IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

DENISE V. LANCASTER,	:	
	:	
Appellant,	:	**CASE NO. 17 CV 1137**
	:	
vs.	:	**JUDGE CHRIS M. BROWN**
	:	
CHEEK LAW OFFICES, LLC, et al.	:	
	:	
Appellees.	:	

DECISION AND ENTRY

REVERSING THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION'S DECISION OF JANUARY 11, 2017

This action comes before the Court on an appeal of the Unemployment Compensation Review Commission's (the "Commission") decision to deny benefits to the Appellant, Denise V. Lancaster. Appellant named the Department of Job & Family Services ("Appellee") and her former employer, Cheek Law Offices, LLC (the "Employer"). As set forth below, the Decision of the Commission is **REVERSED.**

I. STATEMENT OF THE FACTS

Employer is a law firm located on the 12th Floor of the Motorists Insurance Building ("Motorists Building") in Columbus, Ohio as a tenant of the building. The Motorists Building is a secured building and each employee of any tenant in the building is issued an employee identification card to enter the building. The security badge given to an employee of the law firm grants access to the elevator in the building and the law offices located on the 12th floor. The elevator additionally provides access to any floor as well as the lobby of any floor in the building. The badge does not grant access to other offices located in the building.

Appellant had been employed for approximately three months by the law firm as a "skip tracer."[1] On October 18, 2016, Appellant used the elevator during her lunch hour to go up to the 21st floor of the Motorists Building. Employer permits its employers to use their lunch time and their free time. Appellant believed she had permission to enter the floor because other people who worked in the building told her the people there were friendly. The 21st floor is the top floor of the Motorists Building and contains the executive offices of Motorists Insurance, which includes the President, CEO, and Chief Legal Counsel. In order to gain access to the offices on the 21st floor, an individual must swipe an electronic security badge. After she exited the elevator on the 21st floor, Appellant entered the lobby and attempted to swipe her badge to gain access to the offices but it was unsuccessful.

While on the 21st floor, Appellant took pictures of large glass windows of the view from the floor. Two employers of Motorists Insurance approached Appellant, one of whom, Kay Powell, allowed Appellant access to the offices and showed her around. Ms. Powell informed Appellant she could come up to the office again for lunch some time as long as she called ahead of time. After Appellant left the office, she returned to the elevator, at which time an employee in security approached Appellant to ask her why she had been on the 21st floor. Appellant found it "odd" she had been approached because it was her understanding building security would only appear if someone called them. Appellant told the security officer she was on the floor for lunch. The security officer instructed Appellant she was not allowed in the Motorists offices without permission.

On October 19, 2016, Appellant again took the elevator to the 21st floor during her lunch hour. Appellant called Ms. Powell when she arrived on the floor and left a voicemail seeking permission to come into the office. Ms. Powell greeted Appellant outside the office and informed her it was not a good time. Appellant then headed back towards the elevator, at which time she

[1] Although it is not entirely clear from the record, a "skip tracer" is generally someone who locates individuals who are delinquent on debts.

was approached by an employee of building security. The building security officer alleges that Appellant was evasive when answering questions. Appellant then took the elevator to the 10th floor rather than the 12th floor where she worked. Appellant claimed she forgot to push the elevator button for her floor.

After the first incident, building security contacted Toni Cheek, a representative of Employer. Ms. Cheek testified that she received a phone call that Appellant had been on the 21st floor of the Motorists Building. Ms. Cheek intended to address the matter with Appellant to let her know she could not be on the 21st floor. However, no such conversation took place before Appellant went up to the 21st floor again the next day. After the second occasion, Ms. Cheek discussed the two incidents with Appellant, at which time she alleges Appellant did not answer all of her questions. Employer terminated Appellant, deeming her to be a security risk. Appellant stated she told Ms. Cheek she had permission to be on the floor from an employee. Appellant testified that no one told her about any policy limiting her to just the 12th floor where she worked.

Ms. Cheek testified that she was concerned about Appellant being evasive in her answers to security about her name and where she worked. On whether Appellant's conduct violated work rules, Toni Cheek, testifying as a representative of the employer, stated as follow:

> "Q: Okay. And did this conduct violate any of the work rules that you have?
>
> A: Well, I don't know if it's a, a work rule or just common knowledge, but the security badges are considered business property and you're only supposed to use it to come in and out of the building and in and out of our office and I believe that's made fairly clear to all people that come to work here." (Tr. at pg. 13, l. 20-24).

Appellant had not received any prior discipline before her termination.

II. PROCEDURAL HISTORY

On October 19, 2016, immediately after her termination, Appellant applied for unemployment compensation benefits. In a decision dated November 9, 2016, the Ohio Department of Job and Family Services denied the application.

On November 30, 2016, the Director issued a Redetermination disallowing Appellant's application, finding the termination was for just cause. Appellant filed an appeal from the Redetermination on November 30, 2016, at which time the Ohio Department of Job and Family Services transferred jurisdiction to the Unemployment Compensation Review Commission for a telephone hearing. The hearing took place on December 14, 2016 with the Appellant present, as well as Toni Cheek and Emerson Cheek for the Employer. Following the telephone hearing, the Hearing Officer issued a decision on December 22, 2016 finding that Employer had just cause to terminate Appellant. The Hearing Officer specifically found:

> "The claimant knew or should have known that she was not to be on any floor other than those authorized by her employer. Based upon the evidence presented, the hearing Officer finds the claimant committed sufficient misconduct to justify her discharge." (page 5 of Hearing Officer decision)

Appellant filed a request for review of the Hearing Office decision. By decision dated January 11, 2017, the request for review was disallowed.

Appellant filed her appeal with this Court, but she did not file a merit Brief. Appellee ODJFS filed a Motion for Judgment on the Pleadings on April 18, 2017 seeking a ruling affirming the administrative decision. Appellee Cheek Law Office, LLC filed a Motion for Judgment on the Pleadings on April 21, 2017. In light of the lack of merit brief from Appellant, this Court has reviewed Appellant's Notice of Appeal and the complete Record of the Proceedings to understand the basis for Appellant's appeal. This matter is now ready for review.

III. STANDARD OF REVIEW

Ohio Revised Code Section ("R.C.") 4141.282(H) sets forth the standard of review that this Court must apply when considering appeals of decisions rendered by the Ohio Unemployment Review Commission. R.C. 4141.282(H) provides:

> If 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 remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission.

The Ohio Supreme Court has held that "[t]he board's role as fact finder is intact; a reviewing court may reverse the board's determination only if it is unlawful, unreasonable, or against the manifest weight of the evidence." *Tzangas, Plakas & Mannos v. Ohio Bur. Of Emp. Servs.* 73 Ohio St.3d 694,697, 653 N.E.2d 1207 (1995). A judgment by the Commission will not be viewed as against the manifest weight of the evidence if it is "supported by some competent, credible evidence going to all the essential elements of the case." *C. E. Morris Co. v. Foley Construction Co.*, 54 Ohio St.2d 279, 280-81, 376 N.E.2d 578 (1978).

In its review of the Commission's determination, this Court must defer to the Commission's determination of purely factual issues when said issues address the credibility of the witnesses and the weight of the evidence. *Angelkovski v. Buckeye Potato Chips,* 11 Ohio App.3d 159,162, 463 N.E.2d 1280 (10th Dist. 1983). The Hearing Officer and the Review Commission are primarily responsible for the factual determinations and for the judging of the credibility of the witnesses. *Brown-Brockmeyer Co. v. Roach,* 148 Ohio St. 125, 73 N.E.2d 377 (1947); *Angelkovski v. Buckeye Potato Chips*, 11 Ohio App.3d 159,162, 463 N.E.2d 1280 (10th Dist. 1983). "[E]very reasonable presumption must be made in favor of the [decision] and the findings of facts [of the Review Commission]." *Curtis v. Infocision Mgmt. Corp.,* 9th Dist. No. 24305, 2008-Ohio-6434, ¶7, quoting *Upton v. Rapid Mailing Servs.,* 9th Dist. No.21714, 2004-Ohio-966, ¶11. If evidence is susceptible to multiple constructions, the court must give it the interpretation most consistent with sustaining the Commission's decision and judgment. *Id.*

This Court's review is limited to determining whether the Commission's decision is supported by evidence in the certified record. If support is found, then a reviewing court "may not substitute its judgment for the judgment made by the [Commission]. 'The fact that reasonable minds might reach different conclusions is not a basis for reversal.'" (Internal citations omitted.) *Id.* at ¶8.

IV. LAW AND ANALYSIS

Ohio Revised Code Section ("R.C.") 4141.29 sets forth the authority for an award of unemployment benefits and provides that "[e]ach eligible individual shall receive benefits for loss of remuneration due to involuntary total or partial unemployment." An employee is not eligible for unemployment compensation benefits if he or she has been discharged for "just cause" in connection with his or her work. See R.C. 4141.29(D)(2)(a). Appellant, as the claimant, has the burden of proving her entitlement to benefits. *Irvine v. Unemployment Comp. Bd. Of Rev.* (1985), 19 Ohio St.3d 15, 17, 482 N.E.2d 587.

"Just cause" is not clearly defined. Ohio case law describes "just cause" as "that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act." *Loughman v. Ohio Dep't of Pub. Safety*, 10th Dist. Franklin No. 15AP-473, 2016-Ohio-1086, at ¶ 8, citing *Irvine*, supra. In the context of employment termination, "just cause" is present when a person of ordinary intelligence would conclude that the employee's conduct justified the employee's discharge. *Kohl v. Health Mgmt. Solutions*, 10th Dist. Franklin No. 15AP-17 , 2015-Ohio-4999, at ¶ 18. This determination depends upon the unique factual circumstances of each case. *Id.* "Fault on the part of the employee is an essential component of a just cause determination." *Id.* at ¶ 19, citing *Hicks v. Ohio Dept. of Job & Family Servs.*, 10th Dist. Franklin No. 13AP-902, 2014-Ohio-2735.

Appellant contends, within her Notice of Appeal and in the Record, that Employer's justification for her termination is wrong. Appellant argues she was not aware of any policy

prohibiting her from accessing the 21st floor of the Motorists Building and, further, that she had been given tacit permission to access the floor by an employee of Motorists Insurance. Appellant contends the determination of the Commission should be reversed because the Employer did not have just cause to terminate her.

Appellee argues it terminated Appellant's employment because she violated a company policy regarding floor access in the building. "Just cause" is present to discharge an employee for violation of company policy when the policy is fairly administered to the employee. *Porreca v. Miners & Mechanics Sav. & Trust Co.*, 7th Dist. Jefferson No. 94-J-60, Ohio App. LEXIS 1444 (Apr. 2, 1996), citing *Fetzer v. Ohio Bur. Of Unemployment Comp.*, 6th Dist. Lucas No. L-93-055, 1993 Ohio App. LEXIS 5258 (Nov. 5, 1993). "In determining whether a policy is fair, a court should look to whether the employee received notice of the policy, whether the policy could be understood by the average person, whether there is a rational basis for the policy, and whether the policy instituted by the employer was applied to some individuals and not others." *Id.*, citing *Shaffer v. American Sickle Cell Anemia Assn.*, 8th Dist. Cuyahoga App. No. 50127, 1986 Ohio App. LEXIS 7116 (June 12, 1986).

The Court finds there is no "just cause" to support the termination of Appellant because she was not placed on notice of the policy she is alleged to have violated. Appellant testified she was not aware of any policy prohibiting her from taking the elevator to the 21st floor of the Motorists Building. Employer did not contradict this testimony. Ms. Cheek testified she did not know if the policy was "a work rule or just common knowledge." There was no written policy and there was no evidence that any individual in an authority position over Appellant had directed her regarding the policy.

The Hearing Officer found that Appellant "knew or should have known" of the policy. The Court disagrees. Appellant was given a security badge, which granted her access to the elevator. The elevator allowed her to access any floor in the building. The badge she was given would not grant access to other offices in the building. Appellant only discovered her access was

limited when she attempted to use her badge to enter the offices on the 21st floor. However, while she was on the 21st floor, she was granted access by an employee of Motorists Insurance, Kay Powell, who walked her around the floor. Ms. Powell then told Appellant she could come back up to the office again sometime for lunch if she called first. These mixed signals prompted Appellant to again go up to the 21st floor the next day and call Ms. Powell to see if she could have lunch. When Appellant was told it was not a good time, she then proceeded to leave.

Under the circumstances, it would be unfair to enforce a policy upon Appellant for which she was not aware. While there may be a rational basis for a security policy with limited access to other floors in the building, the Court cannot say it is policy that would be common knowledge without a specific unambiguous directive.[2] Therefore, the Court finds, from a review of the certified record, the Commission's decision was not supported by law.

V. DECISION

Having applied the law to the facts, reviewed the arguments and evidence at the administrative level, and, when appropriate, given due deference to the Commission, this Court finds that the Unemployment Review Commission's Decision Disallowing Request for Review was unlawful. Therefore, the Unemployment Review Commission's Decision of January 11, 2017 is hereby **REVERSED**.

THIS IS A FINAL APPEALABLE ORDER.

IT IS SO ORDERED.

JUDGE CHRIS M. BROWN

[2] If, for example, Appellant's badge only granted her access to the 12th floor, it would be clear to an ordinary person their access was limited. Because the elevator allowed Appellant to go to any floor in the building, it was not unreasonable for Appellant to be curious, during her lunch hour, about what was on the top floor. She took pictures of the view and an employee showed her around. Under the circumstances, there was nothing objectively wrong with this conduct.

Franklin County Court of Common Pleas

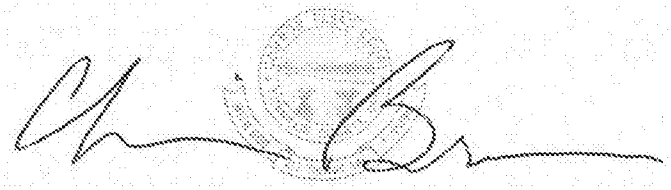
Date: 09-20-2017

Case Title: DENISE V LANCASTER -VS- CHEEK LAW OFFICES LLC ET AL

Case Number: 17CV001137

Type: DECISION/ENTRY

It Is So Ordered.



/s/s Judge Christopher M. Brown

Court Disposition

Case Number: 17CV001137

Case Style: DENISE V LANCASTER -VS- CHEEK LAW OFFICES LLC ET AL

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 17CV0011372017-04-2199980000
   Document Title: 04-21-2017-MOTION FOR JUDGMENT ON PLEADINGS - DEFENDANT: CHEEK LAW OFFICES LLC
   Disposition: MOTION DENIED

2. Motion CMS Document Id: 17CV0011372017-04-1899980000
   Document Title: 04-18-2017-MOTION FOR JUDGMENT ON PLEADINGS - DEFENDANT: OHIO STATE DEPARTMENT JOB FAMILY SERVICE
   Disposition: MOTION DENIED