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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ROBERT GROVES
Plaintiff

RSR PARTNERS, LLC ET AL.
Defendant

Case No: CV-14-838259

Judge: STUART A FRIEDMAN

JOURNAL ENTRY

96 DISP.OTHER - FINAL

DECISION OF THE REVIEW COMMISSION IS REVERSED. CASE IS REMANDED FOR FURTHER HEARING.
COURT COST ASSESSED TO THE DEFENDANT(S).
PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

OSJ

Judge Signature Date

FILED
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CLERK OF COURTS
CUYAHOGA COUNTY

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ROBERT GROVES **APPELLANT,** **v.** **DIRECTOR, OHIO DEPARTMENT OF FAMILY SERVICES, et al.** **APPELLEES.**	)))))))))))	**CASE NO. 838259** **MEMORANDUM OF OPINION AND ORDER**

FRIEDMAN, J.:

{**¶1**} This matter is before the court on appellant Robert Groves's appeal of the denial by appellee Ohio Unemployment Compensation Review Commission of his application for unemployment benefits. The appellee affirmed the hearing officer's finding that appellant was discharged by his employer, RSR Partners, LLC, for just cause under R.C. 4141.29(d)(2)(a). For the reasons stated below, the Court finds the appellee's decision was unreasonable, unlawful, and against the manifest weight of the evidence.

Statement of Facts

{**¶2**} Appellant was employed as a laborer by RSR Partners, LLC, for almost 16 years at the time of his discharge on March 31, 2014. (Hearing Transcript pp. 5-6.)[1] The grounds for his discharge were absenteeism in violation of appellee's disciplinary policy. (Tr. 8-9.)

{**¶3**} The employer's attendance policy states that an absence of three consecutive days without notification will lead to the assumption that the employee has voluntarily abandoned his or her position and will lead to termination. (Appellee's brief, Ex. 3.)

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[1] Hereinafter "Tr. _."

{¶4} Appellant last worked for his employer on March 8, 2014. (Tr. 6.) At the August 26, 2014 hearing, appellant testified that Mr. Murphy, his supervisor, was aware that appellant had experienced prior chest pains and that Mr. Murphy had urged him to see a doctor. (Tr. 11.)

{¶5} On Monday, March 10, appellant called off sick. On Tuesday, March 11, appellant again called off sick. (Tr. 6.) In the March 11 telephone conversation, he notified his employer that he was going to the hospital and that he did not know when he would return to work. (Tr. 12.) Appellant did not call off on Wednesday, March 12.

{¶6} On Thursday, March 13, appellant spoke directly to Mr. Murphy. He informed Mr. Murphy that he was being transferred from the Twinsburg Cleveland Clinic to South Pointe Hospital, that he was under a doctor's care, and that he "didn't know when [he] was going to return to work." (Tr. 12.) Mr. Murphy confirmed the content of this telephone conversation. (Tr. 6.) At this point, appellant had fully-complied with the employer's attendance policy, as he had called in his absence for three out of the past four days.

{¶7} During the hearing, the hearing officer asked Mr. Murphy if appellant were eligible for leave under the Family Medical Leave Act of 1993. Murphy responded that "if there was any documentation . . . and if it was applied for then he would have qualified for it, but was never able to get that far." (Tr. 8.)

Family Medical Leave Act of 1993 (FMLA)

{¶8} The FMLA provides:

"(a) In general.

> (1) Entitlement to leave. * * * An eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:
>
> * * *
>
> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of the employee." Section 2615(a), Title 29, U.S. Code.

{**¶9**} A "serious health condition" involving continuing treatment by a healthcare provider must also involve a 'period of incapacity requiring absence from work . . . of more than three calendar days.'" 29 CFR § 825.114(a)(2), cited in Sims v. Alameda—Contra Costa Transit District (1998), 2 F. Supp. 2d, 1253, 1267.

{**¶10**} The Code of Federal Regulations further explains the extent of the notice for FMLA leave that the employee must provide the employer:

> The employee need not expressly assert rights under FMLA or even mention FMLA, but may only state that leave is needed. 29 CFR § 825.303(b), cited in Sims, 2 F. Supp. 2d at 1267. The employee need only provide her employer with notice sufficient to make the employer aware that her absence is due to a potentially FMLA-qualifying reason. Id., citing Gay v. Gilman Paper Co., 125 F.3d 1432, 1436 (11th Cir. 1997).

Employer's Obligations under FMLA

{**¶11**} Here the record shows that on March 13, when appellant informed Mr. Murphy that he was under a doctor's care and did not know when he could return to work, the employer was placed on notice that appellant's absence was due to a potential FMLA-qualifying event, as he would miss work due to illness for an undetermined amount of time.

{**¶12**} Once an employer is on notice of a potential FMLA leave, "the employer shall provide the employee with notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations." 29 CFR § 825.301(c). The regulations require "an employer to give written notice of a requirement for medical certification." 29 CFR § 825.305(a).

{**¶13**} The Court finds that Mr. Murphy's March 27 telephone conversation with appellant, in which he asked him to fax over his medical documentation "is not the equivalent of written notification of one's obligations to provide adequate certification and the consequences of failing to do so, or of notice detailing the specific expectations and obligations of the employee." Sims, 2 F. Supp. 2d at 1267.

{¶**14**} If an employer fails to provide notice in accordance with the provisions of this section, the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice. 29 CFR § 825.301(f).

{¶**15**} In response to the hearing officer's question, Mr. Murphy testified that he was unaware if appellant was sent any FMLA paperwork. (Tr. 22.) Appellant testified that he did not receive any FMLA paperwork. (Tr. 23.) Thus, the record shows that the employer did not provide appellant with written notice of his rights and obligations under FMLA.

Employee's Obligations under FMLA

{¶**16**} "Where the need for leave is unforeseeable, 'an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case.'" 29 CFR § 825.303(b), cited in Sims, 2 F. Supp. 2d at 1267. Here, there is no dispute that appellant's sudden hospitalization was unforeseeable.

{¶**17**} "If leave is taken for an FMLA reason but the employer is not aware of the reason, and the employee desires that the leave be counted as FMLA leave, the employee must notify the employer within two business days of returning to work[2] of the reason for the leave." 29 CFR § 825.208(e)(1).

{¶**18**} As noted above, on March 13, appellant informed his employer that he was under a physician's care and that he did not know when he could return to work. On March 27, he confirmed with Mr. Murphy that he "was still under doctor's care and a physician recommended me to go back, not to go back on work until April 27." (Tr. 17.)

{¶**19**} Appellant's return to work certificate contained in the record[3] shows his physician cleared him to return to work on April 28. Therefore, under 29 CFR § 825.208(e)(1), appellant's deadline to request FMLA leave and to provide his medical certification was April 30.

{¶**20**} Nevertheless, the record shows that, when appellant brought his medical documentation to Mr. Murphy on April 3, three weeks before he

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[2] Emphasis added.
[3] Received by ODJFS on June 9, 2014. Return to Work Certificate is not marked as an exhibit.

was required to do so, Mr. Murphy refused to accept the medical certifications, and instead informed appellant that he was terminated based upon the company's "no call, no show" policy, and the fact that the company "still did not have any documentation that he was even at the doctor or a hospital or that he had any time off for any kind of medical conditions." (Tr. 7.) The Court notes, however, that at this point in time, appellant was not required to have requested FMLA, let alone provide any medical documentation.

{¶21} It is the employer's duty to "advise the employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency." 29 CFR § 825.305(c). Mr. Murphy's refusal to accept appellant's medical papers denied appellant his legal right to cure any deficiency – for example, by providing a record of his hospitalization.

{¶22} In his testimony, Mr. Murphy summed up appellant's termination as follows:

> [T]his was an excused medical absence, [but] he failed to drop off any documentation or fax or have the hospital fax or anything stating that he was not able to work through a certain period of time um and our policy states that an employee must provide documentation of any missed time if he failed uh if he or she failed er if they went to the doctor so that's kind of just where our policy is. (Tr. 24.)

Conclusion

{¶23} "An attendance policy that does not except as an 'occurrence' an absence caused by a serious medical condition violates the [FMLA] Act." Jones v. Ohio Bur. of Emp. Serv., 2000-Ohio-2597, 2000 Ohio App. LEXIS 5134, *14, citing George v. Associated Stationers (N.D. Ohio 1996), 932 F. Supp. 1012, 1017-1018. "If an employee's last 'occurrence' is due to a serious health condition within the Act, the Company may not terminate the employee based upon its absenteeism policy. Fair or not, as seen through the eyes of the employer, this is the law." Id.

{¶24} This Court agrees with the Eighth District Court of Appeals in Giles v. Willis (1981), 2 Ohio App. 3d 335, 338, where that court held "we

will not construe Ohio law so as to deny benefits to one discharged for exercising his federal rights."

{¶25} Thus, the Court finds that appellee's decision was unreasonable, unlawful, and against the manifest weight of the evidence. Accordingly, pursuant to R.C. 4141.282(H), the Court reverses appellee's December 5, 2014 decision. This case is remanded to the appellee for a finding on the merits of appellant's application for unemployment benefits following the termination of his employment from RSR Partners, LLC.

IT IS SO ORDERED.

Judge Stuart A. Friedman

Dated: