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**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

**CLERMONT COUNTY BOARD OF
COUNTY COMMISSIONERS, ET AL.**

Appellants,

vs.

ANNETTE NIENAJADLY, ET AL.

Appellees

:
:
: **CASE NO. 2015 CVF 00572**
:
: **Judge McBride**
:
: **DECISION/ENTRY**
:

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This cause is before the court for consideration of the merits of the appeal filed by the appellant Clermont County Board of County Commissioners. The parties briefed the issues in the case but waived oral argument.

Upon consideration of the appeal, the record of the proceeding, the written arguments of counsel, and the applicable law, the court renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

Annette Nienajadly began working for Clermont County (hereinafter referred to as the "County") in August 2004, and as of 2014 she maintained the position of water operator.¹

On June 18, 2014, a pre-disciplinary hearing was held, in which Annette was found to have violated Subsection 6.01 of the Employees' Code of Ethics Sections A and B.² The hearing regarded an incident on May 26, 2014, in which Annette did not follow the standard operating procedure ("SOP") required for producing the chemical compound potassium permanganate.³ The County's hearing officer found that Annette lied about the incident and used inappropriate language in discussing it with management.⁴

Leading up to the hearing, Annette emailed Lyle Bloom, the director of the County's water resources department, on June 5, 2014.⁵ It regarded the incident that occurred on May 26, 2014.⁶ She explained that she believed the plant manager, Tim Neyer, "set up an entrapment" for her, wherein Tim Neyer tried to make it appear as though she violated an SOP.⁷ In closing, Annette conveys that she is being harassed

¹ Hearing, pg. 6 (3/26/2015).

² Board of County Commissioners Letter re: Pre-disciplinary Hearing Annette Nienajadly, pgs. 1-2. (6/20/2014). 6.01 Section A requires all employees to perform all assigned duties and responsibilities conscientiously and honestly. Section B requires employees to be tactful, respectful, patient, and courteous. Id.

³ Board of County Commissioners Letter re: Pre-disciplinary Hearing Annette Nienajadly, pgs. 1-2 (6/20/2014).

⁴ Board of County Commissioners Letter re: Pre-disciplinary Hearing Annette Nienajadly, pgs. 1-2 (6/20/2014).

⁵ Email to Lyle Bloom from Annette Nienajadly (6/5/2014).

⁶ Email to Lyle Bloom from Annette Nienajadly (6/5/2014).

⁷ Email to Lyle Bloom from Annette Nienajadly (6/5/2014).

and she thinks “Tim is going to extreme measures” to get her fired or force her to resign.⁸ Annette testified that Lyle Bloom never responded to her concern.⁹

In preparation for the hearing, Annette also obtained an email from her former supervisor of nine years, who stated that Annette “took direction well and if she did have a problem at the plant, she brought it to my attention.”¹⁰ Annette also had an incident prior to the disciplinary meeting in which a water tank had overflowed. In reference to that, the former supervisor stated that “[t]he tank overflowed on occasion. It happened to every employee, there was no scientific way of fixing it. No one was ever disciplined for it or even reprimanded.”¹¹

Shortly after the hearing, Annette was placed on a Performance Improvement Plan (“PIP”).¹² It identified several “areas of concern” and “flaws” in Annette’s performance, including tardiness, recordkeeping accuracy and thoroughness, SOP compliance, neglect of duty, insubordination, honesty, and anger management.¹³ Each area of concern derived from some earlier alleged incident.

The concern for tardiness stemmed from incidents on May 15, 2013 and March 31, 2014.¹⁴ Although the PIP stated that Annette was counseled on her tardiness after the May 2013 incident, Annette testified that no one spoke to her about this problem.¹⁵

The issue of record keeping accuracy and thoroughness derived from multiple incidents. The first involved Annette’s timesheet from September 2013, in which

⁸ Email to Lyle Bloom from Annette Nienajadly (6/5/2014).

⁹ Hearing, pg. 30 (3/26/2015).

¹⁰ Email to Annette Nienajadly from Scott Bates (6/17/2014).

¹¹ Email to Lyle Bloom from Annette Nienajadly (6/5/2014).

¹² Performance Improvement Plan (6/28/2014).

¹³ Performance Improvement Plan, pg. 1 (6/28/2014).

¹⁴ Performance Improvement Plan, pg. 1 (6/28/2014).

¹⁵ Hearing, pg. 8 (3/26/2015).

Annette submitted a timesheet with 80 regular work hours, when in fact she had taken two sick days during this period. Annette explained that she had filled out her timesheet and placed it in her mailbox before the sick leave, and before she could update it when she returned from sick leave, someone removed it from her mailbox and submitted it.¹⁶

The other incidents occurred on May 6, 2014, when three of Annette's log entries had errors, and on May 22, 2014 when Annette misplaced a decimal point in an operator's log book.¹⁷ Annette testified that she had used a decimal point correctly, but the ink or pencil must have been too light for others to read.¹⁸ She noted that she correctly wrote the same results at multiple other points in the log with the decimal point visibly placed in the correct spot.¹⁹

The goal for SOP compliance arose because, as mentioned, on May 26, 2014 Annette did not follow the proper SOP for potassium permanganate, for which she was suspended for three days.²⁰ In addition, the PIP lists an incident from 2013, in which Annette is accused of diverging from an SOP for "preparing post-caustic."²¹ The PIP alleges that Annette received a written warning for this violation, but such warning is not part of the record before the court.²² Furthermore, Annette claims that she did not receive a written warning for this incident.²³

¹⁶ Hearing, pg. 9 (3/26/2015).

¹⁷ Performance Improvement Plan, pg. 2 (6/28/2014).

¹⁸ Hearing, pg. 10 (3/26/2015).

¹⁹ Hearing, pg. 10 (3/26/2015).

²⁰ Performance Improvement Plan, pg. 2 (6/28/2014).

²¹ Performance Improvement Plan, pg. 2 (6/28/2014).

²² Performance Improvement Plan, pg. 2 (6/28/2014).

²³ Hearing, pg. 14 (3/26/2015).

The concern for neglect of duty stemmed from May 5, 2014, when Annette is alleged to have been at fault for permitting water to overflow a post-caustic tank.²⁴ Annette testified that she denies overflowing the tank, and explained that the incident occurred while she was not at the facility.²⁵ She claims to have explained this to her supervisors, but she states they ignored her reasoning.²⁶

The area of insubordination relates to multiple alleged incidents. One incident relates to the May 26, 2014 occurrence involving the mixing of the potassium permanganate.²⁷ The letter states that Annette called her supervisor an "asshole" multiple times when questioning her about compliance with an SOP.²⁸ However, Annette testified that her supervisor kept calling her "a bitch," and variations of that epithet, and a "liar."²⁹ She admits that she became "riled up" after she was called names repeatedly, called the supervisor an "asshole" once, and then walked away.³⁰ She later apologized.³¹ Annette also initially refused to sign a document acknowledging that she was aware of proper procedures for timesheet submission and a written warning.³²

The issue of honesty is listed in the PIP as related to the potassium permanganate incident, in which Annette is alleged to have lied to her supervisor about

²⁴ Performance Improvement Plan, pg. 2 (6/28/2014).

²⁵ Hearing, pg. 15 (3/26/2015).

²⁶ Hearing, pg. 16 (3/26/2015).

²⁷ Performance Improvement Plan, pg. 2 (6/28/2014).

²⁸ Performance Improvement Plan, pg. 2 (6/28/2014).

²⁹ Hearing, pg. 13 (3/26/2015).

³⁰ Hearing, pg. 13 (3/26/2015).

³¹ Hearing, pg. 13 (3/26/2015).

³² Performance Improvement Plan, pg. 2 (6/28/2014).

filling the tank.³³ She claims that she did not lie about the process she used in filling the tank, and in fact she documented the method she used in the log book.³⁴

Finally, the issue of anger management regards general allegations that Annette is combative and confrontational when discussing work performance and that she fails to claim responsibility for mistakes.³⁵ This section specifically notes that Annette had reported that a supervisor intentionally sabotaged her by turning on water that resulted in a water tank overflow.³⁶

Annette claims that the PIP was presented to her, but she was not afforded an opportunity to dispute the accuracy of the alleged incidents it concerned.³⁷ All seven problem areas were accompanied by a list of improvement and activity goals and expectations for Annette to meet.³⁸ "Progress checkpoints" were scheduled monthly meetings used to evaluate Annette's progress, occurring from July to December 2014.³⁹

In her July 2014 evaluation, the issues Annette is noted to have related to record keeping accuracy and thoroughness and honesty.⁴⁰ Regarding the former, Annette is noted to have a lack of detail in documents indicating the "H.S. pumps" were actually in use, and an oversight in signing into the operator's log for attendance tracking.⁴¹ Annette testified that her supervisor did not tell her that he wanted her to designate the exact H.S. pumps she turned on until after she completed the log, and when he did, she

³³ Performance Improvement Plan, pg. 2 (6/28/2014).

³⁴ Hearing, pgs. 16-17 (3/26/2015).

³⁵ Performance Improvement Plan, pg. 2 (6/28/2014).

³⁶ Performance Improvement Plan, pg. 2 (6/28/2014).

³⁷ Hearing, pg. 14 (3/26/2015).

³⁸ Performance Improvement Plan, pgs. 3-4 (6/28/2014).

³⁹ Performance Improvement Plan, pg. 5 (6/28/2014).

⁴⁰ Performance Evaluation Plan (PIP) July 28 Review (8/4/2014).

⁴¹ Performance Evaluation Plan (PIP) July 28 Review (8/4/2014).

agreed to do so moving forward.⁴² The PIP review also indicated that Annette had a problem signing into the log properly for attendance tracking, to which Annette claims that her supervisor picked up the logbook before she had the opportunity to sign-in.⁴³

The honesty issue "is relative to your email dated July 12, 2014 responding to an email from Brent Smith dated July 8, 2014."⁴⁴ No further information is provided on Annette's alleged dishonesty, although this incident is cross referenced under the issue of anger management.⁴⁵ Annette claims that she was not dishonest and that she is not sure why Brent Smith would believe she was dishonest.⁴⁶

In Annette's August 29, 2014 review, the issues relate to record keeping accuracy and thoroughness as well as failure to follow verbal directives.⁴⁷ She is noted to have made an oversight signing into the operators log and committed errors on her timesheet, as well as requesting days off that she was already scheduled to have off.⁴⁸ With respect to the latter issue, Annette claimed that she was not given a verbal directive to follow.⁴⁹ Rather, she claims that after the fact she was told what she did incorrectly.⁵⁰

In Annette's September 30, 2014 review she is noted to have one issue with records keeping and accuracy regarding a misplaced decimal in a log book.⁵¹ Annette explained that, at the time of the incident, she was merely told to write more clearly in

⁴² Hearing, pg. 19 (3/26/2015).

⁴³ Hearing, pg. 19 (3/26/2015).

⁴⁴ Performance Evaluation Plan (PIP) July 28 Review (8/4/2014).

⁴⁵ Performance Evaluation Plan (PIP) July 28 Review (8/4/2014).

⁴⁶ Hearing, pg. 20-22 (3/26/2015).

⁴⁷ Performance Evaluation Plan (PIP) August 29 Review (9/5/2014).

⁴⁸ Performance Evaluation Plan (PIP) August 29 Review (9/5/2014).

⁴⁹ Hearing, pg. 36 (3/26/2015).

⁵⁰ Hearing, pg. 36 (3/26/2015).

⁵¹ Performance Evaluation Plan (PIP) September 30 Review (10/6/2014).

the future and that was the end of the issue.⁵² She is also noted to have an SOP compliance problem when she did not correct a request for sick leave the day she returned to work from the sick leave.⁵³ Instead Annette made the correction the next day.⁵⁴

For Annette's November 3, 2014 review, the only issue listed is with "one occurrence of tardiness," which is not elaborated upon.⁵⁵ The review states that "after your first three reviews, there has been poor progress, and at this point your [sic] failing to make improvements in performance as outlined in your PIP. It is paramount that improvements in performance occur in order for you to be successful in your employment with the County."⁵⁶

In Annette's final review, on November 25, 2014, the only issue was that Annette failed to follow the SOP for timesheet submittal.⁵⁷ Annette testified that she submitted a time sheet without her direct supervisor's signature because he was not there to sign it.⁵⁸

In a letter dated December 8, 2014, Annette is advised that "[a]s a result of failing to make sufficient progress" during her PIP period and "repeated violations of County and department policies," she was scheduled for a pre-disciplinary meeting.⁵⁹ The letter reiterates all of Annette's past offenses that preceded the PIP.⁶⁰ In terms of new issues that developed after instituting the PIP, the letter lists that (1) Annette has been tardy;

⁵² Hearing, pg. 35 (3/26/2015).

⁵³ Performance Evaluation Plan (PIP) September 30 Review (10/6/2014).

⁵⁴ Performance Evaluation Plan (PIP) September 30 Review (10/6/2014).

⁵⁵ Performance Evaluation Plan (PIP) November 3rd Review (11/7/2014).

⁵⁶ Performance Evaluation Plan (PIP) November 3rd Review (11/7/2014).

⁵⁷ Performance Evaluation Plan (PIP) November 25th Review (12/5/2014).

⁵⁸ Hearing, pg. 34 (3/26/2015).

⁵⁹ Letter to Annette Nienajadly from Lyle Bloom (12/8/2014).

⁶⁰ Letter to Annette Nienajadly from Lyle Bloom (12/8/2014).

(2) she has submitted inaccurate and incomplete information in her time sheet logbooks, as well as forgetting to sign the logbook; (3) she has been insubordinate in "several instances" by failing to follow written and verbal instructions, and (4) she failed her anger management goals by being "observed in the workplace with a sweatshirt containing the language, "Warning, To Avoid Injury, Do Not Tell Me How To Do My Job."⁶¹

Regarding the sweatshirt, Annette acknowledges that she brought that sweatshirt with her to work.⁶² She said it was a surprise gag gift for a co-worker that she normally exchanges presents with for Christmas.⁶³ Annette testified that she intended to give the gift after work, and in the meantime it was kept in a plastic bag inside of her jacket sleeve, which was hung-up.⁶⁴ She never took it out of the bag or showed any other employees.⁶⁵ Annette claims that she did not remove the shirt to display it in the control room, which is how it was found.⁶⁶ She believes that the plant manager Tim Neyer searched her belongings, found the sweatshirt, and hung it up for display.⁶⁷ Annette stated that on multiple occasions she found Tim Neyer searching through her personal belongings, including her purse that she stored in her locker.⁶⁸

Annette claims that throughout the PIP review meetings, she would try to raise her concerns and explain the alleged incidents, but she was ignored.⁶⁹ She also testified that in these meetings Mark Day, who is the supervisor of Tim Neyer, "literally

⁶¹ Letter to Annette Nienajadly from Lyle Bloom (12/8/2014).

⁶² Hearing, pg. 23 (3/26/2015).

⁶³ Hearing, pg. 23 (3/26/2015).

⁶⁴ Hearing, pg. 24 (3/26/2015).

⁶⁵ Hearing, pg. 24 (3/26/2015).

⁶⁶ Hearing, pg. 24 (3/26/2015).

⁶⁷ Hearing, pg. 27 (3/26/2015).

⁶⁸ Hearing, pg. 27 (3/26/2015).

⁶⁹ Hearing, pg. 28 (3/26/2015).

came out and word for word said we're not expecting you to pass this * * * we worded this and we did this to make it hard and you have to be perfect. You can make no mistakes."⁷⁰ She claimed that this sentiment was often repeated at her meetings.⁷¹ At her final review, Mark Day told her there was a strong possibility she would not pass because she "had to be 100% perfect all the time and he didn't see that as being possible."⁷² Following the pre-disciplinary hearing, Annette was terminated on December 22, 2014.⁷³

After her termination, Annette filed an Application for Determination of Benefit Rights in December 2014. Annette received a positive determination in her favor in January 2015, finding that she was terminated without just cause. Upon the County's appeal, the Director reversed the determination, to which Annette appealed. In February 2015 the Ohio Department of Job and Family Services transferred jurisdiction to the Unemployment Compensation Review Commission. On March 11 and 15, 2015, hearings were held before a hearing officer. The hearing officer issued a decision finding that the County did not have just cause to terminate Annette. The County thereafter appealed to this court.

⁷⁰ Hearing, pg. 29 (3/26/2015).

⁷¹ Hearing, pg. 28 (3/26/2015).

⁷² Hearing, pg. 34 (3/26/2015).

⁷³ Request to Employer for Information.

STANDARD OF REVIEW

The standard of review in unemployment compensation benefits cases is “well-established.”⁷⁴ R.C. 4141.282(H) sets forth a common pleas court’s standard of review in appeals taken from a decision of the Unemployment Compensation Review Commission.⁷⁵ A reviewing court must reverse, modify, remand, or vacate the commission’s decision when the decision is “unlawful, unreasonable, or against the manifest weight of the evidence.”⁷⁶

In determining if the commission’s decision is supported by the “manifest weight of the evidence,” courts apply the “civil manifest weight of the evidence standard.”⁷⁷ The standard requires the decision to be “supported by some competent, credible evidence going to all the essential elements of the case * * *.”⁷⁸

When reviewing an administrative determination of eligibility for unemployment benefits, the common pleas court sits “in an appellate capacity.”⁷⁹ Reviewing courts are not permitted to “make factual findings or to determine the credibility of witnesses.”⁸⁰ “Factual questions remain solely within the commission’s province.”⁸¹ When testimony conflicts, “the commission, not the court, resolves the conflicts and determines the

⁷⁴ *Johnson v. Edgewood City School Dist. Bd. of Edn.*, Unempl. Ins. Rep. (CCH) P 10, 268, 2010-Ohio-3135, ¶ 9 (12th Dist.).

⁷⁵ *Warren County Auditor v. Sexton*, 12th Dist. Warren No. 05CV64632, 2007-Ohio-7081, ¶ 18.

⁷⁶ R.C. 4141.282(H); *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Serv.*, 73 Ohio St.3d 694, 653 N.E.2d 1207, paragraph one of the syllabus (1995).

⁷⁷ *Mustafa v. St. Vincent Family Ctrs., Inc.*, Unempl. Ins. Rep. (CCH) P 10, 326, 2012-Ohio-5775, ¶ 6 (10th Dist.).

⁷⁸ *Mustafa*, 2012-Ohio-5775, ¶ 6, citing *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

⁷⁹ *Chen v. Ohio Dept. of Jobs & Family Servs.*, Unempl. Ins. Rep. (CCH) P 10, 297, 2012-Ohio-994, ¶ 33 (12th Dist.), citing *Barilla v. Ohio Dept. of Job & Family Serv.*, 9th Dist. No. 02CA008012, 2002-Ohio-5425, ¶ 40.

⁸⁰ *Tzangas*, 73 Ohio St.3d at 696.

⁸¹ *Chen*, 2012-Ohio-994 at ¶ 15, citing *Tzangas*, 73 Ohio St.3d at 697.

credibility of witnesses.”⁸² Similarly, when decisions are “close questions,” reviewing courts leave the Board’s decisions undisturbed.⁸³

Reviewing courts share the duty to determine “whether the board’s decision is supported by evidence in the record.”⁸⁴ The issue of “whether an employee was discharged with just cause is a question of law.”⁸⁵ Notwithstanding, “[t]he fact that reasonable minds might reach different conclusions is not a basis for the reversal of the board’s decision.”⁸⁶ Hence, the reviewing court “must affirm the commission’s findings if some competent, credible evidence in the records” supports the decision.⁸⁷

LEGAL ANALYSIS

The eligibility requirements to receive unemployment compensation benefits are set forth in R.C. 4141.29(D) of the Unemployment Compensation Act, providing in pertinent part:

“* * * no individual may * * * be paid benefits under the following conditions * * * (2) For the duration of the individual’s unemployment if the director finds that: (a) The individual quit work without just cause or has been discharged for just cause in connection with the individual’s work * * *.”

⁸² *Ohio Assn. Pub. School Emp. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 12AP-81, 2012-Ohio-6210, ¶ 25, quoting *Cottrell v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 05AP-798, 2006-Ohio-793, ¶ 15.

⁸³ *Irvine v. State Unemployment Compensation Bd. of Review*, 19 Ohio St.3d 15, 18, 482 N.E.2d 587, 15 O.B.R. 12 (1985).

⁸⁴ *Tzangas*, 73 Ohio St.3d at 696.

⁸⁵ *Sexton*, 2007-Ohio-7081, ¶ 25, citing *Lombardo v. Ohio Bur. of Emp. Serv.*, 119 Ohio App.3d 217, 221 (6th Dist. 1997).

⁸⁶ *Tzangas*, 73 Ohio St.3d at 697, quoting *Irvine*, 19 Ohio St.3d 15.

⁸⁷ *Williams v. Ohio Dept. of Job and Family Servs.*, 129 Ohio St.3d 332; 2011-Ohio-2897, 951 N.E.2d 1031, ¶ 20.

The claimant bears the burden of proving “entitlement to unemployment compensation benefits.”⁸⁸ Courts must “bear in mind that the unemployment compensation statutes should be construed liberally in favor of the applicant.”⁸⁹

While there is no “slide-scale definition of just cause,”⁹⁰ the Ohio Supreme Court has construed “just cause” to mean “that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.”⁹¹ When an employer discharges an employee, whether just cause exists “depends upon the factual circumstances of each case.”⁹² Therefore, it “is primarily an issue for the trier of fact.”⁹³

A just cause discharge must be consistent with the legislative purpose underlying the Unemployment Compensation Act.⁹⁴ The Act’s driving philosophy is that “employment and not unemployment is the goal to be attained.”⁹⁵ “The Act exists to enable unfortunate employees, who become and remain *involuntarily* unemployed by adverse business and industrial conditions, to subsist on a reasonably decent level and is in keeping with the humanitarian and enlightened concepts of this modern day.”⁹⁶ Furthermore, the Act was intended to benefit those who were “willing to work.”⁹⁷ “When

⁸⁸ *Irvine*, 19 Ohio St.3d at 17.

⁸⁹ *Johnson v. SK Tech, Inc.*, 2d Dist. Montgomery No. 23522, 2010-Ohio-3449, ¶ 19, citing *Clark Cty. Bd. of Mental Retardation & Developmental Disabilities v. Griffin*, 2d Dist. Clark No. 2006-CA-32, 2007-Ohio-1674, ¶ 10.

⁹⁰ *Irvine*, 19 Ohio St.3d at 17.

⁹¹ *Williams*, 2011-Ohio-2897 at ¶ 22, citing *Irvine*, 19 Ohio St.3d at 17.

⁹² *Williams*, 2011-Ohio-2897 at ¶ 22, citing *Warrensville Hts. v. Jennings*, 58 Ohio St.3d 206, 569 N.E.2d 489 (1991).

⁹³ *Peterson v. Director*, 4th Dist. No. 03CA2738, 2004-Ohio-2030, ¶16, citing *Irvine*, 19 Ohio St.3d at 17.

⁹⁴ *Irvine*, 19 Ohio St.3d at 17.

⁹⁵ *Chambers v. Owens-Ames-Kimball Co.*, 146 Ohio St. 559, 570, 67 N.E.2d 439, 165 A.L.R. 1373, 33 O.O. 60 (1946).

⁹⁶ (Emphasis original. Citation omitted). *Tzangas*, 73 Ohio St.3d at 697. See *Nunamaker v. U.S. Steel Corp.*, 2 Ohio St.2d 55, 57, 206 N.E.2d 206, 31 O.O.2d 47 (1965) (holding same).

⁹⁷ *Williams*, 2011-Ohio-2897 at ¶ 26, citing *Salzl v. Gibson Greeting Cards, Inc.*, 61 Ohio St.2d 35, 39, 399 N.E.2d 76, 15 O.O.3d 49 (1980).

an employee is at fault, he is no longer the victim of fortune's whims, but is instead directly responsible for his own predicament."⁹⁸

An employer can terminate an employee with just cause when it "has been reasonable in finding fault on behalf of the employee."⁹⁹ "Fault, however, is not limited to willful or heedless disregard of a duty or a violation of an employer's instructions."¹⁰⁰ Similarly, the reason for a just cause discharge "need not reach the level of misconduct but there must be some level of fault" by the employee.¹⁰¹ Therefore, with fault, "the critical issue is not whether an employee has technically violated some company rule, but whether the employee, by his or her actions demonstrated an unreasonable disregard for employer's best interest."¹⁰² Likewise, an employee is at fault when the employee is unable to perform the job, and "[u]nsuitability for a position constitutes fault sufficient to support a just cause termination."¹⁰³

In addition, "Ohio appellate courts have 'generally concluded that where a company bypasses its progressive disciplinary system and terminates an employee, that employee's discharge is without cause for unemployment compensation."¹⁰⁴ A progressive disciplinary system gives employees "expectations on which employees rely."¹⁰⁵

⁹⁸ *Tzangas*, 73 Ohio St.3d at 698.

⁹⁹ *Tzangas*, 73 Ohio St.3d at 698.

¹⁰⁰ *Williams*, 2011-Ohio-2897 at ¶ 24 citing *Tzangas*, 73 Ohio St.3d at 698.

¹⁰¹ *Johnson*, 2010-Ohio-3135 at ¶ 11.

¹⁰² *Id.* at ¶ 13.

¹⁰³ *Chen*, 2012-Ohio-994 at ¶ 15, quoting *Tzangas*, 73 Ohio St.3d at 698.

¹⁰⁴ *Ohio Assn. Pub. School Emp.*, 2012-Ohio-6210 at ¶ 21. See *Peterson*, 2004-Ohio-2030 at ¶ 20 (holding same).

¹⁰⁵ *Ohio Assn. Pub. School Emp.*, 2012-Ohio-6210 at ¶ 21, quoting *Mullen v. O.B.E.S.*, 8th Dist. No. 49891 (Jan. 16, 1986).

Courts have observed that it "is important to distinguish between just cause for discharge in the context of unemployment compensation and other contexts."¹⁰⁶ The Twelfth District Court of Appeals has noted that there is "significant case law suggesting that 'just cause' under the Unemployment Compensation Act is a more stringent standard than the standard necessary to terminate an employee for a disciplinary violation."¹⁰⁷ In a similar sense, although "a termination based upon an employer's economic necessity may be *justifiable*, it is not a *just cause* termination when viewed through the lens of the legislative purpose of the Act."¹⁰⁸ For example, "an employer who has insufficient work to keep an employee may have 'just cause' for discharge from the employer's perspective, but the employer does not have 'just cause' under R.C. 4141.29(D)."¹⁰⁹

Phrased differently, the "issue is not whether the discharge itself is wrongful or justified from an employment-contract viewpoint. Rather, there is a distinct difference between a wrongful discharge and 'just cause for discharge,' pursuant to R.C. 4141.29."¹¹⁰

¹⁰⁶ *Peterson*, 2004-Ohio-2030 at ¶17.

¹⁰⁷ *Id.* at ¶ 18.

¹⁰⁸ (Emphasis original.) *Tzangas*, 73 Ohio St.3d at 697. See *Mustafa*, 2012-Ohio-5775 at ¶ 17, citing *Scamati v. Ohio Dept. Bur. of Emp. Servs.*, 10th Dist. No. 94API01-102 (Aug. 11, 1994) ("the test of 'just cause' for unemployment compensation purposes is different from that required for the tort of constructive discharge.").

¹⁰⁹ *Morris v. Ohio Bur. of Emp. Serv.*, 90 Ohio App.3d 295, 299, 629 N.E.2d 35 (10th Dist. 1993).

¹¹⁰ *Id.* at 300.

(I) FIRST ASSIGNMENT OF ERROR

In the instant case, the County appealed from the commission's decision on three assignments of error. In the first, the County contends: "The hearing officer gave no weight to the Employer's gravest concern – Appellee's failure to follow standard operating procedure when making chemical compositions."¹¹¹ The County highlights that the hearing officer focused on a timesheet error and the sweatshirt incident, but "makes no mention of the history and severity of Appellee's misconduct."¹¹²

The hearing officer focused on the attendance and the sweatshirt incidents, which were the only problems raised in Annette's final two PIP reviews.¹¹³ Leading up to Annette's termination, she received a letter from the director of the water resources department informing her that she would have a disciplinary hearing "[a]s a result of failing to make sufficient progress" during her PIP period and "repeated violations of County and department policies."¹¹⁴

The hearing officer's observation that Annette only had minor issues in the months immediately preceding her termination belies the County's conclusion that Annette failed to make sufficient progress. As highlighted above, Annette's insufficient progress was the proffered reason for the pre-disciplinary hearing that culminated in her termination. The only SOP violation the hearing officer did not mention during the six month PIP period was one from September when Annette failed to correct a request for

¹¹¹ Appellant's Brief, pg. 6.

¹¹² Appellant's Brief, pg. 6.

¹¹³ Commission Decision, pg. 5.

¹¹⁴ Letter to Annette Nienajadly from Lyle Bloom (12/8/2014).

sick leave the same day she returned to work, as policy required.¹¹⁵ That single SOP violation is unrelated to making chemical compositions and does not underscore “the severity of Appellee’s misconduct.”¹¹⁶

In addition, the hearing officer, not this court, makes credibility determinations.¹¹⁷ Annette's testimony challenged almost all the alleged incidents of misconduct the County cited. Furthermore, Annette indicated that, no matter how much progress she made, the County had predetermined that she should fail. The hearing officer was in the best position to determine whether Annette’s account of the events was more accurate than the County’s. When evidence conflicts, as it does here, the commission “resolves the conflicts and determines the credibility of witnesses.”¹¹⁸ It is the hearing officer’s prerogative to give certain incidents of misconduct more weight than others based upon his determination of the witnesses' credibility.

Thus, upon reviewing the record, the court finds adequate evidence was presented to support the commission’s determination that the County did not terminate Annette for just cause based on the misconduct involved. The County’s first assignment of error is not well-taken and is denied.

(II) SECOND ASSIGNMENT OF ERROR

In the County’s second assignment of error, it appeals on the basis that the “The hearing officer found that the sweatshirt was removed from claimant’s locker; no

¹¹⁵ Performance Evaluation Plan (PIP) September 30 Review (10/6/2014).

¹¹⁶ Appellant’s Brief, pg. 7.

¹¹⁷ *Tzangas*, 73 Ohio St.3d at 696.

¹¹⁸ *Ohio Assn. Pub. School Emp.*, 2012-Ohio-6210 at ¶ 25 quoting *Cottrell*, 2006-Ohio-793 at ¶ 15.

evidence was presented that the sweatshirt was in a locker."¹¹⁹ In actuality Annette had hidden the sweatshirt in a plastic bag, which she tucked into her jacket sleeve to conceal it.¹²⁰ She had previously testified that she believed that Tim Neyer, the plant manager, had searched her belongings and displayed the shirt because she had witnessed him search her purse on earlier occasions, which had been in her locker.¹²¹

The County posits that "[t]he hearing officer placed weight on the misbelief that Appellee went to lengths to conceal the sweatshirt by locking it in a locker and the Employer rifled through her locked belongings."¹²² Despite the hearing officer's apparent error in conflating the jacket with the locker, the hearing officer's conclusion was more concerned with the fact that Annette concealed the sweatshirt in her private belongings, inside of a plastic bag. The hearing officer concluded: "Claimant presented credible testimony that the sweatshirt was in a bag and that she did not display the sweatshirt."¹²³ The hearing officer found that Annette was being truthful in that she did not display the sweatshirt in the control room, which would have been an act of hostility and insubordination. Whether she hid the sweatshirt in her jacket or her locker, the ultimate conclusion that she did not purposely display the sweatshirt remains unchanged. Accordingly, the County's second assignment of error is not well-taken and is denied.

¹¹⁹ Appellant's Brief, pg. 7.

¹²⁰ Hearing, pg. 24 (3/26/2015).

¹²¹ Hearing, pg. 27 (3/26/2015).

¹²² Appellant's Brief, pg. 3.

¹²³ Commission Decision, pg. 5.

(III) THIRD ASSIGNMENT OF ERROR

In the County's third and final assignment of error, the County appeals on the basis that "Appellee Nienajadly's employment was terminated due to her failure to make progress on the categories noted in her PIP; she was not charged with violating the apparel policy."¹²⁴ The County emphasizes that Annette was terminated for multiple reasons, including her failure to follow SOPs when preparing chemical compounds, her inattentiveness and lack of attention to detail, and her combativeness when confronted with mistakes.¹²⁵ The County insists that the sweatshirt incident was just one piece of this much larger pattern of conduct demonstrating that Annette had not improved in spite of the six month PIP.

As discussed, however, the hearing officer was free to weigh the credibility of the witnesses and the evidence presented. Annette contested many of the County's complaints lodged against her and often contradicted the testimony of the County's only witness, Lyle Bloom. If believed, Annette's testimony severely diminishes the County's position that she was terminated for a failure to progress in her position.

Annette's testimony, if considered credible, would not allow an "ordinarily intelligent person" to conclude that the County had "a justifiable reason" for terminating her in the face of the progress she made throughout the previous six months.¹²⁶ Under Annette's version of events, she had been unfairly targeted by her supervisors and was positioned to fail her PIP goals despite her improvements. In consideration of Annette's testimony, the court cannot conclude that the commission's decision was without "some

¹²⁴ Appellant's Brief, pg. 7.

¹²⁵ Appellant's Brief, pg. 8.

¹²⁶ *Williams*, 2011-Ohio-2897 at ¶ 22 citing *Irvine*, 19 Ohio St.3d at 17.

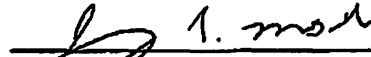
competent, credible evidence.”¹²⁷ As such, the court cannot find that the commission’s decision was “unlawful, unreasonable, or against the manifest weight of the evidence.”¹²⁸ The County’s third assignment of error is not well-taken and is denied.

CONCLUSION

For the foregoing reasons, the court holds that the County’s assignments of error that the Unemployment Compensation Review Decision was unlawful, unreasonable or against the manifest weight of the evidence are not well-taken and are hereby denied.

IT IS SO ORDERED.

DATED: 3-25-16



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¹²⁷ *Mustafa*, 2012-Ohio-5775, ¶ 6, citing *C.E. Morris Co.*, 54 Ohio St.2d at the syllabus. The Ohio Department of Job & Family Services (hereinafter referred to as “ODJFS”) also argues that the County did not have just cause to terminate Annette because it failed to adhere to its progressive discipline policy. Appellee’s Brief, pg. 13. ODJFS maintains that the County failed to follow its policy because Annette was improving throughout her PIP reviews and was without interceding incidents since the PIP process began. Appellee’s Brief, pg. 14. Yet, Annette was terminated after the sweatshirt incident when, according to the policy, she had not committed a terminable offense. Appellee’s Brief, pg. 14. The County retorts that the case law ODJFS cites is only applicable to collective bargaining situations. Appellant’s Reply Brief, pgs. 1-2. Moreover, the County highlights that the policy did not restrict the County’s ability to terminate employees without first suspending them for longer periods of time. Appellant’s Reply Brief, pg. 1. Although some cases ODJFS cites are concerning collective bargaining situations, others do not involve collective bargaining agreements. See *Peterson*, 2004-Ohio-2030 at ¶ 20 (“Our colleagues in other appellate districts have generally concluded that when a company bypasses its progressive disciplinary system and terminates an employee, that employee’s discharge is without cause for unemployment compensation.”). However, the County is correct in that the progressive discipline policy in place allowed the County flexibility to terminate an employee involved in the PIP process: “The policy in no way limits the statutory rights enumerated in the ORC or the right of the Board to discharge an employee without prior discipline.” Section 6.13(A), Progressive Discipline Policy.

¹²⁸ R.C. 4141.282(H); *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Serv.*, 73 Ohio St.3d 694, 1995-Ohio-206, 653 N.E.2d 1207, paragraph one of the syllabus.

NOTICE TO CLERK:

The Clerk is hereby directed to serve upon all parties not in default for failure to appear notice of this judgment and the date of its entry upon the journal. Within three days of entering this judgment upon the journal, the Clerk shall serve the parties in a manner prescribed by Civ.R.5(B) and note the service in the appearance docket.



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision/Entry were sent on this 20 day of March 2016 by e-mail to Mary Lynne Birck, attorney for the plaintiffs, at mbirck@clermontcountyohio.gov and Robin A. Jarvis, attorney for the defendant Director of Ohio Department of Job and Family, at rjarvis@ag.state.oh.us, and by regular U.S. mail to the defendant Annette Nienajadly, at 4425 Happiness Lane, Cincinnati, Ohio 45245-1411.



Administrative Assistant to Judge McBride