

FILED
LUCAS COUNTY

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COMMON PLEAS COURT
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IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Marsha Manon,

Plaintiff-Appellant,

vs.

COMPASS Corporation for Recovery
Services, et al.,

Defendants-Appellees.

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Case No. CI0201105756

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OPINION AND JUDGMENT ENTRY

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Hon. Myron C. Duhart

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This unemployment-compensation administrative appeal is before the Court for a decision on the merits. Upon review of the pleadings, the administrative and the Court's record, arguments of the parties, and applicable law, the Court finds that the August 5, 2011 decision of the Unemployment Compensation Review Commission ("Commission") should be affirmed, and the instant appeal of the plaintiff-appellant, Marsha Manon, should be dismissed.

I. BACKGROUND

Ms. Manon worked as a "counselor" for defendant-appellee COMPASS Corporation for Recovery Services ("COMPASS") from November 5, 2003 through April 4, 2011. (Transcript for August 3, 2011 Hearing ["Tr. _"], p.8.) Ms. Manon's clinical manager, Craig Ward, discharged Manon on April 4 for her alleged "falsification of records." (Tr.8-9.)

Mr. Ward concluded Ms. Manon had falsified patient progress notes -- specifically, he determined Ms. Manon had been "entering incorrect start and ending times for counseling sessions." (Appellant Brief p.3; *see, also*, Tr.9.)

On or about April 13, 2011, Ms. Manon made a claim with defendant Director, Ohio Department of Job and Family Services ("Director") for unemployment compensation. On or about May 3, 2011, the Director determined COMPASS had discharged Ms. Manon without just cause, and thus the Director awarded her unemployment compensation. COMPASS asked the Director to redetermine the issue; on or about May 31, 2011, the Director again found in favor of Ms. Manon. On or about June 9, 2011, COMPASS appealed the redetermination to the Commission. On August 3, 2011, Commission Hearing Officer Emily Briscoe conducted a telephonic hearing. Hearing Officer Briscoe issued her Decision on August 5, 2011 ("Decision") reversing the Director's redetermination; Hearing Officer Briscoe concluded that COMPASS had discharged Ms. Manon for just cause. After the Commission denied Ms. Manon's request for review of the Decision, Ms. Manon filed her timely appeal to this Court on September 30, 2011. The parties have briefed the matter fully, and the Court finds the matter ripe for a decision on the merits.

II. UNEMPLOYMENT COMPENSATION STANDARD

Pursuant to R.C. 4141.29(A) and (D)(2)(a), an unemployment-compensation claimant is entitled to benefits if she quit work for just cause or if her employer discharged her without just cause. *Moore v. Comparison Mkt., Inc.*, 9th Dist. No. 23255, 2006-Ohio-6382, at ¶10. The claimant bears the burden to establish "cause." *Id.* "The determination of what constitutes 'just cause' within the context of unemployment compensation 'necessarily depends

upon the unique factual considerations of the particular case' and involves a concurrent analysis of [whether the claimant] was temporarily without employment *through no fault or agreement of [her] own.*" (Citations and quotation marks omitted; emphasis sic.) *Id.* "Fault on behalf of the employee remains an essential component of a just cause termination." *Tzangas, Plakas & Mannos v. Administrator, Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 698, 1995-Ohio-206, 653 N.E.2d 1207. A claimant need not be at "*fault in a moral sense*" for an employer to discharge her for just cause; the claimant's inability to do her work in the manner reasonably required by the employer "*constitute[s] fault in a legal sense* sufficient for her termination to have been made with just cause." (Emphasis added.) *Id.* at 699.

When an employer promulgates a policy manual which contains procedures for employee-discipline, the employer owes a duty to its employees to follow the procedures outlined in the policy. *Martinez v. Wood Cty. Hosp. Assn.*, 6th Dist. No. WD-85-12, 1985 Ohio App.Lexis 8214, *3 (June 28, 1985), citing with approval *Helle v. Landmark, Inc.*, 15 Ohio App.3d 1, 7-8, 472 765 (1984). Thus, generally, an employer's failure to follow its own published "disciplinary procedure prior to terminating an employee constitute[s] a discharge without cause." *Williams v. State Unemployment Comp. Review Comm*, 11th Dist. No. 2010-T-0094, 2011-Ohio-2458, at ¶44. However, an employer is relieved of its duty to follow each step in its progressive-discipline policy before terminating an employee, if the employer earlier has met with the employee, discussed the problematic or deficient job-performance, gave specific instructions in order to achieve proper performance, and told the employee that discharge would follow if the employee failed to follow the specific instructions. *Williams* at ¶¶46-50, citing *Rose v. Hercules Tire & Rubber Co.*, 3rd Dist. No. 5-87-9, 1990 Ohio App.Lexis 345, *7.

Accordingly, such "specific instructions given [to an employee supercede] any general disciplinary policy of the employer and [these notify the employee] of the terms of his employment thereafter." *Rose* at *7.

R.C. 4141.282(H) provides for the review by a common pleas court of a final decision by the Commission regarding benefits. *Whaley v. Unemployment Comp. Bd. of Rev.*, 11th Dist. No. 2005-T-0070, 2006-Ohio-7017, at ¶12. That section reads in pertinent part as follows:

[t]he court shall hear the appeal on the *certified record* provided by the commission. *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 modify the decision, or remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission.* (Emphasis added.)

Thus, a court exercising appellate review "may only reverse an unemployment compensation eligibility decision by the Review Commission if the decision is unlawful, unreasonable, or against the manifest weight of the evidence." *Moore v. Comparison Mkt., Inc.*, 9th Dist. No. 23255, 2006-Ohio-6382, at ¶7. The Commission has the role of resolving factual questions, and the court has the limited role of determining if the Commission's decision is supported by evidence in the certified record. *Id.* at ¶9. "The fact that reasonable minds might reach different conclusions is not a basis for the reversal of the board's decision. * * * Where the board might reasonably decide either way, the courts have no authority to upset the board's decision." (Emphasis added.) *Robertson v. Dir., Ohio Dept. Job & Family Serv.*, 8th Dist. No. 86898, 2006-Ohio-3349, at ¶21, quoting *Irvine v. Unemp. Comp. Bd. of Rev.*, 19 Ohio St.3d 15, 18, 482 N.E.2d 587 (1985).

III. DISCUSSION

Ms. Manon's clinical manager, Mr. Ward, discharged her for "falsification of records" on April 4. (Tr.8-9.) The Director initially awarded Ms. Manon benefits. In his initial determination, the Director stated in relevant part as follows: "* * * The employer discharged the claimant for violating a company rule. The employer failed to establish negligence or willful disregard of the rule on the part of the claimant." COMPASS appealed that determination to the Commission, and Hearing Officer Briscoe reversed the Director's grant of benefits. Hearing Officer Briscoe stated in relevant part as follows:

Claimant was discharged from her employment with [COMPASS] on April 4, 2011, for falsification of agency records. The evidence shows that claimant incorrectly reported in her progress notes [that] she spent more time * * * with three specific clients than she actually did. Craig Ward, Clinical Manager, appeared at the hearing and explained that these incorrect reports were a serious concern because they were the basis for the Medicaid billing which funds the agency. Claimant argues that she made the correct reports, and that someone used her password to change the reported times. The Hearing Officer finds this explanation not to be credible. In light of the evidence presented in this case, the Hearing Officer finds that claimant was discharged from her employment with [COMPASS] for just cause in connection with work.

In her appeal, Ms. Manon challenges the Hearing Officer's determination that COMPASS discharged Ms. Manon for just cause.

A. COMPASS' DISCIPLINARY POLICY AND PROCEDURES

As part of new-employee orientation, COMPASS notifies each new-hiree of the agency's published "Policies & Procedures" in which COMPASS sets forth its policy regarding "Disciplinary Actions." (Director File pp.9-12 -- Appellee Brief Exh.A.; *see, also*, Tr.11.) COMPASS states the "POLICY" behind the Disciplinary-Actions section as follows:

The Progressive Correction Process shall be used for all situations that require

corrective/disciplinary actions with the exception of *type A infractions*. Reprimand and termination of the employee are serious corrective/disciplinary measures that *ordinarily* are taken *only when more normal methods of supervision* have failed to produce the desired results. (Emphasis added.) (Director File p.9.)

COMPASS describes the "PURPOSE" behind the section as follows:

To provide steps to be taken in disciplinary situations so that disciplinary actions will be *applied fairly and consistently* throughout the agency. (Emphasis added.) (Director File p.9.)

The general "PROCEDURE" which COMPASS is to follow when taking "corrective action" includes the following:

Supervisors * * * must notify HR immediately of any employee issue when the potential for corrective action exists. * * * All corrective action must take place immediately and *no later than ten (10) days from the incident* that led to corrective action, or three days after the investigation is completed. * * *. (Emphasis added.)

COMPASS makes a "not-all-inclusive list" of "infractions" in the Disciplinary-Actions section.

The agency categorizes infractions into three types. For the less-grave "Type C" category of infractions," COMPASS applies a four-step "progressive correction process:" 1) a "verbal reprimand" for the first offense; 2) a "written reprimand" for the second offense; 3) a "suspension" for the third offense; and 4) "discharge" for the fourth offense. (Director File pp.10-11.) For the more grave "Type B" category of infractions, "COMPASS applies a two-step process": 1) a "suspension" for a first offense; and 2) "discharge" for a second offense. (Director File p.11.) And, for the most grave "Type A" category of infractions," COMPASS expressly provides for immediate "discharge." (Director File pp.11-12.) COMPASS includes "[f]alsification of facility records" as a Type A Infraction. (Director File p.11.) Ms. Manon knew of all of these disciplinary provisions before her discharge. (Tr.32.)

B. RECORDING START AND END TIMES IN PROGRESS NOTES

COMPASS tracks the productivity of its counselors by reviewing start-and-end times for counseling sessions. (Tr.14.) COMPASS records these times on its central computer system. (Tr.12.) Each individual counselor will make her/his own appointments with clients, and upon doing so will enter the appointment into that central computer system. (Tr.12.) For each appointment entered, the computer system generates a "progress note," and each progress note contains the "start" and "end" times which the system determines by "default." (Tr.12.) Default times are based on the "standard length of time for [the particular type of] appointment." (Tr.24.) On occasion, the actual counseling-session times are different than the default times entered by the computer. (Tr.12,14,24.) On those occasions, the counselor must go back into the system and adjust the default times to reflect the actual start and end times. (Tr.24.) COMPASS requires counselors to make these changes within 48 hours. (Tr.24.)

Accuracy in start-end time recording is critical. (Tr.10.) One of COMPASS' primary funders, Medicaid, requires COMPASS to record "exact times"; the failure of a COMPASS counselor to have accurate times risks loss of Medicaid funding. (Tr.10.)

C. PRODUCTIVITY-REQUIREMENT AND AWARD-PAYMENTS

COMPASS holds its counselors responsible for achieving a fifty-percent productivity level; half of a counselor's work time is to be "billable services for the patient." (Tr.14-15.) COMPASS makes award payments to counselors who have productivity levels higher than fifty percent. (Tr.14-15.) Mr. Ward noted that productivity-requirements and award-payments could provide incentive for a counselor to falsify the start-end times in the progress notes. (Tr.14.) Ms. Manon typically achieved the fifty-percent productivity level. (Tr.17.)

Nonetheless, when Mr. Ward and Ms. Manon would meet at their regular weekly supervisory sessions, Mr. Ward repeated, "over and over again," to Ms. Manon that she must "mak[e] sure that [she] made [the expected] productivity" level. (Tr.23.)

D. MEETING AND DISCUSSION REGARDING PROPER RECORDING

On February 21, 2011, Mr. Ward and Ms. Manon met to discuss several issues including: the "ongoing issue" of accurate time recording (Tr.19-20); that COMPASS considered the knowing maintenance of improper start-end time records to be "falsification" and therefore "fraudulent behavior" (Tr.10-11); and such fraudulent behavior could "lead to immediate discharge" (Tr.11.) At that meeting, Mr. Ward gave Ms. Manon "a heads up" about staff rumors indicating that Ms. Manon was falsifying her start and end times. (Tr.10-11.) Mr. Ward had no "concrete evidence" at that meeting to support the rumors; indeed, he had no evidence "until [he] had begun an investigation [himself]." (Tr.11.) In that subsequent investigation, Mr. Ward compared Ms. Manon's progress notes (which contained the recorded start-end times for Ms. Manon's counseling sessions) with videotapes of the lobby. (Tr.10-14.) Thus, he was able to view when Ms. Manon first would begin a session upon greeting a client in the lobby and taking the client into her office; and he was able to see when Ms. Manon reappeared with the patient in the lobby after the session. (Tr.10-14.)

As a result of his comparison study, Mr. Ward concluded that Ms. Manon had falsified the "start times and the end times" for three specific counseling sessions she had conducted on February 26, 2011, March 5, 2011, and March 15, 2011. (Tr.9,12.) On February 26, Ms. Manon recorded her session times as 9:00 a.m. to 11:00 a.m., but the actual times were 9:35 a.m. to 10:12 a.m.; on March 5, Ms. Manon recorded her session times as 9:00 a.m. to 11:30

a.m., but the actual times were 9:13 a.m. to 10:39 a.m.; and on March 15, Ms. Manon recorded her session times as 8:30 a.m. to 10:00 a.m., but the actual times were 9:05 a.m. to 9:46 a.m. (Tr.12; Plaintiff Exb.A.)

E. MARCH 21 NOTICE AND APRIL 4 DISCHARGE

In a supervision meeting on March 21, 2011, Mr. Ward notified Ms. Manon about the three instances of inaccurate recording he discovered in his investigation. (Tr.11-13,23.) In that meeting, and in a follow-up email that same day, Mr. Ward asked Ms. Manon to correct the times in the computer system before the end of that day. (Tr.12; Appellee Exb.B.) She corrected the times as instructed. (Tr.12.) Ms. Manon believes that she earlier had corrected the three instances before March 21. (Tr.24.) She "speculat[es]" that "other people" had her computer password and "made changes" to her corrected times. (Tr.24-25,32-33.) But, she also states that possibly she "unintentionally did not" make the corrections until asked to do so by Mr. Ward on March 21. (Tr.25.)

Thereafter, on April 4, 2011, Mr. Ward and the Human Resources ("HR") director for COMPASS discharged Ms. Manon by issuing to her a "Corrective Action Form" ("CAF"). (Director's File pp.3-4.) The CAF which COMPASS issued to Ms. Manon at that meeting reads in pertinent part as follows:

Incident: On three separate dates it has been discovered Marsha *falsified* the start-end times of patient counseling time. All start-end times are expected to be documented according to "actual" time spen[t] with the patient. It is considered fraud to bill otherwise. *This conduct is a violation of Policy 831 - Professional Ethical Code of Conduct, as well as Policy 832 - Disciplinary Action Type A Infraction* (type A infraction is *immediate termination*) #33: *Falsification of facility records, reports or other documents, including application, health screening, injury reports, and employee's time card.* (Emphasis added.)

Mr. Ward and the HR director signed the CAF, but Ms. Manon refused to sign the document.

F. MERITS OF THE APPEAL

In her appeal, Ms. Manon presents two arguments to support her claim that the Hearing Officer wrongly concluded that COMPASS terminated her with just-cause. First, Ms. Manon asserts that the record is devoid of evidence that she "intentionally 'falsified' patient records." (Appellant Brief p.5.) Ms. Manon testified about her "speculation" that other people falsified the start-end times that she had previously corrected. (Tr.24; *see, also*, 32-33.) Additionally, she states that "it [was] quite possible * * * that [she] unintentionally did not [make the corrections]." (Tr.25.) The Hearing Officer found that Ms. Manon's argument, that someone else had "change[d] the reported times," was not "credible." (Decision p.4of6.) Indeed, during the hearing, Mr. Ward testified that a counselor has an incentive to falsify start-end times in order to ensure that the counselor would meet the fifty-percent productivity-requirement and then be able to collect the award-payments. (Tr.14-15.) One month before the discharge, upon hearing rumors about Ms. Manon's inaccurate start-end time recording, Mr. Ward counseled and "notified" Ms. Manon that COMPASS would consider any future inaccuracies by her as "falsification" and, thus, "fraudulent behavior * * * that could lead to immediate discharge." (Tr.11.)

Here, as to the issue of intent, the Court finds that the record discloses sufficient evidence from which Hearing Officer Briscoe reasonably could conclude that Ms. Manon intentionally falsified the start-end times in question here and that COMPASS could "immediate[ly] discharge" her in conformity with the agency's published "Policies & Procedures."

Second, Ms. Manon argues that COMPASS discharged her without just cause because COMPASS failed to discharge her in a timely manner in conformity with COMPASS' Policies & Procedures; specifically, COMPASS did not discharge her within *ten days* from the March 21 email in which Mr. Ward notified her of the three incidents of inaccurate start-end times.¹ COMPASS discharged her *fourteen days* after the email.

As discussed above, "an employer's promulgation of * * * policy manuals manifests a duty to follow the procedures outlined therein." *Martinez v. Wood Cty. Hosp. Assn.*, supra, 1985 Ohio App.Lexis 8214, at *3. *See, also, Helle v. Landmark, Inc.*, 15 Ohio App.3d at 8, 472 N.E.2d 765 (the employer's creation of employment manuals, employee handbooks, or personnel policies and practices, can create enforceable terms and conditions in employment-at-will cases). Thus, progressive disciplinary policies give "rise to a factor limiting the at-will nature of * * * employment[, thus] discharge in contravention of that policy constitute[s] discharge without 'just cause' within the meaning of R.C. 4141.29(D)(2)(a)." *Rose v. Hercules Tire & Rubber Co.*, supra, 1990 Ohio App.Lexis 345, *5. "[F]airness dictates that an employee not be subjected to punishment greater than the stated penalty." (Emphasis added.) *Id.* Nonetheless, when an employer earlier has met to discuss a specific disciplinary issue with an employee, and when the employer has stated that future failure by the employee to comply with the instructions would result in discharge, such instructions may supercede any "general disciplinary policy" of the employer. *Rose* at *6. *See, also, Williams v. State Unemployment*

¹The relevant provision from the Policies & Procedures reads as follows:
" * * * All corrective action must take place immediately and *no later than ten (10) days from the incident* that led to corrective action, or three days after the investigation is completed. * * *." (Emphasis added.)

Comp. Review Comm, supra, 2011-Ohio-2458, at ¶¶44-50. This type of individually-administered specific instructions, which outline "perfectly fair and legitimate objectives[,] represent a *fair means* of pursuing those objectives." (Emphasis added.) *Id.* at 7.

In this case, as discussed above, COMPASS employed printed Policies & Procedures governing "Disciplinary Actions." The agency distributed the policies to employees during orientation. The "PURPOSE" behind these policies was to ensure that "disciplinary actions will be applied *fairly and consistently* throughout the agency." (Emphasis added.) (Director File p.9.) The policies notified Ms. Manon that the violation for which COMPASS discharged her -- "falsification of facility records" -- was a subject to "immediate discharge." In the February 21, 2011 meeting, Mr. Ward expressly re-notified Ms. Manon of this fact after warning that "rumors" indicated she had not maintained accurate start-end times.

The Court finds that by undertaking such special and specific warnings to Ms. Manon at the February 21 meeting, Mr. Ward and COMPASS superceded any non-material requirement in the Disciplinary-Action procedures. Unlike policy-manual protections that ordinarily are enforced by courts, the instant ten-day requirement cited by Ms. Manon provided her no material protection. *See Rose v. Hercules Tire & Rubber Co.*, supra, 1990 Ohio App.Lexis 345, *5 (progressive discipline must be followed); *Martinez v. Wood Cty. Hosp. Assn.*, supra, 1985 Ohio App.Lexis 8214, at *3 (violation of "fair treatment" procedures); and *Helle v. Landmark, Inc.*, 15 Ohio App.3d 1, 472 N.E.2d 765 (severance benefits must be paid). COMPASS' failure to adhere to the ten-day rule did not prejudice her in any way. The Court finds that she was treated "fairly."

Based on the foregoing, the Court finds that the August 5, 2011 Decision by

Hearing Officer Briscoe was not unlawful, unreasonable, or against the manifest weight of the evidence. *See Moore v. Comparison Mkt., Inc.*, supra, 2006-Ohio-6382, at ¶7. Accordingly, the Court must affirm that decision and will dismiss this appeal.

JUDGMENT ENTRY

The Court hereby ORDERS that the August 5, 2011 Decision of the Unemployment Review Commission denying unemployment benefits to the Appellant is affirmed. The Court further ORDERS that the instant appeal is dismissed with prejudice. The Court finds no just reason for delay.

3/22/12

M. Duhart
Myron C. Duhart, Judge

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