IN THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO

CLW OPERATING COMPANY,	*	CASE NO. 2011 CV 1169
	*	
Appellant,	*	JUDGE YOST
	*	
-vs-	*	**JUDGMENT ENTRY**
	*	
ERIC S. FARMER, et al.,	*	
	*	
Appellees.	*	

PROCEEDING: Appeal from Decision of Unemployment Compensation Review Commission, mailed December 1, 2011.

The Employer/Appellant filed a timely Notice of Appeal, in this Court, from the Decision of the Unemployment Compensation Review Commission, disallowing review of the Hearing Officer's Decision, mailed November 1, 2011. The record discloses that the Claimant, Eric S. Farmer, was employed by CLW Operating Company, from September 2, 2008, until he was discharged on August 2, 2011. The Claimant's initial application for unemployment benefits was allowed on the finding that he was discharged without just cause. On the employer's continuing appeals, this finding was upheld at every stage of the administrative review process.

The decision of the Hearing Officer included the following findings of fact:

"The Claimant worked for CLW Operating Company as a direct care worker from September 2, 2008 to August 2, 2011. CLW Operating Company does not have a written policy addressing employees and the use of social media. On July 27, 2011, the Claimant maid [*sic*] a series of comments on his personal Facebook

account while outside of work. The pertinent content of these posts are, 'I am tired of being thought of as stupid because I don't have a college degree.' 'I am tired of my concerns not being taken seriously.' 'Come on let's fucking play.' 'You are gonna fuck up and someone is going to get hurt. If I have to play dirty so be it.' 'This dude isn't dumb and I've fucking had it so let's fucking play.' 'Gasket is very close to being blown and I know what I've got to do and I will be doing it first thing in the morning.' The claimant was discharged for making threatening remarks on Facebook."

The Employer/Appellant is raising two bases for why the decision of the Unemployment Compensation Review Commission must be reversed. First, that the determination that the Claimant was discharged without just cause is unlawful, unreasonable, and against the manifest weight of the evidence. Second, that the hearing officer excluded material testimony, denying the employer a fair hearing. In defending the decision of the Review Commission, the Department of Job and Family Services argues that there is competent, credible evidence in the record supporting the decision and that the Employer/Appellant waived any error in the exclusion of the testimony of Brittany Starcher, by failing to proffer what she would say.

Regarding the Hearing Officer's refusal to receive the testimony of Brittany Starcher, he stated that her conversation with Mr. Farmer in which Farmer told her of problems controlling his anger, was not relevant because it occurred after the Facebook postings. According to the uncontroverted evidence in the record, the sequence of events was that Mr. Farmer published the threats on Facebook on July 27, 2011. The Employer learned of the threats on July 28, 2011. On that same date, Mr. Farmer advised Starcher that he was

not able to control his anger well, that he felt like lashing out on some people, but was holding back. The Employer undertook an investigation. Five days later, on August 2, 2011, the decision was made to discharge Mr. Farmer. Starcher's testimony was clearly relevant. Nevertheless, the Court finds that this error does not warrant reversal, because the Hearing Officer indicated that he would reconsider his ruling excluding Starcher's testimony after receiving the claimant's testimony. Counsel for the employer did not renew his request to call Brittany Starcher as a witness.

The Court notes that the entire record submitted in this case is replete with significant and uncontroverted evidence which the Hearing Officer does not mention in his decision. It is well settled that the decision of the Review Commission must be affirmed, unless it was unlawful, unreasonable or against the manifest weight of the evidence. R.C.§4141.282(H). The only authority of a Common Pleas Court is to determine whether the decision of the Board of Review is supported by the evidence in the record. *Kilgore v. Board of Review* (1965), 2 Ohio App.2d 69. The court cannot substitute its judgment for a decision that is lawful, reasonable and supported by credible evidence. The issue before the Court is whether the Claimant/Appellee was discharged without just cause. "There 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." *Peyton v. Sun T.V. & Appliances et al.* (1975), 44 Ohio App.2d 10, 12.

In providing the reasons for his decision, the Hearing Officer stated that the Claimant was discharged for making threatening remarks on his personal Facebook account outside of work; the comments did not contain any specific threats; the vast majority of the complaints addressed dissatisfaction with his job and management; the Employer was not specifically named; and the Claimant did not threaten violence on a specific individual or against the company. The Hearing Officer felt that, based on the evidence, the Claimant did not commit misconduct.

In his testimony, Mr. Farmer claimed that his entire Facebook rant related to his concerns about vehicle safety, which he felt his employer was not addressing, in spite of his requests. His intimation that someone was going to get hurt only meant that sooner or later there would be an accident if the vehicle was not repaired. His statement that he knew what to do and would do it first thing in the morning meant he was going to call the Commercial Vehicle Enforcement Department, on the advice of the State Highway Patrol. His comment that the gasket was dangerously close to being blown was in response to another person's post that he should calm down because he was going to blow a gasket. However, there is no evidence that he ever explained what he meant by this response prior to his testimony in the administrative

hearing. It would appear that the Hearing Officer believed and accepted the explanations of Mr. Farmer, which he was entitled to do. Nevertheless, the issue is not what Mr. Farmer really intended, but rather, whether an ordinarily intelligent person would find Mr. Farmer's conduct to be a justifiable reason for terminating his employment.

The Employer, CLW Operating Company, works with developmentally disabled individuals. (T.p. 10) The Claimant, Eric Farmer, was employed as a direct care worker. (T.p. 5) The Claimant acknowledged that he did post the statements on Facebook, just as they were read into the record. (T.p. 14) Regardless of whether the statements were published on Facebook or made in any other context, or whether they were made outside of work hours, an ordinarily intelligent person would find the comments to reflect, at minimum, a high level of anger and hostility. The statements "I am tired of being thought of as stupid because I don't have a college degree," and "I am tired of my concerns not being taken seriously," fairly address dissatisfaction with the Claimant's job and management, but these two statements cannot be fairly characterized as the vast majority of the complaints. In fact, the majority of the statements implied some imminent action, involving interaction, if not actual confrontation. After making reference to his (unspecified) concerns not being taken seriously, the Claimant stated, "you are all gonna fuck up and someone is going to get hurt." (T.p. 7). An ordinarily intelligent person would

not understand this to mean that someone may be injured by an equipment failure. The Claimant stated, "if I have to play dirty so be it." (T.p. 7) Again, an ordinarily intelligent person would not understand this to mean that he was going to place a phone call to the appropriate State agency to voice his safety concerns. The next Facebook statement was, "come on work let's fucking play this dude isn't dumb, I've fucking had it so let's fucking play." (T.p. 7) The Hearing Officer stated that the employer was not specifically named. However, the Claimant was employed by CLW Operating Company. When he stated "come on work let's fucking play," (T.p. 7) would an ordinarily intelligent person conclude that he might not be referring to his employer? Apparently, the Facebook page on which Mr. Farmer published the threatening remarks included the name of his employer, Creative Learning Workshop. The statement "I've fucking had it so let's fucking play," (T.p. 7) clearly implied that Mr. Farmer had reached a critical point and was now going to take some sort of action. The record indicates that some of his friends posted responses trying to calm him (T.p. 7). He then posted, "Gasket is very dangerously close to being blown." (T.p. 7) In the context of Mr. Farmer's preceding statements, his use of the word "dangerously" would lead an ordinarily intelligent person to expect something untoward. Mr. Farmer then stated, "I know what I got to do, I will be doing it first thing in the AM." (T.p. 7) He did not explain what it was that he would be doing.

Based upon the series of statements which the Claimant published on Facebook, he seemed particularly disturbed by his perception that he was thought of as stupid, and that he was not taken seriously. Taken as a whole, the rant is irrational and reckless. The Hearing Officer seemed to emphasize that the comments did not contain specific threats and the claimant did not threaten violence against any specific individual or the company. However, it is unreasonable to require an employer to wait until an employee has described particular harm to be inflicted, or identified a specific target, before taking disciplinary action.

Finally, the Hearing Officer reasoned that the Claimant was discharged for making threatening remarks on his personal Facebook account. The record demonstrates that the Employer was following its progressive discipline policy and that Mr. Farmer had been disciplined on June 8, 2011, for a major violation involving insubordination and disrespect to a supervisor. (T.p. 5) Mr. Farmer was aware of the policy and the fact that he had been written up for a major infraction, prior to the Facebook postings. (T.p. 21) The threatening remarks published on Facebook were clearly the triggering factor for an investigation, the findings of which culminated in the decision to terminate his employment on August 2, 2011.

Regardless of what Mr. Farmer may have actually intended by the statements he published on Facebook, an ordinarily intelligent person would

have found them to be threatening and disconcerting. Given the nature of CLW Operating Company's business, the Employer had a duty to take reasonable measures to protect its clients and other employees. In spite of the Hearing Officer's opinion that the Claimant did not commit misconduct, Mr. Farmer's threatening remarks were a reasonable concern for the employer. *Cottrell v. Ohio Department of Job & Family Services et al.* (Feb. 23, 2006), Franklin App. No. 05AP-798, unreported. They constituted a major infraction that occurred within less than two months of a prior major disciplinary violation by the Claimant. In accordance with its progressive discipline policy, the Employer was reasonably justified in terminating Mr. Farmer's employment.

The Court finds that the decision of the Unemployment Compensation Review Commission is contrary to the law defining just cause, unreasonable, and against the manifest weight of the evidence. The appeal in this case is well taken. The Decision of the Unemployment Compensation Review Commission, mailed December 1, 2011, finding that the Claimant was discharged by CLW Operating Company without just cause in connection with work is reversed and judgment is rendered in favor of the Employer/Appellant.

Costs are assessed against the Appellees.

SO ORDERED.

THIS IS A FINAL APPEALABLE ORDER. Within three (3) days of the entry of this judgment upon the journal, the Clerk of Courts shall serve notice

in accordance with Civ. R. 5, of such entry and the date upon every party who is not in default for failure to appear and shall note the service in the appearance docket.

The Clerk is directed to serve notice of this judgment and its date of entry upon the journal upon the following: David N. Truman, Esq.; Laurel Blum Mazorow, Esq.; Eric S. Farmer; and Unemployment Compensation Review Commission.

GARY L. YOST, JUDGE

18

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