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LUCAS COUNTY

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COMMON PLEAS COURT
BERNIE QUILTER
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IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

University of Toledo Chapter of
American Association of University
Professors,

Appellant,

vs.

Mary J. Erard, et al.,

Appellees.

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Case No. CI13-5282

OPINION AND JUDGMENT ENTRY

Hon. Linda J. Jennings

In this administrative appeal under R.C. 4141.282, Appellant University of Toledo Chapter of American Association of University Professors (UT-AAUP) asks the Court to reverse a final decision made by Appellee State of Ohio Unemployment Compensation Review Commission (the Commission).

In the decision under review, the Commission, after reviewing the entire record, affirmed a local hearing officer's decision that reversed the redetermination of benefits issued by Appellee Director (Director) of the Ohio Department of Job and Family Services (ODJFS) and found that UT-AAUP discharged Erard without just cause.

The Director's redetermination affirmed the initial determination disallowing Erard's application for unemployment compensation benefits on the ground that UT-AAUP had discharged Erard due to dishonesty in connection with her work under R.C. 4141.29(D)(2)(f).¹

¹ The hearing officer mistakenly stated that the Director's redetermination was "based upon the finding that claimant was discharged from employment * * * for just cause in connection with work."

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

FACTUAL AND PROCEDURAL HISTORY

UT-AAUP employed Erard for more than 20 years before terminating her on April 11, 2013. At the time of her termination, and for more than half of her tenure, Erard served as UT-AAUP's executive director.

UT-AAUP discharged Erard a few months after a new treasurer took office, following an "investigation" that purportedly revealed that Erard had misused UT-AAUP's credit card.

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

The Commission's hearing officer reversed the redetermination.

The hearing officer made the following findings of fact:

Claimant worked for the employer from September 1, 1992 through April 11, 2013 as an executive director. The employer does not have a policy and procedure manual. During claimant's employment the treasurer, Ms. Miller (who had been treasurer from 1998 through 2012) set up a credit card in her name because the business could not obtain one. The credit card statements were sent to Ms. Miller's home and she had access to statements at all times. Claimant was given a credit card to use for business expenses which included entertainment costs. Claimant was never given any written discipline and was never told that if she continued to use the credit card in this manner she would be discharged.

A yearly audit was also done and all of the financial records had to be turned over to the auditor. These records included the credit card statements and receipts. The finances were certified each year by the auditor and Ms. Miller signed off on them stating that she was unaware of any misappropriation of funds.

In January of 2013 a new treasurer, Ms. Nygem[,] was hired. She began reviewing the finances as it appeared they were having difficulty. There was some discussion that meal expenses should not be included as reasonable costs. Claimant went over these with Ms. Miller and it was decided that claimant would reimburse the employer for these agreed expenses from 2011 through 2012 in the amount of \$711.00. On February 1, 2013 claimant submitted an email about this to her employer. Claimant told them that the

only personal charge was for her nails for \$30 and the rest were business related but probably unnecessary. Claimant was suspended for misuse of the credit card and was discharged on April 11, 2013 for the same.

The hearing officer reasoned:

The employer failed to provide reliable, substantial and probative evidence that claimant intentionally violated company policy or was aware that her conduct would result in discharge. Claimant presented credible testimony, and the employer's witness Ms. Miller admits, that she reviewed and was aware of all charges claimant made during her employment. The employer also admitted that claimant was never disciplined for her conduct [and was] only told to pay back any personal expenses which she had previously done. When the new treasurer was hired it appears she did not agree with this policy, however claimant was never presented with a new rule or requirement and given the opportunity to follow it before being discharged. Instead claimant was discharged for charges previously reviewed by Ms. Miller and approved by both her and the auditors. Had the employer believed that claimant's conduct was inappropriate and she was mispending money, they should have discharged her when they were aware of the problem, which is as early as the credit card was open since the statements were sent to Ms. Miller's home.

Claimant's conduct did not change over the course of her employment and Ms. Miller as well as other board members were aware of her charges. The employer cannot choose to discharge claimant at a later date because a new treasure[r] took office and did not like the past conduct. The discipline associated with the act was not within the timeframe related to the act and no credible justification was provided by the employer. Claimant did not misuse the credit card but instead used it as she was given permission to by the treasurer. Therefore, the Hearing Officer finds that claimant was discharged without just cause in connection with work.²

The Commission allowed UT-AAUP's request for review of the hearing officer's decision but ultimately affirmed the decision, prompting UT-AAUP's appeal to the Court.

APPELLATE ARGUMENTS

UT-AAUP contends that the Commission's decision affirming the hearing officer's determination that UT-AAUP discharged Erard without just cause should be reversed as unlawful, unreasonable, and/or against the manifest weight of the evidence. According to UT-AAUP, Erard abused the UT-AAUP credit card by charging personal expenses without

² The Director notes that the Commission rarely grants a request for review or reviews the entire record, as it did in this case.

approval. Such conduct purportedly constitutes (1) dishonest conduct in connection with work under R.C. 4141.29(D)(2)(f) and (2) justifiable cause for discharge under R.C. 4141.29(D)(2)(a) and disqualifies Erard from receiving unemployment compensation.

Erard, on the other hand, insists that the applicable standard of review mandates affirmance of both the hearing officer's and the Commission's determinations because the certified administrative record contains considerable evidence to support them.

Erard also notes that UT-AAUP relies heavily on the affidavit of Don Wedding, who did not testify at the hearing. The affidavit is part of the certified administrative record because UT-AAUP submitted it in conjunction with its request for review of the hearing officer's decision. Erard posits that the Commission reviewed the entire record but was not "taken in" by the affidavit. Characterizing the affidavit as an attempt to distract the Court from its review function, which is not to look at the loser's version of the facts but is limited to determining whether record evidence supports the hearing officer's determination, Erard insists that the affidavit is irrelevant here.

Erard also notes that the record includes her response to the Wedding affidavit and attaches the portion of her response that addresses Wedding's credit card allegations against her.

The Director, like Erard, takes exception to UT-AAUP's reliance on the Wedding affidavit and notes that UT-AAUP cites heavily to documentary evidence in the record that was not the subject of questioning at the administrative hearing. Thus, according to the Director, UT-AAUP's arguments are less persuasive than the live testimony of the four witnesses who appeared at the hearing, especially since the hearing officer specifically found that Erard presented credible testimony.

Summarizing his position, the Director asserts:

In sum, Ms. Erard violated no union [UT-AAUP] policies -- chiefly because there weren't any -- when using its credit card. And while "[p]rohibitions against stealing and lying" most assuredly "should not have to be in writing or verbalized in order to fire an employee," UT-AAUP's brief at 14, here Ms. Miller

received the credit-card statements at her home, met with Ms. Erard and approved the statements every month, and never warned Ms. Erard that she could have been discharged for how she was using the card. The issues regarding her card usage arose only when Ms. Nygem became the treasurer and announced that she didn't like UT-AAUP's expenses policy. Then Ms. Erard, given no chance to explain herself, was discharged with the same indignity accorded to Dallas Cowboys coaching legend Tom Landry by that team's then-new owner. Though a different finder of fact might have decided this matter differently, the hearing officer's decision here is supported by competent, credible evidence and, therefore, is entitled to deference.³

In its first reply brief, UT-AAUP makes the following arguments: (1) The lack of an employee manual advising Erard that she could be fired for stealing is a red herring; (2) UT-AAUP's failure to discipline Erard in the past is not a reason to find that there was no just cause to terminate her; (3) UT-AAUP's Executive Board did not ratify Erard's conduct by paying the credit card bills; (4) the fact that UT-AAUP's auditors did not find any irregularities is not dispositive; and (5) Erard was subject to termination for just cause because there was at least circumstantial evidence of her thefts, which constitutes dishonesty.

The Court is not sure why UT-AAUP filed a second reply brief, as there is no record of seeking leave to do so. However, neither Erard nor the Director moved to strike the second reply so the Court will consider it.

The second reply reiterates many of the arguments set forth in UT-AAUP's initial reply brief. In addition UT-AAUP asserts that the hearing officer's factual findings, even if correct, do not preclude the Court from finding that the administrative decision is wrong as a matter of law. In that regard, UT-AAUP characterizes the following facts omitted by the hearing officer as "critical" and contends that their inclusion would have required a different result: (1) Erard admitted that she was aware of the company policies that led to her discipline; (2) treasurer Miller had no authority to fire or discipline Erard; (3) Erard was UT-AAUP's only employee and worked largely free of supervision and exercised a high degree of independent judgment; (4) Miller trusted Erard implicitly; (5) Erard was the only person using the credit

³ Director's Brief at 20.

card; (6) the 2008-2012 credit card statements show numerous non-business charges; and (7) Erard agreed to refund \$711.42 but never did.

LEGAL STANDARD GOVERNING ERARD'S ADMINISTRATIVE APPEAL

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

The scope of the Court's review is extremely limited.⁵ The Court should defer to the determinations of the Commission and its hearing officers with respect to factual matters, the credibility of witnesses, and the weight of conflicting evidence⁶; and the Court must determine whether evidence in the record supports the Commission's decision.⁷ Only a decision that is "so manifestly contrary to the natural and reasonable inferences to be drawn from the evidence as to produce a result in complete violation of substantial justice" is deemed to be against the manifest weight of the evidence.⁸ In other words, the Court may not reverse the Commission's decision "where reasonable minds could weigh the evidence and arrive at contrary conclusions."⁹ Therefore, if some competent, credible evidence going to all the essential elements of the case supports the Commission's decision, the decision

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

⁵ *Perry v. Buckeye Community Servs.*, 48 Ohio App.3d 140, 141 (1988).

⁶ *Tzangas*, 73 Ohio St.3d at 696; *Myers v. Garson*, 66 Ohio St.3d 610, 615 (1993); *Brown-Brockmeyer Co. v. Roach*, 148 Ohio St. 511, 518 (1947); *Angelkouski v. Buckeye Potato Chips Co.*, 11 Ohio App.3d 159, 161 (10th Dist. 1983), overruled on other grounds by *Galluzzo v. Ohio Bur. of Emp. Servs.*, 2d Dist. No. 95-CA-6 (Nov. 29, 1995).

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

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

⁹ (Citation omitted.) *Angelkouski*, 11 Ohio App.3d at 161.

must stand,¹⁰ and the Court cannot reverse it as being against the manifest weight of the evidence.¹¹

Nor can the court reverse merely because it would make a different decision based on the evidence, or because reasonable minds could weigh the evidence and arrive at contrary conclusions, or because the Commission might reasonably have decided either way.¹² A decision is unreasonable if it is irrational or capricious, where it is clearly not guided by reason.¹³

The Sixth District reiterated and followed the above principles in the 2009 case of *McCarthy v. Connectronics Corp.*¹⁴ and the 2013 case of *DS Express Carriers, Inc. v. Dixie*.¹⁵

LAW, ANALYSIS, AND DECISION

An employee who is discharged from work "for just cause" is ineligible for unemployment benefits.¹⁶ "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."¹⁷ However, just cause determinations in the unemployment compensation context must also be consistent with the legislative purpose that underlies the Unemployment Act.

The Act exists to enable employees who become and remain involuntarily unemployed, through no fault of their own, to subsist on a reasonably decent level. Thus, the

¹⁰ (Citation omitted.) *Phillips*, 1988 WL 88787, at *1. *Accord C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus.

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

¹² *Tzangas*, 73 Ohio St.3d at 697; *Irvine*, 19 Ohio St.3d at 18 (citation omitted); *Angelkovski*, 11 Ohio App.3d at 161; *Irvine*, 19 Ohio St.3d at 18 (citations omitted).

¹³ Black's Law Dictionary, 8th Ed.

¹⁴ 183 Ohio App.3d 248, 2009-Ohio-3392 (6th Dist.).

¹⁵ 6th Dist. No. E-12-034, 2013-Ohio-4829.

¹⁶ See R.C. 4141.29(D)(2)(a).

¹⁷ (Citation omitted.) *Irvine*, 19 Ohio St.3d at 17.

Act exists to protect employees from economic forces over which they have no control, not to protect them from themselves. Fault on the employee's part separates him or her from the Act's intent and protection.¹⁸

Whether or not just cause exists necessarily depends on the factual considerations of each particular case.¹⁹ However, an employer has just cause to fire an employee only when the employee is culpable or at fault. In other words, "[f]ault on behalf of the employee is an essential component of a just cause termination,"²⁰ and the employer must be reasonable in finding fault in order to terminate the employee for just cause.²¹

Here, the hearing officer heard testimony from four witnesses -- UT-AAUP's president Harvey Wolff and treasurer Miller on behalf of UT-AAUP, and Erard and former UT-AAUP Board member James Ashley on behalf of Erard -- that required 97 pages of written transcript. The hearing officer also considered voluminous documentary evidence (1,500 pages by the Director's estimate). Despite UT-AAUP's best efforts, neither the witnesses nor the documentary evidence convinced the hearing officer that Erard's use of the credit card was just cause for terminating her. The Commission reviewed the entire record, including Wedding's 69-paragraph post-hearing affidavit, and agreed with the hearing officer's decision. Thus, the hearing officer and the Commission impliedly concluded that it was not reasonable for UT-AAUP to find that Erard was culpable or at fault in her use of the credit card.

The Court finds that the Commission's decision is not against the manifest weight of the evidence. Competent, credible record evidence supports the decision. Moreover, the Commission's determinations on factual matters, witness credibility, and the weight of

¹⁸ *Tzangas*, 73 Ohio St.3d at 697-698.

¹⁹ *Irvine*, 19 Ohio St.3d at 17.

²⁰ *Tzangas* at paragraph two of the syllabus.

²¹ *Id.* at 698.

conflicting evidence are not so at odds with the natural and reasonable inferences to be drawn from the evidence as to completely violate substantial justice. Therefore, the Court cannot reverse the Commission's decision as being against the manifest weight of the evidence.

Nor can the Court find that the Commission's decision is unreasonable. The hearing officer set forth her findings of fact and reasoning in considerable detail, belying a finding of irrationality or capriciousness.

Likewise, the Court is not persuaded that the hearing officer's decision is contrary to law. UT-AAUP asserts that the 2008-2012 credit card statements show numerous non-business charges and mandate a finding that Erard was rightfully discharged for dishonesty in connection with her work. UT-AAUP submitted exhibits detailing numerous charges that appeared or "seemed" to be unrelated to UT-AAUP's business²²; discussed the charges in its letter requesting further administrative review of the hearing officer's decision²³; and attached Wedding's affidavit, which included 19 paragraphs attesting to Erard's alleged credit card abuse, to its request for review.²⁴ Erard's Exhibit Summary includes an explanation of the business nature of many of the charges,²⁵ and Erard offered testimony in that regard.²⁶ Erard also responded to the allegations in UT-AAUP's Request for Review and in Wedding's affidavit and explained how the allegedly dishonest charges were business-related.²⁷ With the exception of a \$30 charge at a nail salon, Erard did not admit that any charges were

²² Transcript I at 11, 18-22, 30 and Exhibits A1-A6, B1-B5.

²³ Record Binder 3 of 3, Review Commission File: Sept. 10, 2013 "Request for Review of Hearing Officer's Decision" (fax/letter from UT-AAUP's counsel to the Commission).

²⁴ *Id.* at Exhibit 1.

²⁵ Record Binder 2 of 3, Review Commission File: July 12, 2013 "Exhibit Summary" (letter from Erard's attorney to the Commission).

²⁶ Transcript II at 32-36.

²⁷ Record Binder 3 of 3, Review Commission File: Oct. 9, 2013 "Claimant's Response to Employer's Request for Review" (letter from Erard's counsel to the Commission).

strictly personal.²⁸ Neither the hearing officer nor the Commission agreed with UT-AAUP's claim that Erard's use of the credit card warranted discharging her for dishonesty in connection with her work. The evidence was clearly conflicting, and the Court finds no basis for setting aside the hearing officer's or the Commission's determinations with respect to factual matters, witness credibility, or the weight of conflicting evidence.²⁹ Thus, the Court cannot say that the hearing officer's decision was contrary to law or that the law, as applied to the evidence in this case, mandates the finding sought by UT-AAUP.

The Court has reviewed the certified administrative record and the parties appellate briefs. Notwithstanding UT-AAUP's arguments to the contrary, the Court finds that competent, credible evidence supports the hearing officer's findings of fact, reasoning, and ultimate conclusion that UT-AAUP discharged Erard without just cause in connection with her work. Thus, the decisions under review are not against the manifest weight of the evidence.

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

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

JUDGMENT ENTRY

It is ORDERED that both the Ohio Unemployment Compensation Review Commission's "Decision on Request for Review Affirming Hearing Officer" (mailed on October 17, 2013) and the Commission [Hearing Officer]'s "Decision" reversing the Director's June 4, 2013 Redetermination, finding that Appellant University of Toledo Chapter of

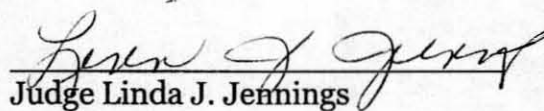
²⁸ Transcript II at 36.

²⁹ Contrary to the "Opinion and Order" filed and journalized July 17, 2014, it is *not* for the Court to determine whether to assign the Wedding affidavit that UT-AAUP attached to its request for review the same weight it assigns the live testimony of witnesses who actually appeared before the hearing officer. On the contrary, it was for the Commission to do so. Accordingly, the Court has issued a separate Order granting the Director's July 18, 2014 "Motion for Partial Reconsideration" and vacating the following final paragraph in its July 17, 2014 Order: "It is further ORDERED that the Court may or may not assign the "Affidavit of Don Wedding," which is included in the certified administrative record in this case, the same weight it assigns the live testimony of witnesses who actually appeared before the administrative hearing officer."

American Association of University Professors discharged Appellee Mary J. Erard without just cause in connection with work, and remanding the case to Appellee Ohio Department of Job and Family Services (mailed on August 21, 2013), are AFFIRMED.

THIS IS A FINAL APPEALABLE ORDER.

July 24, 2014


Judge Linda J. Jennings

cc: Erik G. Chappell, Esq. and Amy M. Waskowiak, Esq. (Counsel for Appellant UT-AAUP)
Eric A. Baum, Esq. (Counsel for Appellee Director of ODJFS)
Alan R. Kirshner, Esq. (Counsel for Appellee Mary J. Erard)