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CINDY A. HOFNER

**IN THE COURT OF COMMON PLEAS
WOOD COUNTY, OHIO**

Jennifer A. Gunderson,

Case No. 2015CV0322

Plaintiff-Appellant,

Judge Robert C. Pollex

v.

Director, Ohio Department of
Job & Family Services, et al.,

JUDGMENT ENTRY

Defendants-Appellees.

This matter is before the Court on appeal from a decision of the Ohio Unemployment Compensation Review Commission ("UCRC") denying Appellant, Jennifer Gunderson ("Gunderson") unemployment benefits after her discharge from Appellee, I.G.H. II, Inc., dba TruGreen ("TruGreen"). Gunderson filed her brief on October 29, 2015. Appellee, Director, Ohio Department of Job and Family Services ("ODJFS") filed its response brief on November 30, 2015. TruGreen filed its response brief on December 2, 2015. Gunderson filed her reply brief on December 8, 2015. This matter is now decisional.

On October 13, 2014, Gunderson's employment with TruGreen, a lawn care business, was terminated. Gunderson applied for unemployment benefits with ODJFS. The Director found that Gunderson was discharged with just cause and Gunderson appealed from that determination. The appeal was transferred to the UCRC, which held a hearing on January 30, 2015. In a Decision issued on February 17, 2015, Gunderson was found to have been discharged without just cause

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and therefore entitled to benefits. TruGreen appealed from that determination and a second hearing was held by the UCRC on May 8, 2015. In a Decision issued on May 20, 2015, the hearing officer reversed the prior determination and found that Gunderson was discharged with just cause and therefore not entitled to unemployment benefits. Gunderson then appealed to this Court asserting two assignments of error that state essentially one issue—that TruGreen did not have just cause to terminate her, therefore the decision of the UCRC was against the manifest weight of the evidence and should be reversed.

When reviewing an appeal pursuant to R.C. 4141.282, “[i]f 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). “[A] reviewing court may not make factual findings or determine a witness's credibility and must affirm the commission's finding if some competent, credible evidence in the record supports it.” *Williams v. Ohio Dept. of Job & Family Servs.*, 129 Ohio St.3d 332, 2011-Ohio-2897, 951 N.E.2d 1031, ¶ 20, citing *Irvine v. State Unemployment Compensation Bd. of Review*, 19 Ohio St.3d 15, 18, 482 N.E.2d 587 (1985). In other words, the commission’s decision will not be reversed simply because “reasonable minds might reach different conclusions.” *Id.*

An individual is not eligible to receive unemployment benefits after being discharged with just cause in connection with the individual’s work. R.C. 4141.29(D)(2)(a). “Just cause” constitutes “ ‘conduct that would lead a person of ordinary intelligence to conclude the surrounding circumstances justified the employee’s discharge.’ ” *McCarthy v. Connectronics Corp.*, 183 Ohio App.3d 248, 2009-Ohio-3392, 916 N.E.2d 871, ¶ 13, quoting *Carter v. Univ. of Toledo*, 6th Dist. Lucas No. L-07-1260, 2008-Ohio-1958, ¶ 10. “An employee's conduct need not rise to the level

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of misconduct for there to be just cause, but there must be some fault by the employee.” *Id.*

Upon due consideration, the Court finds that the record contains competent, credible evidence that Gunderson was discharged with just cause for exceeding the amount of sick/personal days she was allowed under TruGreen’s no-fault attendance policy. Carrie Grames, the office manager in TruGreen’s HR Department, testified that Gunderson was entitled to five paid sick/personal days based on the start date of Gunderson’s employment and the amount of years she was employed with TruGreen. Gunderson was absent while using her sick/personal days for a full day on June 17, 2014, a half day on July 2, 2014, a full day on July 9, 2014, a full day on July 25, 2014, a full day on July 28, 2014, and a half day on August 13, 2014, totaling her five allowed sick/personal day absences. Gunderson was issued a written warning on August 27, 2014 indicating that she no longer had available sick/personal days and that any further absences may result in termination of her employment. Gunderson failed to report to work on October 10, 2014 after leaving a message for her supervisor Jeff Utz. Further, Gunderson failed to report to work on October 11, 2014, and did not call her supervisor to report her intended absence. When Gunderson reported to work on October 13, 2014, her employment was terminated for excessive absenteeism in violation of the attendance policy.

Gunderson testified that she was aware of the attendance policy and the amount of days she was entitled to pursuant to the policy. Gunderson testified that she received the August 27, 2014 written warning and admitted to signing the document in acknowledgment. Gunderson admitted to each sick/personal day absence, aside from the no call, no show absence on Saturday, October 11. Typically, employees who do not meet their sales quota during the week are required to work on Saturday in an attempt to reach their weekly goal. Gunderson claimed she was unaware that she was scheduled to work that Saturday. However, Gunderson admitted to keeping track of

her sales and that she knew she had not met her quota because of her absence on Friday, October 10. Clearly, Gunderson should have worked Saturday, October 11, 2014.

Gunderson, however, argues that the majority of her absences were due to her suffering from migraine headaches. "Where an employer fires an employee for excessive absenteeism under a no-fault policy, the employee may still be entitled to compensation if she can establish that her absences were the result of a bona fide illness." *Durgan v. Ohio Bur. Of Emp. Serv.*, 110 Ohio App.3d 545, 550, 674 N.E.2d 1208 (9th Dist. 1996). The burden of proof is on the employee to show that a bona fide illness caused the absences and that the employee was therefore discharged without just cause. *Id.* Ultimately, the UCRC found Gunderson's documentation supporting the existence of a bona fide illness to be lacking. The only information provided to TruGreen indicating that Gunderson suffers from migraines was a letter dated April 12, 2001, addressed to one of Gunderson's former employers, Northwest Airlines, written by a doctor who is now deceased. Based on Gunderson's failure to substantiate her illness, the record contains sufficient evidence to support the UCRC's decision that Gunderson was discharged with just cause.

Finally, Gunderson argues that TruGreen did not comply with its progressive discipline policy before terminating her employment. Normally, "[a] failure to follow a mandatory progressive discipline procedure which results in an employee's discharge is a discharge without just cause and entitles that employee to receive unemployment benefits." *Pickett v. Unemployment Compensation Bd. of Review*, 55 Ohio App.3d 68, 562 N.E.2d 521 (8th Dist.1989), syllabus. According to TruGreen's policy,¹ an employee eligible to receive five sick/personal days will receive an oral warning for the third absence, a written warning for the fourth absence, and a final

¹ TruGreen's policy provides a progressive discipline schedule for employees entitled to receive six sick/personal days. However, as Gunderson was allowed only five sick/personal days, Ms. Grames testified that the progressive discipline schedule is altered accordingly.

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warning at five absences, with termination possible thereafter.

Ms. Grames and Mr. Utz both testified that Gunderson received an oral warning, or at least an acknowledgement of the amount of sick/personal days remaining as she proceeded to use them. Further, it is undisputed that Gunderson received the final written warning on August 27, 2014. However, it does appear that TruGreen did not comply with step two of the policy—a written warning prior to the final warning.

Nonetheless, the record reflects that Gunderson was explicitly warned that she had no remaining sick/personal days and that any further absences may result in termination of her employment. Gunderson was then absent two additional days following the warning, with one absence being a no call, no show. Despite apparently bypassing a step in its progressive discipline policy, TruGreen was justified in discharging Gunderson for using a total of seven sick/personal days under a policy that only allowed her five. *See Spayde v. Hi-Stat Florida Mfg. Co., Inc.*, 5th Dist. Richland No. 92-CA-37, 1992 WL 362464 (affirming UCRC's decision that the employee was dismissed with just cause, regardless of the employer's failure to impose a step in its progressive discipline policy, as the employee was absent a sufficient number of days to support discharge under the policy); *see also Peterson v. Director*, 4th Dist. Ross No. 03CA2738, 2004-Ohio-2030, ¶ 31 (agreeing with the holding in *Spayde*—"that strict compliance with progressive disciplinary policies is unnecessary to support a finding of just cause for termination * * *").

ORDER

Upon due consideration of the briefs, the certified record, and the applicable law, the Court finds that there was competent, credible evidence supporting the UCRC's determination that Appellant was discharged from her employment with just cause and therefore the decision of the

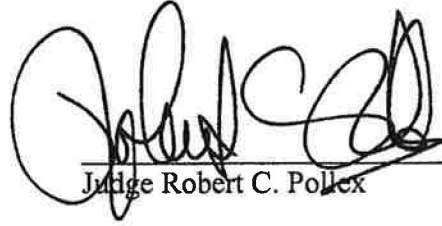
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UCRC was not unlawful, unreasonable, or against the manifest weight of the evidence.

Accordingly, the UCRC's decision is hereby affirmed and Appellant's appeal is denied.

IT IS SO ORDERED.

**Judgment for court costs
rendered to Wood County**



Judge Robert C. Pollex

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