IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

DERRICK BALLARD,	CASE NO. 2013 CV 05015
Plaintiff/Appellant,	JUDGE MARY KATHERINE HUFFMAN
-vs-	DECISION, ORDER AND ENTRY AFFIRMING DECISION OF THE UNEMPLOYMENT COMPENSATION REVIEW BOARD
OHIO DEPARTMENT OF JOB AND FAMILY SERVICES, et. al,	
Defendants/Appellees.	

This matter is before the court as a result of an appeal taken by Appellant, Derrick Ballard, from a determination of the Ohio Unemployment Compensation Review Commission, denying him unemployment compensation benefits as a result of his employment with Behr Dayton Thermal Products LLC (hereinafter "Behr"). Appellant filed his brief herein on November 7, 2013, 2013. Appellee, Director, Ohio Department of Job & Family Services filed its brief on November 8, 2013. Appellant filed his Reply Brief on December 9, 2013. This matter is now ripe for decision.

I. PROCEDURAL HISTORY AND FACTS

Appellant Derrick Ballard was employed at Behr Dayton Thermal Products, LLC from August 8, 1999 until he was terminated from his employment on May 17, 2013. At that time he was issued an indefinite suspension notice. He was then subject to a disciplinary layoff beginning May 10, 2013. On May 17, 2013 his suspension was converted to a discharge for "violation of

Standards of Conduct #9, Production of excessive scrap or inferior work and Standards of Conduct #5, Failure to exert normal effort on the job, wasting time, loitering, loafing or sleeping on the job."

His employer, in its submission to the Ohio Department of Job and Family Services on May 15, 2013, indicated:

> Employee failed to follow work procedures and produced an excessive number of bad parts. As parts are produced, the employee should have put a stamp on the parts that identifies the operator. Some of the parts were not stamped, some were stamped in the wrong spot. He produced 36 bad parts that had to be scrapped.
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> Claimant had signed a "Last Chance Letter" in March of 2012. The letter gave him one last opportunity to maintain his employment. By violating standards of conduct #9 and #5, claimant failed to adhere to the rules that caused his loss of employment.

Ballard was notified on May 20, 2013 that his suspension was converted to a discharge effective May 17, 2013. The "Last Chance Letter" signed by Ballard, Ellyn Chaney as Manager of Human Resources & Labor Relations for Behr, and Charles Thomas, Chief Steward, IUE-CWA Local No. 775 on March 16, 2012 states:

> Effective Saturday March 3, 2012, Mr. Ballard was placed on a Disciplinary Layoff (Suspension) for violating Standard of Conduct #3: Unexcused absence or tardiness from plant or workstation, #4: Leaving your workstation, office or plant during working hours without permission or failing to return to work after lunch or relief without permission, #5Failure to exert normal effort on the job, wasting time, loitering, loafing or sleeping on the job, #7: Leading, instigating, supporting or taking part in any work stoppage in violations of the collective bargaining agreement, or in any slowdown or other improper interference with or restriction of operations, and #9: Production of inferior work.
>
> During a discussion between representatives of the IUE-CWA Local 775 and Management, an agreement was reached to reinstate Mr. Ballard, on a non-precedent setting, "Last Chance Letter," which will deem this suspension time served as disciplinary layoff.
>
> Mr. Ballard will be reinstated with full seniority with the understanding that any time off work will be considered without pay or other benefits. It is al understood that Mr. Ballard is required to pass the "Drug Screen" administered by Behr Dayton Thermal Products on March 16, 2012 prior to being reinstated to the active roll contingent with a "negative" drug screen. It is with this right, with an unsuccessful (positive) test, Mr. Ballard's seniority will be terminated with this acknowledgment. With a successful drug screen, Mr. Ballard will be reinstated to a Production Operator position, and will not be eligible to apply for any jobsetter position upgrade for at least (12) twelve months upon reinstatement.

> This agreement resolves all claims and grievances against the Corporation concerning Mr. Ballard and is without precedence. By accepting this reinstatement opportunity, Mr. Ballard understands he must adhere to the rules and regulations of Behr Dayton Thermal Products.

Ballard's application for unemployment compensation benefits was denied on June 4, 2013. The Notice provided to Ballard from the Ohio Department of Job and Family Services, Office of Unemployment Compensation, determined that Ballard was

> Discharged by Behr Dayton Thermal Products LLC on 5/17/2013. The employer discharged the claimant for violating a company rule. Evidence supports negligence or willful disregard of the rule on the part of the claimant. Evidence also allows that violating the rule was in connection with the work, did materially and substantially affect the employer's interest, and that the rule was reasonable, known and uniformly enforced….After a review of the facts, this agency finds that the claimant was discharged with just cause under Section 4141.29(D)(2)(a), Ohio Revised Code.

Ballard appealed the decision of the Ohio Department of Job and Family Services. On June 17, 2013 a Redetermination was issued disallowing the application and finding that Ballard was discharged for just cause in connection with work. On June 18, 2013 Ballard filed an appeal from the Redetermination. The matter was then transferred to the Unemployment Compensation Review Commission. A telephone hearing was held before Hearing Officer Kristina Mitchell on July 16, 2013 and continued on July 31, 2013.

At the telephone hearing on July 16, 2013, Patty Murray, the Benefits Administrator for Behr, testified that the defective parts were produced on March 26, 2013, but the defect was not discovered until May 9, 2013 when they were removed from a storage area for distribution to a customer. (Tr., p. 9). Ballard was placed on unpaid suspension on May 10, 2013 while the issue was being investigated. (Tr., p. 11). He was separated from his employment on May 17, 2013. (Tr., p. 12). He had gone through Behr's disciplinary procedure and was on a Last Chance Agreement at the time of his termination. He had been subjected to prior discipline. Ballard contended in his testimony that he was terminated to cover up the fact that his supervisor had failed to include him on an overtime list and then scheduled him for overtime. (Tr. II, p. 15, 17). Ballard

admitted that his supervisor's error regarding overtime was corrected and "everybody was happy with that resolution." (Tr. II, p. 18). Ballard was warned in the Last Chance Agreement executed on March 16, 2012 that he could be terminated for a variety of reasons, including production of inferior work. (Tr., p. 12). Ballard complained at the telephone hearing that he was only shown one inferior part and not all thirty six of the parts. (Tr., II, p. 12). He admitted being on a Last Change Agreement but testified that it was the first discipline he ever received. (Tr. II, p. 11). He had notice of his employer's policies regarding discipline and the meaning of the Last Chance Agreement prior to the incident causing his termination. (Tr. II, p. 16).

Terry Schroeder, Ballard's direct supervisor at Behr also testified at the telephone hearing. The production of the thirty six scrap pieces by Ballard occurred on March 26, 2013, but it was discovered in May when the parts were pulled from bins for shipment to a customer. Ballard was the only operator of the machine on March 26, 2013 and his unique identifying stamp was on the parts. (Tr., p. 23). Failure to place the stamp on the part in the appropriate place on a part is grounds for disciplinary action. (Tr., p. 29). Since the time of the Last Chance Agreement, Schroeder had given Ballard several verbal warnings about his work performance, including being on his telephone at his workstation, one for short shots, and another for sitting down on the job. (Tr. II, p. 10).

As a result of that hearing, the Hearing Officer made the following findings of fact:

> Claimant was employed by Behr Dayton Thermal Products LLC from August 9, 1999 until May 17, 2013. The employer has a progressive discipline policy. However, any Last Chance Agreement are outside of the progressive discipline process. Claimant had notice of the policy.
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> On March 16, 2012, claimant entered into an agreement with the employer memorialized in a Last Chance Letter. The letter provided that on March 3, 2012, claimant was placed on a Disciplinary Layoff for violating various standards of conduct, including production of inferior work. The Letter reinstated claimant to his production position with claimant's understanding that he must adhere to the rules and regulations of the employer. The rules and regulations include the employer's prohibition of producing inferior work.

> Between March 16, 2012 and May 9, 2013, claimant had an incident of a minor production error and an incident of violating the employer's cell phone use policy. Claimant's Production Supervisor informally verbally warned claimant about these infractions at the time they occurred.
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> On March 26, 2013, claimant was working on a machine that had a visual aide document at the work station. Claimant had prior experience on this machine. The visual aide information indicated the production requirements, including the specific area on the part being produced that required the production worker's identification stamp on it when the part was completed. This process allows the employer and the customer to trace a part back to the production worker and also for that information to be easily viewed on a completed product that included the part as a component. Claimant was also required to inspect the parts as produced to correct for any defects during production.
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> On May 9, when the parts claimant produced on March 16 were pulled to fill a customer order, it was discovered that thirty six parts had significant defects and had to be scrapped. It was also noted that claimant repeatedly put his stamp on the wrong area of the part. The Production Supervisor confirmed by reviewing the production reports for March 26 that claimant was the one operating the machine that day and produced the parts that day.
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> On May 10, claimant was presented with the findings and shown one of the defective parts. Claimant was suspended pending a decision on his employment status.
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> On May 17, 2013, claimant was discharged for the production error after receiving the Last Chance Letter…
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> Claimant argues that termination was too harsh since he had not received any discipline for production errors for over a year before he was terminated. Claimant also argues that he was not presented with the full evidence of the bad parts since he was only shown one. However, there is no time frame or expiration date on the Last Chance Letter claimant entered into on March 16, 2012. Further, the employer provided credible detailed testimony and some photographic evidence of the part defects and the record keeping system that tied claimant to the defective parts.
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> Based on substantial, reliable, and probative evidence, the Hearing Officer finds that claimant violated the terms of his Last Chance Letter by producing inferior work. Such actions demonstrated an unreasonable disregard for the employer's best interest. Therefore, claimant was discharged with just cause in connection with work…
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> Claimant's Application for Determination of Benefit Rights is disallowed as claimant was separated from employment under disqualifying conditions.

II. LAW AND ANALYSIS

In his brief Appellant argues that the Unemployment Compensation Review Commission erred in finding that his actions constituted misconduct sufficient to result in discharge for just cause. He also argues that his termination was inconsistent with the progressive disciplinary

procedure outlined in the Collective Bargaining Agreement between his employer, Behr, and the Industrial Division of the Communication Workers of America, AFL-CIO (hereinafter IUE-CWA). Appellant argues that since there is no specific number of scrap parts nor a percentage of parts that requires discipline, his termination for producing thirty-six defective parts resulting in scrap does not constitute just cause for termination. He argues that he never saw the purportedly scrapped parts and that someone else also operated the same machine as him on the day the defective parts were produced.

The right to appeal from an administrative decision is not an inherent right, but instead is one conferred by statute. *See Harrison v. Ohio State Medical Board* (1995), 103 Ohio App.3d 317, 321. Where a statute confers a right to appeal, strict adherence to the statutory conditions is essential. *Holmes v. Union Gospel Press* (1980), 64 Ohio St.2d 187, 188.

Pursuant to R.C. 4141.281(A), a party may appeal a determination of unemployment benefit rights or a claim for benefits determination. "Within twenty-one days after receipt of the appeal, the director of job and family services shall issue a redetermination or transfer the appeal to the unemployment compensation review commission. A redetermination under this section is appealable in the same manner as an initial determination by the director." *R.C. 4141.281(B).*

Once the final decision of the review commission has been sent to all interested parties, any party may appeal the decision to the court of common pleas within thirty days. *R.C. 4141.282(A).* R.C. 4141.282(H) delineates the standard of review for the court of common pleas during such appeal, stating:

> 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.

The reviewing court is limited to the record as certified by the review commission. *Abrams-Rodkey v. Summit County Children Servs.*, 163 Ohio App. 3d 1 (2005). The court must give due deference to the agency's resolution of evidentiary conflicts, and the court may not substitute its judgment for that of the agency. *Budd Co. v. Mercer*, 14 Ohio App. 3d 269 (1984). Moreover, "[a] reviewing court may not make factual findings or determine the credibility of witnesses, and may not overturn a decision of the commission simply because it might reach a different result." *Gregg v. SBC Ameritech*, 2004-Ohio-1061, *citing Tzangas, Plakas & Mannos v. Administrator, Ohio Bureau of Employment Servs.*, 73 Ohio St. 3d 694, 696-697 (1995). While a reviewing court is "not permitted to make factual findings or to determine the credibility of witnesses, they do have the duty to determine whether the board's decision is supported by the evidence in the record." *Tzangas, supra.* at 696-697, *citing Irvine v. Unemp. Comp. Bd. of Review*, 19 Ohio St. 3d 15, 18 (1985). Thus, the standard on review is a highly deferential one. *Case Western Reserve Univ. v. Statt*, 2012-Ohio-1055.

The claimant has the burden of proving his or her entitlement to unemployment compensation benefits. *Irvine v. Unemployment Comp. Bd. of Review*, 19 Ohio St. 3d 15, 17 (1985). A trial court "must uphold the hearing officer's decision so long as it is not unlawful or unreasonable and some competent, credible evidence supports it." *Myers v. Director, Ohio Dept. of Job and Family Services*, 2009-Ohio-6023. The court, however, does not have the discretion to consider the credibility of the witnesses in its review of the decision of the hearing officer. Instead, the sole duty of the Court of Common Pleas is to determine whether the evidence on record supported the Commission's decision. *Kilgore v. Board of Review*, 2 Ohio App. 2d 69, 71 (1965). "The Court may not substitute its judgment***, it may not reverse simply because it interprets evidence differently***." *Angelkovski v. Buckeye Potato Chips, Co.*, 11 Ohio App.3d 159, 161 (1983).

An employee is ineligible for unemployment compensation benefits if he or she was terminated for just cause. O.R.C. §4141.29(D)(2)(a) provides, in pertinent part:

> (D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:
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> (2) For the duration of the individual's unemployment if the Director finds that:
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> (a) The individual…has been discharged for just cause in connection with the individual's work.

"An employee is not eligible for benefits if he has 'quit work without just cause or has been discharged for just cause in connection with [his] work.'" *Lorain County Auditor v. Ohio Unemployment Compensation Review Comm.*, 113 Ohio St. 3d 124 (2007); *see also* O.R.C. §4141.29(D)(2)(a). The Ohio Supreme Court has defined "just cause" as "that which, to an ordinary intelligent person, is a justifiable reason for doing or not doing a particular act" *Irvine v. Unemployment Comp. Bd. of Rev.*, 19 Ohio St. 3d 15, 16 (1985), *quoting Peyton v. Sun T.V.*, 44 Ohio App. 2d 10, 12 (1975). "'(T)here is, of course, not a slide-rule definition of just cause. Essentially, each case must be considered upon its particular merits. 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.'" *Irvine v. Unemployment Comp. Bd. of Review*, 19 Ohio St. 3d 15, 17 (1985) *quoting Peyton v. Sun T.V.*, 44 Ohio App. 2d 10, 12 (1975). In reviewing such a determination, a court is not permitted to interpret the facts. *Gallagher v. Alliance Hospitality Management*, 2010-Ohio-1882.

"Just cause" is "conduct that would lead a person of ordinary intelligence to conclude the surrounding circumstances justified the employee's discharge." *Carter v. Univ. of Toledo*, 2008-Ohio-1958. A determination of just cause sufficient to uphold the discharge of an employee under a civil service rule or a labor contract does not equate to just cause to prohibit an employee from receiving unemployment compensation benefits. *See Guy v. City of Steubenville*, 147 Ohio App. 3d

142, 2002-Ohio-849. However, violation of a last chance agreement can constitute just cause for termination from employment. *See Watkins v. Ohio Dep. of Hum Serv.,* Franklin App. No. 00AP-224 (Oct. 31, 2000).

When an employee demonstrates by his or her actions an unreasonable disregard for the employer's best interest, there is just cause for the discharge. *Kiikka v. Ohio Bur. of Emp. Serv.,* 21 Ohio App. 3d 168 (1985); *see also LaChappelle v. Ohio Dept. of Job and Family Serv.,* 184 Ohio App. 3d 166, 2009-Ohio-3399. "(T)he critical issue is not whether an employee has technically violated some company rule, but rather whether the employee, by his actions, demonstrated an unreasonable disregard for his employer's best interests.***" *Stephens v. Bd. of Rev.*, Cuyahoga App. No. 41369 (May 22, 1980); *see also Kiikka, supra* . "While the conclusions of the unemployment compensation review commission 'as to the legal import of an essentially undisputed set of facts are entitled to some deference,' the question of whether an employee was discharged with just cause is a question of law and 'the reviewing court has a duty to reverse the [commission's] decision if it is contrary to law.'" *Warren County Auditor v. Sexton*, 2007-Ohio-7081, *quoting Lombardo v. Ohio Bur. of Emp. Serv.,* 119 Ohio App. 3d 217, 221 (1997). Of particular significance herein is the decision by the Ohio Supreme Court in *Tzangas, Plakas & Mannos v. Adm. Ohio Bur. Empl. Serv.,* 73 Ohio St. 3d 694 (1995), wherein the court stated:

> To find that an employee is entitled to unemployment compensation when she is terminated for her inability to perform the job for which she was hired would discourage employers from taking a chance on an unproven worker. Most employees need an employer to take a leap of faith when initially hiring them. An employer relies upon an employee's representations that she can adequately perform the required work. Likewise, an employee relies upon an employer's description of what the job will entail. The party that fails to live up to those expectations is at fault.
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> Unsuitability for a position constitutes fault sufficient to support a just cause termination. An employer may properly find an employee unsuitable for the required work, and thus to be at fault, when: (1) the employee does not perform the required work, (2) the employer made known its expectations of the employee at the time of hiring, (3) the

> expectations were reasonable, and (4) the requirements of the job did not change since the date of the original hiring for that particular position.

Tsangas, supra. at 698-699. However,

> (a) just cause determination must also be consistent with the legislative purpose underlying the Unemployment Compensation Act: to provide financial assistance to individuals who are involuntarily unemployed through no fault or agreement of their own. 'Where an employee is at fault, he is no longer the victim of fortune's whims, but is instead directly responsible for his own predicament. Fault on the employee's part separates him from the Act's intent and the Act's protection.'

Chen v. Ohio Dept. Job & Fam. Serv., 2012-Ohio-994, *quoting Tzangas* at 697-698.

After reviewing the certified record herein, the court finds that the decision of the commission is not unlawful, unreasonable nor against the manifest weight of the evidence. The court further finds that the decision of the commission is supported by a rational view of the evidence. There was substantial, competent evidence that Appellant violated the terms of the Last Chance Agreement entered into with his employer, which was entered into outside of the employer's progressive discipline policy, and an agreement with no expiration date, and was discharged from his employment for cause. The court further finds that Appellant was discharged with just cause. As such, the court hereby **AFFIRMS** the decision of the Unemployment Compensation Review Commission.

III. CONCLUSION

For the reasons stated above, the decision of the Unemployment Compensation Review Commission is **AFFIRMED**.

SO ORDERED:

JUDGE MARY KATHERINE HUFFMAN

THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NOT JUST CAUSE FOR DELAY FOR PURPOSES OF CIV. R. 54. PURSUANT TO APP. R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED.

_____
JUDGE MARY KATHERINE HUFFMAN

To the Clerk of Courts:
Please serve the attorney for each party and each party not represented by counsel with Notice of Judgment and its date of entry upon the journal.

_____
JUDGE MARY KATHERINE HUFFMAN

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General Divison

Montgomery County Common Pleas Court

41 N. Perry Street, Dayton, Ohio 45422

Type: Decision

Case Number: 2013 CV 05015

Case Title: DERRICK BALLARD vs OHIO DEPARTMENT OF JOB AND FAMILY SERVICES

So Ordered

Mary H. Huffman