pp. 25-32). She testified that on October 17, 2012, the last day that she actually went into work at Yaskawa, she left at 1:30 p.m. with Fairchild's approval, "expect[ing] to be back at 2:30." (*Id.*, p. 26). Instead, her doctor "put me on an immediate medical leave." (*Id.*). According to Fulkerson, she went directly home from the doctor's office, and "that's when I sent the email[ ]" to Fairchild and Williams, copying Kann. (*Id.*). She confirmed that she sent that email to the email addresses shown on the "copy of the original email" that was presented into evidence. (*Id.*); (see also *Admin. R.*, 11/17/12 letter from Fulkerson to ODJFS, attached copy of 10/17/12 email from safulker0652@gmail.com). She indicated that she never had encountered delivery problems with prior emails sent to Fairchild and

Williams from her personal email account. (*Admin. R.*, Tr., p. 26). Fulkerson indicated that no further communication with Yaskawa occurred from that date until she received Fairchild's telephone message on Friday, October 19, 2012. (*Id.*, p. 27).

Fulkerson stated that she did not feel obligated to daily advise her supervisor of her absences once she had sent the email indicating that she would be on leave through October 31. (*Id.*). She did expect Fairchild to follow up, and had included a request for "any appropriate paperwork" in the October 17 email. (*Id.*, p. 27).

Fulkerson stated that she had planned to contact Fairchild on Monday, October 22, 2012, but before she did so, she received emails and text messages from several other company employees, asking why she had left Yaskawa. (*Id.*, p. 28). She said that she now possesses a copy of an email sent that day by Williams "to only a select few employees," advising them that Fulkerson no longer was with the company. (*Id.*). Fulkerson indicated that this so "took me all by surprise" that she "took . . . a little while to . . . absorb this information due to my medical condition," so "I had to wait until the next day" before contacting company officials. (*Id.*).

On Tuesday, October 23, Fulkerson communicated with Myers via email, sending her "another copy of my first doctor's note," and also forwarding "a second doctor's note" that Myers requested. (*Id.*, pp. 28-29). That was her "last communication" with Yaskawa, except for a later telephone call during which Myers told her that Myers had "reviewed all of the documentation that I submitted;" that the company "stood by [its] actions;" and that Fulkerson "was no longer an employee with Yaskawa." (*Id.*, pp. 29, 30). Fulkerson testified that she told Myers "there must have been some miscommunication," explaining "everything I had done." (*Id.*). According to Fulkerson, "I had forwarded the original email[,] I forwarded her all of the doctor's notes[,] I'm not sure what more they could of possibly needed from me." (*Id.*). She claimed to have received "no follow up" from Yaskawa on her earlier email offer to provide any additional information that the company might require. (*Id.*).

Upon further questioning, Fulkerson "guess[ed]" that she "must have [had] three conversations" with Myers on October 23. (*Id.*, p. 30). She reasoned that in the first, Myers said that Fairchild and Williams had not received the 10/17/12 email sent by Fulkerson; in the second, Myers requested a different doctor's note; and in the third, Myers informed Fulkerson that Myers "had reviewed all of the documentation and that [Yaskawa] stood by [its] actions." (*Id.*).

In closing, Fulkerson related that she never had been "warned nor received a write up regarding the use of text [messages] and[/]or emailing as being unacceptable forms of communication for absenteeism" at Yaskawa, despite previously having used those means to communicate an absence over the prior four years. (*Id.*, p. 31). She said that she did not realize that she had violated any company policy, and simply was trying to notify the Yaskawa employees "who would be[ ] directly affected by my absence," so "as to not disrupt the daily normal day-to-day operations of my position." (*Id.*). She claimed to have tried to act in the company's "best interest" by using email in this instance, expecting it to be "received quickly." (*Id.*). Finally, Fulkerson reiterated her belief that she had provided document sufficient to prove "that I did not intentionally violate company policy," and that she also did not "voluntarily resign or terminate my employment" with Yaskawa. (*Id.*, pp. 31-32).

Jennifer Kann testified as a final witness. (*Id.*, pp. 32-35). She began by expressing that she felt "uncomfortable" and "awkward" because Fairchild is "my boss and I mean[,] I've been called to my HR department about this." (*Id.*, pp. 32-33). The hearing officer informed her that he believed both Myers and Fairchild would be listening. (*Id.*, p. 33). In response to questioning, Kann confirmed being a current Yaskawa employee. (*Id.*, p. 34). She recalled receiving an email from Fulkerson on October 17, 2012, but said that she did not converse with anyone else at the company about that email in the days immediately following. (*Id.*). She indicated that Fulkerson was just "letting me know that she would not be back into work for a few weeks." (*Id.*). Only "a week or so after that" did Kann learn that Fulkerson was being discharged by Yaskawa. (*Id.*).

Kann stated that she once or twice had communicated to Fairchild by email about a work absence due to illness, "and there was never an issue with it." (*Id.*, pp. 34-35).

In his decision released on January 15, 2013, the hearing officer held as follows:

> The Director's Redetermination, issued December 06, 2012, is reversed with respect to claimant's separation from Yaskawa Electric America Inc.
>
> Claimant was discharged by Yaskawa Electric America Inc. without just cause in connection with work.
>
> Claimant's Application for Determination of Benefit Rights is no longer disallowed based upon a disqualifying separation from employment. The claimant remains ineligible for benefits for the period October 21, 2012 through October 31, 2012 as she was not fully able to work. This case is remanded to the Ohio Department of Job and Family Services to determine claimant's monetary entitlement and any charges to the base period employers.

(*Appellant's Brief*, Exh. F, pp. 4-5). He also set forth the following "Reasoning" underlying his holding to that effect:

> The claimant was discharged for missing work and not calling in her intended absences. The claimant has credibly testified that she attempted to send an e-mail to the employer stating she would be off work for two weeks for medical reasons. A copy of the e-mail was received by a coworker of the claimant. On claimant's second day of absence, her supervisor left a voicemail message requesting an update on her condition. Nothing was said in the voice mail indicating the employer was contemplating discharging claimant for failing to call in her intended absences. The claimant had received no prior warnings and her job was not in jeopardy. The evidence before the Hearing Officer fails to establish that the claimant was guilty of sufficient fault or misconduct to warrant disqualification for unemployment benefits. The claimant was discharged without just
> cause in connection with work.
>
> The claimant was not able to work until October 31, 2012 when she was released to return to work by her physician.

(*Id.*, p. 5).

By letter dated February 1, 2013, Yaskawa notified UCRC that it wished to appeal the hearing officer's decision. (*Admin. Rec.*, 2/1/13 letter from Taft, Stettinius & Hollister LLP). On March 12, 2013, UCRC issued its decision on Yaskawa's request for review, stating simply that

"[t]he Commission concludes that the Hearing Officer's decision should be affirmed." (*Admin. Rec.*, 3/13/13 "Decision on Request for Review Affirming Hearing Officer").

It is from that final ODJFS decision that Yaskawa now appeals to this Court.

LAW AND ANALYSIS

Standard of Review on Appeals from Unemployment Compensation Review Commission

Pursuant to Ohio R.C. § 4141.282(A), any interested party may appeal a final decision of the UCRC to an Ohio court of common pleas. In reviewing such decisions,

> The court shall 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.

R.C. § 4141.282(H). Because a reviewing court thus "may reverse the [commission's] determination only if it is unlawful, unreasonable, or against the manifest weight of the evidence,' *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.*, 73 Ohio St. 3d 694, 697, 1995-Ohio-206, 653 N.E.2d 1207, such courts may not make factual findings or determine witness credibility. *Irvine v. State Unemployment Comp. Bd. of Rev.*, 19 Ohio St. 3d 15, 18, 482 N.E.2d 587 (1985); see also *Tzangas, supra* at 696 (factual questions solely within Commission's province). Accordingly, a reviewing court may not reverse the Commission's decision simply because "reasonable minds might reach different conclusions." *Lang v. Dir., Ohio Dep't of Job & Family Servs.*, 134 Ohio St. 3d 296, 2012-Ohio-5366, ¶11 (quoting *Irvine*, 19 Ohio St. 3d at 18). Where there is "significant evidence to support both parties' arguments," the court may not disrupt a hearing officer's conclusions regarding witness credibility. See *David A. Bennett, D.D.S. v. Director, Ohio Dep't of Job & Family Servs.*, 10th Dist. No. 11AP-1029, 2012-Ohio-2327, ¶¶18-19.

Eligibility for Unemployment Compensation Benefits

According to the statute that governs eligibility and qualification for unemployment compensation benefits, with limited exceptions, no person who "has been discharged for just cause

in connection with the individual's work" may be paid such benefits. R.C. § 4141.29(D)(2)(a). The Ohio Supreme Court has defined "just cause" as "that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act." *Williams v. Ohio Dep't of Job & Family Servs.*, 129 Ohio St. 3d 332, 2011-Ohio-2897, ¶22, 951 N.E.2d 1031.

"'[W]hat constitutes just cause must be analyzed in conjunction with the legislative purpose underlying the Unemployment Compensation Act,'" *id.* (quoting *Irvine*, 19 Ohio St. 3d at 17), which is "'to provide financial assistance to an individual who had worked, was able and willing to work, but was temporarily without employment through no fault or agreement of his own.'" *Id.* at ¶26 (quoting *Salzl v. Gibson Greeting Cards, Inc.*, 61 Ohio St. 2d 35, 39, 399 N.E.2d 76 (1980)). However, "'[t]he Act does not exist to protect employees from themselves, but to protect them from economic forces over which they have no control.'" *Id.* at ¶23 (quoting *Tzangas*, 73 Ohio St. 3d at 699). "Fault on an employee's part is an essential component of a just-cause termination," and includes "willful or heedless disregard of a duty or a violation of an employer's instructions." *Id.*

Violation of his or her employer's attendance policy may constitute just cause for an employee's termination. See *Woodworth v. Dir., Ohio Dep't of Job & Family Servs.*, 8th Dist. No. 91601, 2009-Ohio-734; see also *Peterson v. Ohio Dep't of Job & Family Servs.*, 4th Dist. No. 03CA2738, 2004-Ohio-2030, ¶33. As discerned by some appellate courts, however, "'the critical issue is not whether the employee has technically violated some company rule, but whether the employee by his actions [or inactions] demonstrated an unreasonable disregard for his employer's interests.'" *Williams v. Ohio Dep't of Job & Family Servs.*, 10th Dist. No. 13AP-312, 2013-Ohio-4159, ¶7 (brackets in original) (quoting *Gregg v. SBC Ameritech*, 10th Dist. No. 03AP-429, 2004-Ohio-1061, ¶39; *Piazza v. Ohio Bur. of Emp. Servs.*, 72 Ohio App. 3d 353, 357, 594 N.E.2d 695 (8th Dist. 1991)); see also *LaChappelle v. Dir., Ohio Dep't of Job & Family Servs.*, 6th Dist. No. L-08-1446, 2009-Ohio-3399, ¶21 ("Whether the employee violated a company rule is not determinative for unemployment eligibility."). As such, "'the violation of a work rule which may well justify the

discharge of an employee . . . does not necessarily amount to misconduct sufficient to deny unemployment compensation benefits.'" *LaChappelle, supra* at ¶21 (quoting *Adams v. Harding Mach. Co.*, 56 Ohio App. 3d 150, 155, 565 N.E.2d 858 (3rd Dist. 1989)).

Application of Relevant Law to Fulkerson's Claim

In contesting UCRC's decision to award benefits, Yaskawa maintains that Fulkerson was terminated for just cause "because she violated Yaskawa's known and reasonable absenteeism policy." (*Appellant's Brief*, p. 9 and Exhs. A & B). Yaskawa argues that UCRC's decision should be overturned "for three independent reasons." (*Id.*, pp. 12-13). The Court therefore will address separately each such reason articulated by Yaskawa.

a. UCRC "improperly allocated the burden of proof"

Yaskawa first suggests that UCRC erroneously delegated to Yaskawa the burden of establishing "'sufficient fault or misconduct to warrant disqualification for unemployment benefits.'" (*Appellant's Brief*, p. 13); (quoting *id.*, Exh. F, p. 4). Urging that the unemployment compensation statute "provides that no burden shall be imposed upon the employer to prove entitlement to unemployment compensation benefits," Yaskawa contends that UCRC's final decision must be overturned for that reason. (*Id.*) (citing R.C. § 4141.281(C)(2)).

As the ODJFS Director aptly counters, however, the burden of proof also does not lie with Fulkerson. (*Appellee's Brief*, p. 12). Rather, the statutory section cited by Yaskawa actually states as follows:

> No person shall impose upon the claimant or the employer any burden of proof as is required in a court of law.

(*Id.*) (emphasis added) (quoting R.C. § 4141.281(C)(2)); see also *Shepherd Color Co. v. Dir., Ohio Dep't of Job & Family Servs.*, 12th Dist. No. CA2012-11-244, 2013-Ohio-2393, ¶21 (employment compensation proceedings place "no burden of proof on either the claimant or the employer").

Yaskawa identifies nothing else within the hearing officer's decision that would suggest he improperly imposed on Yaskawa some burden of proof as to Fulkerson's unemployment

compensation benefits eligibility, notwithstanding his isolated reference to a lack of evidence of "sufficient fault or misconduct." (See *Appellant's Brief*, p. 13); (see also *id.*, Exh. F, p. 4). This Court does not construe the hearing officer's choice of that terminology to amount to an improper allocation of the burden of proof. This Court's review of that decision likewise discloses nothing else to suggest that the hearing officer so erred. (See *id.*, Exh. F). Yaskawa's challenge to UCRC's decision based on the supposedly improper allocation of the burden of proof therefore is not well taken.

b. UCRC "fundamentally misapplied the standard of just cause"

Appellant Yaskawa next contests UCRC's analysis of Fulkerson's entitlement to benefits due to what Yaskawa suggests was an improper application of the "just cause" standard. (*Appellant's Brief*, pp. 13-15). Urging that Fulkerson was discharged for violating "a fair and fairly applied policy" providing that employees who failed to report consecutive absences would be "considered to have voluntarily resigned" (*id.*, p. 14); (see also *id.*, Exh. A, §5), Yaskawa maintains that Fulkerson's termination was just because she was aware of that policy; the policy is readily understandable; a rational basis exists for that policy; and Fulkerson "has not presented any evidence to suggest that Yaskawa's policy was not fairly applied." (*Id.*) (citing *Shaffer v. Am. Sickle Cell Anemia Ass'n*, 8th Dist. No. 50127, 1986 Ohio App. LEXIS 7116 (Jun. 12, 1986)).

In responding to Yaskawa's contentions as to this assignment of error, Appellee Commissioner correctly observes that the fairness of Yaskawa's absenteeism policy never has been in dispute. (*Appellee's Brief*, pp. 12-13). More significant for purposes of this Court's review, though, is Yaskawa's failure to convincingly demonstrate why the analysis of this case should turn on the "fair and fairly applied policy" test that Yaskawa advances. (See *Appellant's Brief*, pp. 13-15).

Although Appellant accurately identifies *Shaffer, supra*, as the source of the cited language, Appellant gives no indication that the approach applied in that unpublished 8th District opinion has

been adopted by the Second District Court of Appeals for this appellate district. (See *Appellant's Brief*, pp. 13-15). Indeed, although boldly asserting that "Ohio courts have unequivocally concluded that employees are not entitled to unemployment benefits" when terminated pursuant to "a fair, and fairly applied, company policy," Yaskawa cites to no other Ohio appellate court that has so held. (See *id.*).

Conversely, this Court's own research reveals that appellate decisions from multiple appellate districts in this state – including a more recent decision out of the very same appellate court that spawned *Shaffer, supra*, the sole authority cited by Yaskawa – have concluded that "'the critical issue is not whether the employee has technically violated some company rule, but whether the employee by his actions [or inactions] demonstrated an unreasonable disregard for his employer's interests.'" See *Williams*, 2013-Ohio-4159, ¶7 (10th Dist.); *Gregg*, 2004-Ohio-1061, ¶39 (10th Dist.); *Piazza*, 72 Ohio App. 3d at 357 (8th Dist.); *LaChappelle*, 2009-Ohio-3399, ¶21 (6th Dist.).[1] In light of such precedent, this Court cannot say that UCRC acted unreasonably by implicitly finding that "the violation of a work rule which may well justify the discharge of an employee . . . does not necessarily amount to misconduct sufficient to deny unemployment compensation benefits." See *LaChappelle, supra* at ¶21; *Adams*, 56 Ohio App. 3d at 155 (3rd Dist.); (compare *Appellant's Brief*, Exh. F, p. 4) (hearing officer's reference to "'sufficient . . . misconduct to warrant disqualification for unemployment benefits'"). The hearing officer appears to have applied appropriately the standard articulated in the aforecited cases.

Assuming *arguendo* that Yaskawa's absenteeism policy was both fair and fairly applied, the hearing officer's decision nonetheless was supported by lawful, reasonable, and significant evidence that Fulkerson did not act with "unreasonable disregard" for Yaskawa's interests in arguably violating the letter of that policy. See *Williams*, 2013-Ohio-4159, ¶7, *etc.* The following analysis of

[1] Indeed, the *LaChappelle* decision has been cited with favor by the appellate court whose decisions are binding on this Court. See *Bates v. Airborne Express, Inc.*, 186 Ohio App. 3d 506, 2010-Ohio-741, ¶14, 928 N.E.2d 1168 (2nd Dist.).

the hearing officer's factual conclusions will illuminate the reasons for this Court's conclusion to that effect.

c. UCRC "made factual conclusions that are against the manifest weight of the evidence"

Finally, Yaskawa disputes as against the manifest weight of the evidence the hearing officer's conclusion that Fulkerson "credibly testified" to having attempted to timely communicate the reason for her absence to the company via email. (*Appellant's Brief*, pp. 15-17); (quoting *id.*, Exh. F, p. 4). Yaskawa first notes that both Fairchild and Williams denied receiving any such email from Fulkerson, even in their spam folders. (*Id.*, p. 15). Additionally, Yaskawa points to evidence that a forensic search of Yaskawa's email system logs yielded no record that any such email had been sent to those individuals' email accounts (*id.*), as well as evidence that Fulkerson typically communicated with Fairchild by way of text message, not email. (*Id.*, p. 16 & Exh. C).[2] Characterizing Fulkerson's claim as "preposterous" in light of such evidence, and urging that Fulkerson is "the only person with a motiv[e] to lie regarding the existence of" such an email, Yaskawa contends that UCRC's conclusion regarding that supposed email is not sustainable. (*Id.*, pp. 15-16); (see also *Reply*, p. 7).

Some evidence tending to corroborate the existence of such an email, however, is all but ignored in Yaskawa's initial brief. (See *Appellant's Brief*, pp. 15-16). Just a few days later, Fulkerson forwarded to Myers a copy of the email claimed but disputed to have been sent on October 17, a copy of which also is contained in the administrative record. (See *Admin. Rec.*, 11/17/12 letter from Fulkerson to ODJFS, attached copy of 10/17/12 email from safulker0652@gmail.com). That copy displays an email addressed to Fairchild's and Williams' company email accounts, bearing the date of October 17, 2012, at 4:35 p.m., and containing the following text:

> Sally, I hate to do this via email, but I really don't feel like talking right now. My doctor has decided that I cannot return to work for

[2] Earlier, Yaskawa also notes the absence of any response to Fulkerson's alleged email, despite Fairchild's prior history of promptly replying to messages from Fulkerson. (*Appellant's Brief*, p. 11 and Exh. C).

> approximately 2 weeks – starting today. The current paperwork has me returning on 10/31/12, which is subject to change. I'm not sure how to proceed esp. with everything that I need to do for the upcoming shows. Feel free to contact me if there are any questions or anything I can do.
>
> Dianne, please contact me if I need to submit any paperwork.
>
> Stephanie

(*Id.*). Aside from testimony described *supra*, Yaskawa presented no evidence to the hearing officer indicating that the copy produced by Fulkerson was not authentic. Obviously, despite evidence indicating that no such email ever arrived to the intended recipients, the hearing officer accepted as credible Fulkerson's testimony that the subject email nevertheless was sent. (See *Appellant's Brief*, Exh. F, p. 4).

In replying to the Director's opposing memorandum, Yaskawa now poses additional arguments as to why it maintains that the hearing officer's finding regarding the disputed email should be considered erroneous. First, Yaskawa argues that although Fulkerson produced copies of that purported email "in no less than **four different forms**," none listed Kann as a blind-copy recipient. (*Reply*, p. 5 & Exhs. G1-G4) (emphasis in original). Noting that other emails from Fulkerson do show that Kann was blind copied (see *id.*, pp. 5-6 and Exhs. H1 & H2), Yaskawa implies that the blind copy omission from the 10/17/12 email demonstrates that such email was fabricated. (See *id.*).

Yaskawa never raised this particular argument in its original brief filed with this Court, however (see *Appellant's Brief*), nor in its written appeal to the Commissioner from the hearing officer's decision. (See *Admin. Rec.*, 2/1/13 letter from Taft, Stettinius & Hollister LLP). Yaskawa also has not drawn this Court's attention to anything suggesting that such argument was presented to ODJFS in any other fashion.

Per the applicable rules of appellate procedure, the purpose of reply briefs is to permit appellants to rebut arguments raised in appellees' briefs. See App.R. 16(C). As such, an appealing

party "is not permitted to raise new arguments in [its] reply brief." See *Hoskins v. Simones*, 173 Ohio App. 3d 186, 2007-Ohio-4084, ¶38, 877 N.E.2d 1008 (2nd Dist.). That admonition from the Second District Court of Appeals in *Hoskins* discourages this Court from considering Appellant's newly-introduced argument that relies on various versions of various emails sent by Fulkerson. See *id.*; (see *Reply*, pp. 5-6 and Exhs. G1-G4, H1 & H2). Finding Yaskawa in effect to have waived that argument is not unreasonable here, given that Yaskawa's failure to raise the argument sooner not only deprived Fulkerson of any meaningful opportunity to respond, but also effectively denied UCRC's hearing officer a chance to incorporate that argument into his decision. See also *BSI Sec. Servs. v. Ohio Dep't of Pub. Safety*, 2nd Dist. No. 24050, 2011-Ohio-4866, ¶13 (party generally waives right to appeal issue "that could have been, but was not, raised in earlier proceedings," including administrative proceedings).

The same result follows as to the contention in Yaskawa's reply that Fulkerson's claim to have blind copied the 10/17/12 email to Kann's personal rather than company email account is a cunning ploy to sidestep Yaskawa's ability to track emails sent to its employees' email accounts. (See *Reply*, p. 5). Again, having apparently failed to present that particular argument either before ODJFS or in its original appellate brief to this Court, Yaskawa cannot now introduce that argument by way of reply. See App.R. 16(C); *Hoskins*, 2007-Ohio-4084, ¶38; *BSI Sec. Servs.*, 2011-Ohio-4866, ¶13.

This Court does agree, however, with Yaskawa's suggestion that ODJFS mistakenly contends that the email from Fulkerson to Kann found among Yaskawa's internally logged emails for October 17, 2012 corroborates the existence of the email that Fulkerson claims to have sent to Fairchild and Williams on that date, with a blind copy to Kann. (*Reply*, p. 5); (see *Appellee's Brief*, p. 8). The copy of the contested email proffered by Fulkerson indicates that the email she claims to have sent to Fairchild and Williams was transmitted at **4:35 p.m.** on that date. (See *Admin. Rec.*, 11/17/12 letter from Fulkerson to ODJFS, attached copy of 10/17/12 email from

safulker0652@gmail.com). Conversely, Yaskawa presented evidence that the email from Fulkerson to Kann discovered in Yaskawa's email system log was sent at 15:12 (*i.e.*, 3:12 p.m.), more than an hour before Fulkerson claims to have sent the disputed email to Fairchild and Williams. (*Admin. Rec.*, Tr., pp. 18, 19). Additionally, Fulkerson's own testimony suggests that she blind copied Kann at Kann's personal rather than company email address (*id.*, Tr., p. 19), meaning that no record of that email would appear in Yaskawa's internal email account logs.

Nevertheless, the Court does not agree that ODJFS' mistake as to that point requires that UCRC's final decision be overturned. Significantly, the hearing officer's conclusion as to the disputed email was based primarily on what he deemed to be Fulkerson's "credibl[e]" testimony. (See *Appellant's Brief*, Exh. F, p. 4). This Court's limited role on review of an administrative decision does not allow the Court to reject the hearing officer's credibility determinations. See *Irvine*, 19 Ohio St. 3d at 18; *Tzangas*, 73 Ohio St. 3d at 696. Absent clear evidence that the hearing officer's decision depended on a mistaken impression about the significance of the logged email to Kann, ODJFS's misplaced argument does not provide this Court with a valid basis for overturning UCRC's final decision. The hearing officer's conclusion is supported not only by Fulkerson's testimony but also by other cognizable evidence in the form of a copy of the disputed email, and this Court is not persuaded by Yaskawa's insistence that UCRC's decision regarding that email is against the manifest weight of the evidence.

Although Yaskawa now also argues that the proffered email copy must have been fabricated because Fulkerson "would have received a delivery status notification" of an undeliverable email, but has failed to produce any such notification (*Reply*, pp. 3-4), the Court notes that Yaskawa likewise has produced no evidence (as opposed to argument) on that point. The testimony of Yaskawa's IT witness indicates that no record of such an email was found, but not that a lie by Fulkerson would be the only possible explanation for that absence. (See *Admin. Rec.*, Tr., pp. 17-

19). The record evidence thus falls short of proving Yaskawa's argument that the email was fabricated.

The outcome also is unchanged by Yaskawa's assertion that Fulkerson's failure to timely respond to Fairchild's voice message left on Friday, October 19 constituted just cause for the termination of Fulkerson's employment, irrespective of any email. (*Reply*, pp. 7-11). The record does not support Yaskawa's contention that Fairchild therein "instruct[ed]" Fulkerson "to return [Fairchild's] call the same day" (*id.*, p. 7), or that Fairchild's message amounted to "a direct order" that Fulkerson call the same day. (*Id.*, p. 9). Instead, the hearing transcript of that re-played message reveals that Fairchild conveyed only that she'd "appreciate it" if Fulkerson could "give [Fairchild] a call today before four," with this qualifier: "if you can." (*Admin. Rec.*, Tr., p. 24). Myer's testimony reflects that Fulkerson told Myers she had been unable to return Fairchild's call before 4 p.m. that day because she was at a doctor's appointment until 6 p.m. (*Id.*, pp. 12-13). That evidence is undisputed. Moreover, this Court concurs in ODJFS's position that Fairchild's message as re-played at the hearing did not alert Fulkerson to any urgency to return Fairchild's call. (See *Appellee's Brief*, p. 10) (suggesting that Fairchild's message was "too casual" to provide notice that Fulkerson's job was in jeopardy); (see also *Admin. Rec.*, Tr., p. 24). Indeed, even Fairchild characterized the purpose of her call as being chiefly to "check" that Fulkerson "was all right." (*Id.*, pp. 24-25). The Court concludes that Fulkerson had no objective reason to infer from Fairchild's message that her employment was endangered if she delayed in returning Fairchild's call.

Finally, this Court also rejects Yaskawa's assertion that Fulkerson's failure to return Fairchild's call even on the following Monday, October 22, 2012, provides a sound legal basis for reversing UCRC's decision. (See *Reply*, pp. 10-11). Fulkerson testified that she had intended to call Fairchild on that date, but was so shaken by co-workers' messages concerning news of her apparent separation from employment that she "had to wait until the next day" in order to process

that information before calling in to Yaskawa. (*Admin Rec.*, Tr., p. 28). She attributed the extra time needed "to absorb this information" to her "medical condition." (*Id.*).

Although the doctor's notes produced by Fulkerson indicate that her physician ordered her on a medical leave of absence for undisclosed reasons (*Admin Rec.*, 10/17/12 Rx note from Gary Allen Balster, M.D. and 10/23/12 letter to Yaskawa America from Gary A. Balster, M.D. Inc.), elsewhere the record indicates that the conditions from which Fulkerson suffers include panic disorder with agoraphobia, mixed anxiety disorder, and depressive disorder. (See *Admin. Rec.*, Application Summary). Whether because of her underlying medical condition or because he agreed that Fulkerson was under no obligation to continue to report her absences once she sent the explanatory email (see *Admin. R.*, Tr., p. 26) that he believed she had sent to Fairchild and Williams, the hearing officer apparently concluded that Fulkerson's failure to call in to Yaskawa on Monday, October 22, 2012 did not constitute just cause for her termination. (See *Appellant's Brief*, Exh. F). This Court has no basis for disrupting that conclusion, which has evidentiary support.

Based on the record evidence as a whole, this Court cannot say that UCRC's decision is against the manifest weight of the evidence in any respect. See *Tzangas*, 73 Ohio St. 3d at 697. The possibility that this Court might have resolved certain factual questions differently is not a valid basis for reversing UCRC's decision, see *Lang*, 2012-Ohio-5366, ¶11, given the hearing officer's broad discretion to make findings of fact and determine witness credibility. See *Irvine*, 19 Ohio St. 3d at 18; *Tzangas, supra* at 696; *David A. Bennett, D.D.S.*, 2012-Ohio-2327, ¶¶18-19. As a result, Appellant Yaskawa's appeal cannot succeed.

CONCLUSION

For the foregoing reasons, the State of Ohio's Unemployment Compensation Review Commission's March 12, 2013 "Decision on Request for Review[/]Affirming Hearing Officer," affirming Appellee Stephanie A. Fulkerson's eligibility for unemployment compensation benefits after October 31, 2012 (see *Appellant's Brief*, Exh. F), hereby is AFFIRMED.

Accordingly, this matter hereby is REMANDED to the Ohio Department of Job and Family Services for further action consistent with this decision.

THIS IS A FINAL APPEALABLE ORDER UNDER CIV.R. 58. PURSUANT TO APP.R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED:

JUDGE MARY WISEMAN

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41 N. Perry Street, Dayton, Ohio 45422

Type: Decision Confirming Admin. Agency Decision

Case Number: 2013 CV 02212

Case Title: YASKAWA ELECTRIC AMERICA INC vs STEPHANIE A FULKERSON

So Ordered

Mary Wiseman

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CASE NUMBER: 2013 CV 02212 Docket ID: 18566554
GREGORY A BRUSH
CLERK OF COURTS MONTGOMERY COUNTY OHIO

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

YASKAWA ELECTRIC AMERICA INC	**CASE NO.** 2013 CV 02212
VS.	**JUDGE**
STEPHANIE A FULKERSON et al	MARY WISEMAN

You are hereby notified that a Decision Confirming Admin. Agency Decision has been filed with the Clerk of Common Pleas Court on 10/21/2013

Pursuant to Ohio Civil Rule 58 (B) you are notified that a judgment has been filed that may be a final appealable order.

Under Ohio Appellate Rule 4(A) you shall file your notice of appeal within either:
- 30 days from the entry of judgment or order being appealed OR
- 30 days of service of the notice of judgment and its entry if service was not made within the 3 day period in Ohio Civil Rule 58 (B).

If you intend to appeal the judgment of the trial court, you must file your notice of appeal with the clerk of the trial court. Please refer to 2nd District Court of Appeals Local Appellate Rule 2 concerning the $75 deposit. Please refer to Ohio Appellate Rule 3 (D) for a detailed description of the content of the notice of appeal.

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