IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Martiquea Middleton.,	:	
Appellant,	:	**Case No. 16CV-9358**
-v-	:	**JUDGE SERROTT**
Ohio State Unemployment Compensation Review Commission, et al.,	:	
Appellees.	:	

DECISION AND ENTRY AFFIRMING THE ORDER OF APPELLEE OHIO STATE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION
AND
NOTICE OF FINAL APPEALABLE ORDER

Rendered this 6th day of January, 2017

SERROTT, J.

This case is before the Court on Appellant Martiquea Middleton's ("Appellant") administrative appeal from the final order of the Ohio Unemployment Compensation Review Commission ("the Review Commission") disallowing her claim for unemployment benefits. Appellant challenges the Review Commission's finding that she was discharged for just cause in connection with her work. The matter has been fully briefed and is ready for consideration. The relevant facts and procedural history are as follows.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

In April of 2016, Appellant was hired by TWC Administration, LLC, (commonly known as Time Warner Cable), for the position of Inbound Sales Representative. At the time of hiring, Appellant was informed that her job duties would be to "provide excellent customer service," to "sell product," and to build a "rapport" to attract more customers. Appellant

admitted that these job expectations were reasonable and were in line with her ten years of prior experience as a sales representative. (Hearing Transcript, pp. 7-8).

On April 8, 2016, Appellant signed an "Employee Acknowledgment" verifying receipt of Time Warner Cable's "Inbound Sales Policy and Procedures." The manual included a "New Hire Performance Expectations" section outlining the training and assessments that would be given to new employees. The section indicated that new hires would receive training and information on selling Time Warner Cable's portfolio of products and would be given four assessments administered over the full length of the training session: "The assessments cover knowledge that is required on a daily basis to succeed as an Inbound Sales Agent. Trainees are assessed weekly on various topics."

Trainees were required to obtain a score of 80% to pass each assessment. Trainees were further informed that:

> Failure to successfully pass an assessment will require a retake of the assessment.
>
> Failure to successfully score 80% on any assessment (one retake allowed per assessment) may result in a review for termination of employment.

Upon successful completion of the training and assessments, new hires would move to "phase two of training which includes On the Job Training." This on the job training was to be measured in weekly intervals, where the employee was expected to achieve or exceed certain "minimum expectations' in order to successfully complete the training process. Employees were informed that, during the "on the job training" process: [E]mployee performance will be closely monitored, and any employee who is not consistently achieving or making progress towards the requirements may be subject to the normal performance improvement process. Failure to

demonstrate immediate and sustained improvement may result in further counseling or corrective action up to and including termination of employment."

Finally, the manual set forth a "Performance and Improvement Plan Process" outlining "general guidelines and expectations around overall performance accountability for the Inbound Sales Agent." This section explained how employee performance would be measured and further indicated that the sales agents would "receive performance coaching and feedback on an on-going basis to help meet and exceed minimum performance expectations." An employee who failed to meet expectations was subject to "progressive corrective action as follows: 1) documented counseling; 2) written warning; 3) a final written warning; and 4) termination.

Appellant attended and completed the initial four week training session during April and the early part of May, 2016. After each week of training, Appellant was given assessments in the form of four "open book" tests. The first three assessments consisted of multiple choice tests. Appellant testified that she scored "perfectly" on these assessments, but also indicated that she had received scores of "85" and "86." (Id. at 8, 36)

The final assessment was a short answer test. The first time Appellant took it, she received a score of 13%. Appellant re-took the test the next day and raised her score to 73%. Appellant was then informed that she would be able to re-take the test one more time, and if she did not pass, then she would be terminated. Appellant studied the materials over the weekend, and then retook the test, but still only received a score of either 72% or 73%[1]. Appellant was subsequently terminated by Time Warner for failing to score at least an 80% on the final assessment.

[1] The face of the test states that Appellant received a 72%, but Appellant testified that she was informed she had scored 73%.

Appellant then filed an application for unemployment benefits, which was denied on June 17, 2016. Appellant filed an appeal, and the matter was transferred to the Review Commission, who scheduled a hearing for August 1, 2016. During the hearing, Appellant contended that her termination was without just cause. Appellant's primary argument was that she should have been given a "grading rubric" for the final assessment so that she would know how the answers were being graded and the criteria for obtaining credit or partial credit:

> Q. What do you mean by grading rubric?
> A. * * * So what I mean by a grading rubric * * * for example, it's a standardized criteria that says that you'll receive certain amount of credit based on that explanation of that step, a partial credit for half of that step or no credit for providing that step.
> Q. So, something that they would tell you what they would accept as a proper answer and what they would not?
> A. Yeah, it wouldn't be like, "Here's the answer." It would be 25 (inaudible) for putting in all the different graphics correctly, meeting the audit part, adhering to the verification procedure.
> Q. So, in other words, what you would be credited with and what you would not get credit for?
> A. Exactly.
> Q. Okay.
> A. So, the whole time I'm taking this test I have no idea of the grading rubric.

(Id. at 23-24).

Appellant also argued that Time Warner did not follow its progressive corrective action policy prior to terminating her employment. Appellant further indicated that she had experienced technical issues with her assigned computer during the training sessions and while taking the assessments. Appellant had raised this issue during her initial application for unemployment benefits, and Time Warner responded that "No system issues have been or were reported. The claimant simply struggled to navigate the ICOMS system successfully." (See Record, Director's File, at E2618-R99). Time Warner further submitted an e-mail chain to show

that it had looked into the allegation and Appellant's "trainer" indicated: "Martiquea did not report any computer issues during any of the assessment attempts. She just did not know how to navigate. She did let me know she was stuck but when I gave assistance or direction, and I did several times, she was able to move forward." (Id. at E2618- S2).

Appellant also argued that her termination was unjust because she has had a successful career in telephone sales and was never afforded the opportunity to actually do the job. Appellant indicated in the record that she could have "run the center," and intimated that perhaps the "director" was worried she would eventually take his position. She further testified as follows:

> A. * * * I mean, was I even graded correctly? Or, did I score too high and was terminated because I scored too high?
> Q. Do you have evidence that you scored too high or were terminated because you scored too high?
> A. I have evidence that I've been a top sales performer doing the same job function done ten years. I have a grade card for each job performer and the ten years of sales experience and that sales experience that shows that I exceeded every sales goal that there was to exceed.
> Q. Was this your first time working for Time Warner Cable?
> A. First time working for Time Warner Cable, yeah. But, in the same sales, inbound sales. If you compare the inbound sales position to Chase's inbound sales position, it's the same position. It's just a different product.

(Transcript, p. 29).

Finally, during the hearing, Appellant objected to admission of her actual tests because Time Warner had not given her a grading rubric. The Hearing Officer indicated that she was making Appellant's actual tests a part of the record, but was not going to use or quote from them in her decision:

> "I'm going to add them to the Director's file for purposes of appeal. * * * But I won't use them in my decision. Understood? * * *.
>
> Yeah, I won't, I won't look at them after today and, and use them or refer I'll refer to them because it's part of the record. We've been, this is what we've been talking about. * * * But after that, I won't go back and be like, oh, quote something verbatim from them. I won't use them in my decision. I'll make them part of the record for purpose of appeals. * * * But I won't use them in my actual decision."

(Id. at 40-41).

The Hearing Officer subsequently issued a Decision finding that Appellant's termination was for just cause:

> The facts establish claimant was discharged for just cause in connection with work. The employer's expectations were reasonable. Claimant was following the same training as other individuals in her classification. The facts establish the claimant was unable to meet the employer's new hire training assessment grading criteria in a manner expectable to the employer. She was put on notice that if she did not pass on a third retake, she would be terminated. Claimant was given three opportunities to meet the grading criteria on said training assessment. One retake is allowed per assessment. She failed to pass. This is sufficient to create just cause in connection with work for her discharge.

(Hearing Officer's Decision, p. 4).

The Review Commission disallowed any further review pursuant to a final order issued August 31, 2016. Appellant then initiated this appeal.

II. STANDARD OF REVIEW

In reviewing unemployment compensation cases, "[a]n appellate court may reverse the board's decision if the court finds the decision unlawful, unreasonable, or against the manifest weight of the evidence." *Wash. County Eng'r v. Adm'r*, 4th Dist. No. 95CA34 (Sept. 25, 1996) (citing *Tzangas, Plakas & Mannos v. Adm'r*, 73 Ohio St.3d 694 (1995), paragraph one of the

syllabus). "This standard applies to courts of common pleas and courts of appeals." Id. (citing *Tzangas, Plakas & Mannos*, 73 Ohio St.3d at 696). "In its review, a court determines whether 'some competent, credible evidence' supports the board's conclusion." Id. (quoting *Central Ohio Joint Vocational Sch. Dist. Bd. of Edn. v. Adm'r*, 21 Ohio St.3d 5, 8 (1986)). "The resolution of purely factual questions, including the credibility of conflicting testimony and the weight given to the evidence, is primarily within the province of the board." Id. (citing *Tzangas, Plakas & Mannos*, 73 Ohio St.3d at 697).

"[A]ppellate courts are obligated to defer to the board's findings and have no authority to make their own findings." Id. "A court may not substitute its judgment for that of the Administrator or the board." Id. (citing *Simon v. Lake Geauga Printing Co.*, 69 Ohio St.2d 41, 45(1982)). "Under the foregoing standard, reviewing courts are not permitted to make factual findings or determine the credibility of witnesses, which are instead reserved for decision by the Review Commission." *Quartz Scientific, Inc. v. Dir., Bur. of Unemployment Comp.*, 11th Dist. No. 2012-L-090, 2013-Ohio-1100, ¶9 (citing *Irvine v. Unemployment Comp. Bd. of Rev.*, 19 Ohio St.3d 15, 17 (1985)). "The decision of the Review Commission may not be reversed simply because reasonable minds might reach different conclusions from the same evidence." Id. (citing *Tzangas*, supra, at 697). "Where the board might reasonably decide either way, the courts have no authority to upset the board's decision." *Irvine v. State, Unemployment Comp. Bd. of Review*, 19 Ohio St.3d 15, 18 (1985).

III. LAW AND ANALYSIS

"The Unemployment Compensation Act was intended to provide financial assistance to an individual who had worked, was able and willing to work, but was temporarily without employment through no fault or agreement of his own." *Tucker v. Home Health Connection*,

10th Dist. No. 03AP-1262, 2005-Ohio-848, ¶13 (quoting *Salzl v. Gibson Greeting Cards*, 61 Ohio St.2d 35, 39 (1980). "Generally, 'the basic eligibility for unemployment benefits depends upon the establishment of an 'employment' relationship followed by 'involuntary unemployment.'" Id. (quoting *Mathieu v. Dudley*, 10 Ohio App.2d 169, 174 (10 Dist. 1967)).

"R.C. 4141.29 sets forth the statutory authority for an award of unemployment benefits[.]" *Rubin v. Dir., Ohio Dep't of Job & Family Servs.*, 10th Dist. No. 11AP-674, 2012-Ohio-1318, ¶7. "R.C. 4141.29(D)(2)(a) establishes that a claimant who quits his or her work without just cause or has been discharged for just cause in connection with his or her work is not entitled to unemployment compensation benefits. The claimant has the burden to prove his or her entitlement to benefits." Id. (Emphasis added). "The term 'just cause' has been defined 'in the statutory sense, [as] that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.'" Id. at ¶8 (quoting *Irvine*, supra at 17). "The determination of whether just cause exists necessarily depends upon the unique factual considerations of the particular case." *Irvine* at 17.

The Unemployment Compensation Act "protects those employees who cannot control the situation that leads to their separation from employment," and "[c]onsistent with that purpose, courts have repeatedly held that a discharge is considered to be for just cause where an employee's conduct demonstrates some degree of fault, such as behavior that displays an unreasonable disregard for his employer's best interests." *Niskala v. Dir., Ohio Dep't of Job & Family Servs.*, 9th Dist. No. 10CA0086-M, 2011-Ohio-5705, at ¶11-12. "The Ohio Supreme Court has specifically held: 'When an employee is at fault, he is no longer the victim of fortune's whims, but is instead directly responsible for his own predicament. Fault on the employee's part

separates him from the Act's intent and the Act's protection. Thus, fault is essential to the unique chemistry of a just cause termination.'" Id. at ¶13 (quoting *Tzangas*, 73 Ohio St.3d at 697-698). Thus, "[t]o show he is entitled to unemployment compensation, the employee must provide evidence that his discharge was without just cause by demonstrating he was without fault in the incident resulting in his termination." Id.

Thus, in *Tzangas*, the Supreme Court set forth the following factors that must be proven to show an employee was unsuitable for the required work, and thus at fault for the discharge:

> (1) the employee does not perform the required work, (2) the employer made known its expectations of the employee at the time of hiring, (3) the expectations were reasonable, and (4) the requirements of the job did not change since the date of the original hiring for that particular position.

Tzangas at 698-699.

Additionally, the Tenth District Court of Appeals has ruled that, "[w]hether or not an employee provides logical excuses for not satisfying an employer's reasonable standards is irrelevant to an inquiry regarding that employee's eligibility for unemployment compensation." *City of Dublin v. Clark*, 10th Dist. Nos. 05AP-431, 05AP-450, 2005-Ohio-5926, ¶26 (10th Dist.). Finally, in *Lyons v. Dir., Ohio Job & Family Servs.*, 8th Dist. No. 90334, 2008-Ohio-3547, ¶19, appellate court ruled that "[t]he stringent job requirements did not bar the determination of unsuitability" when the employer's expectations were made known to the employee at the time he was hired, and the expectations, though high, were reasonable in light of the nature of the position.

"[T]he discharged employee bears the burden of proving his or her entitlement to unemployment compensation benefits" and it is the employee who "must provide evidence that his or her discharge was without just cause by demonstrating that he or she was without fault in

the incident that resulted in termination." *Williams v. Ohio Dep't of Job & Family Servs.*, 10th Dist. No. 09AP-471, 2009-Ohio-6328, ¶14 (10th Dist.).

The Court will begin by first addressing Appellant's argument that the Hearing Officer improperly utilized Appellant's tests in reaching her Decision after clearly indicting at the hearing that she would not do so. The Hearing Officer stated that she was making the tests "part of the record," but was not going to use them or "quote something verbatim from them" in her Decision. The Hearing Officer adhered to this guideline. Her Decision makes mention of Appellant's scores and the fact that the tests were "short answer" and not multiple choice like the first three weekly assessments. But this information came from Appellant's own testimony. Therefore, the Court finds that the Hearing Officer did not consider improper evidence in reaching her Decision.

The primary issue in this appeal is whether Appellant's termination for "just cause in connection with her work." The Review Commission determined that Appellant's termination was for just cause because she was not suited for the position and was ultimately at fault for the discharge. These findings must be supported by evidence that: "(1) the employee does not perform the required work, (2) the employer made known its expectations of the employee at the time of hiring, (3) the expectations were reasonable, and (4) the requirements of the job did not change since the date of the original hiring for that particular position." *Tzangas* at 698-699.

The Court's thorough review of the record demonstrates that the second and fourth elements were met. Appellant admittedly received at the time of hiring Time Warner's "Inbound Sales Policy and Procedures" informing her of its "New Hire Performance Expectations." The manual explained that new hires would receive training and information on selling Time Warner portfolio of products. She was further put on notice that four assessments would be administered

over the full length of the training session. The manual indicated that a score of 80% was required to pass each assessment, that one retake was allowed per assessment, and that failure to obtain the passing score "may result in a review for termination." Thus, Time Warner made its expectations known to Appellant at the time of her hiring. Those expectations did not change, with the exception that Time Warner allowed her two retakes of the final assessment, which was to her benefit.

The Court next must examine whether there was competent and credible evidence establishing that Appellant could not perform the required work and that Time Warner's expectations were reasonable. Appellant was discharged for failing to achieve a score of 80% of the final assessment. Appellant contends this requirement was not reasonable because she was not given a grading rubric explaining how the short answers were being graded and the criteria for obtaining full or partial credit.

Although a grading rubric may have helped Appellant to better understand the responses Time Warner was seeking in the short answer portion of the assessment, the Court notes that Appellant remarkably improved her score from a 13% to 73% in one retake after just one night of extra studying. This shows that, having seen the test once, Appellant had a much better understanding of what was expected. Her extraordinary improvement may have been a factor in Time Warner allowing her a third try in contravention of its policy of affording one retake per assessment. Unfortunately, Appellant still was unable to achieve the required passing score of 80%. She blames this on the lack of a grading rubric, but Time Warner was under no legal obligation to give her one, and the Court cannot find that Time Warner's testing procedure and score requirements are unreasonable.

Appellant did raise an issue concerning computer problems she experienced during the training sessions and while taking the assessments. However, Appellant's testimony as to the nature of the technical issues was not clear and was at times confusing. There was no competent and credible evidence presented showing that any of these computer issues actually affected her score or her ability to take the assessments.

Appellant also argues that Time Warner failed to follow its progressive corrective action policy. However, Appellant was not subject to the progressive corrective action policy until she had at least moved on to "phase two" of her employment, the "on the job training." At the time of her discharge, Appellant was still undergoing the one month training session. The employee manual unambiguously expressed that the failure to achieve a passing score on any of the training session assessments could result in a review for termination. Appellant was given notice after failing the final assessment two times that her failure to pass on a third attempt would result in her termination.

Finally, Appellant argues that she was successful in her prior employment doing telephone sales, and therefore, it was unreasonable for Time Warner to terminate her without actually affording her an opportunity to do the job. However, although Appellant opined that a telephone sales position is "the same" no matter which company you work for, she also testified: "If you compare the inbound sales position to Chase's inbound sales position, it's the same position. It's just a different product." Time Warner's initial training and assessments focused on its products and services. It is not unreasonable for a company to first require a new hire to demonstrate a basic level of knowledge of its products and services before allowing the employee to engage in telephone sales and customer service.

Based on the foregoing the Court finds there was just cause for Appellant's discharge. The Court finds that the Review Commission's decision is not unlawful, unreasonable, or against the manifest weight of the evidence and is fully supported by the competent and credible evidence in the record. Accordingly, the Review Commission's Order is AFFIRMED.

Pursuant to Civ. R. 58, the Clerk of Courts shall notify all parties of the existence of this judgment and its date of entry on the record.

IT IS SO ORDERED.

Electronically Signed By:
JUDGE MARK A. SERROTT

Franklin County Court of Common Pleas

Date: 01-06-2017

Case Title: MARTIQUEA M MIDDLETON ET AL -VS- OHIO STATE UNEMPLOYMENT

Case Number: 16CV009358

Type: DECISION/ENTRY

It Is So Ordered.

/s/ Judge Mark Serrott

Court Disposition

Case Number: 16CV009358

Case Style: MARTIQUEA M MIDDLETON ET AL -VS- OHIO STATE UNEMPLOYMENT

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes