

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

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CLERMONT COUNTY, OHIO

CLERMONT CHILI COMPANY, INC., : **CASE NO. 2011-CVF-1047**
Appellant, : **Judge Richard P. Ferenc**
Vs. :
BRANDY N. BROWN, ET AL., : **DECISION AND ENTRY**
Appellees. :

Robert Croskery, 810 Sycamore, 2nd Floor, Cincinnati, OH 45202, Attorney for Appellees.

Robin A. Jarvis, 1600 Carew Tower, 441 Vine Street, Cincinnati, OH 45202, Assistant Attorney General, Attorney for ODJFS.

Patricia Anderson Pryor, PNC Center, 201 East Fifth Street, 26th Floor, Cincinnati, OH 45202, Attorney for Appellant.

PROCEDURAL POSTURE

Appellant, Clermont Chili Company, Inc. ("CCC"), appeals a determination of the Unemployment Compensation Review Commission ("Commission") that its former employee, Brandy N. Brown ("Brown"), is entitled to unemployment benefits.

Brown filed an application for unemployment benefits on July 26, 2010. On August 16, 2010, the Ohio Department of Jobs and Family Services ("ODJFS"), through its Director, determined that Brown was terminated with just cause in connection with work and disapproved her claim for benefits. Brown appealed that determination. On September 9, 2010, ODJFS issued a redetermination affirming its initial determination. Brown appealed the redetermination and the case was transferred to the Commission.

On March 8, 2011, and April 5, 2011, a hearing officer conducted an in-person hearing. Brown, represented by her husband, Charles Brown, and James Simms ("Simms"), a district manager for CCC testified. The hearing officer

reversed ODJFS's redetermination and found that Brown was discharged without just cause in connection with work. The Commission subsequently disallowed CCC's request for review of the hearing officer's decision. CCC has now timely appealed the decision to this Court pursuant to R.C. 4141.282.

LEGAL STANDARD

Ohio statutory law governs the scope of this Court's review of the Commission's decision. Pursuant to R.C. 4141.282, the Court must hear the appeal on the certified record as provided by the Commission. The Court may reverse the matter only if the Commission's findings were "unlawful, unreasonable, or against the manifest weight of the evidence." R.C. 4141.282(H).

In reviewing the Commission's record, the Court may not make factual findings, nor may it determine the credibility of witnesses. *Tzangas, Plakas & Mannos v. Ohio Bur. Of Emp. Serv.*, 73 Ohio St.3d 694, 696, 653 N.E.2d 1207 (1995); *Irvine v. Unemp. Comp. Bd. Of Rev.*, 19 Ohio St.3d 15, 18, 482 N.E.2d 587 (1985). Instead, the Court may only determine whether evidence exists in the record to support the Commission's decision. *Irvine, supra* at 18. The Court will not reverse, as against the manifest weight of the evidence, any findings by the Commission that are supported by some competent credible evidence. *Lombardo v. Ohio Bur. Of Emp. Serv.*, 119 Ohio App.3d 217, 220, 695 N.E.2d 11 (6th Dist. 1997); *C. E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1987). Further, "[t]he fact that reasonable minds might reach different conclusions is not a basis for reversal of the [board's] decision." *Tzangas, supra* at 697.

The Ohio Revised Code provides that an individual is not entitled to receive unemployment benefits if the individual ". . . has been discharged for just cause in connection with the individual's work . . ." R.C. 4141.29(D)(2)(a). "Traditionally, just cause, in the statutory sense, is that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act. *Irvine, supra* at 17. "Further, [j]ust cause for termination exists when an employee demonstrates by her actions 'an unreasonable disregard for [her]

employer's best interest." *Bruce v. Hayes*, 12th Dist. No. CA2003-05-020, 2004-Ohio-2903, ¶19.; *Kiikka v. Ohio Bur. Of Emp. Serv.*, 21 Ohio App.3d 168, 169, 486 N.E.2d 1233 (8th Dist. 1985). "If an employer has been reasonable in finding fault on behalf of an employee, then the employer may terminate the employee with just cause. Fault on behalf of the employee remains an essential component of the just cause termination." *Tzangas, supra* at 698. "The Act does not exist to protect employees from themselves, but to protect them from economic forces over which they have no control. 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 the just cause termination." *Tzangas, supra* at 697-698.

It is the responsibility of the reviewing court to reverse just cause determinations only if they are unlawful, unreasonable, or against the manifest weight of the evidence. R.C. 4141.282(H). It may not make factual findings or determine the credibility of witnesses, but must determine whether the Commission's decision is supported by the evidence in the record. *Tzangas, supra* at 696. The question of whether an employee was discharged with just cause is a question of law and the reviewing court has a duty to reverse the Commission's decision if it is contrary to law. *Lombardo, supra* at 221.

FACTS

As a franchisee of Skyline Restaurants, CCC operates four Skyline Chili Restaurants in the Greater Cincinnati Area. CCC hired Brown on June 25, 2007. She eventually became general manager of CCC's West Chester location, a position she held for approximately fifteen months prior to her July 23, 2010 termination. Prior to her CCC employment, Brown worked in the franchisor's corporate office beginning in 1995 and thereafter worked in a restaurant owned by a franchisee other than CCC.

Brown has a business marketing and triple accounting degrees. While employed by the franchisor she was trained in management functions and thereafter she trained "tons of managers in tons of new stores."

On July 19, 2010, CCC, through its district manager, Simms, issued a reprimand to Brown. The reprimand was in writing, though it is titled a "Verbal Reprimand." It referenced her failure to control her store's food and paper usage and its labor costs. CCC's rule for its stores was that these costs were not to exceed for each period 30% of that store's income. A period is approximately one month. The West Chester location had exceeded 30% five out of the previous seven periods. The reprimand referenced these issues having been previously discussed with Brown before and her having never offered an explanation for same. In addition, Brown's store's employee discounts for food purchases were \$3,857.00 higher than any other store.

To remedy the situation, Brown was instructed to inventory key items during both of the daily shifts, to ring in employee meals and have the employee sign for same, and to ring in catering and vending machine receipts and report same each Monday.

Brown was warned that if she did not meet the guidelines and manage her location within CCC's parameters, she would be terminated. She was instructed that if she wanted to meet with Simms or with CCC's president, John Trautman ("Trautman"), she could do so. No meeting was requested. Brown signed the reprimand acknowledging its receipt and her understanding of its meaning.

On July 23, 2010, Brown was personally served with a written "Termination with Cause" by Trautman for "mismanagement of company funds and company assets." A recording of the Brown-Trautman July 23, 2010 conversation, secretly recorded by Brown, contains a number of references by Trautman to Brown's mismanagement of funds and assets but also includes accusations of Brown's theft of money. She is given the choice of resigning in which case CCC reserved the right to prosecute or she would be terminated in which case CCC would prosecute. Brown chose the latter.

Within the four day period between the July 19, 2010 reprimand and the July 23, 2010 termination, Simms reviewed records maintained by Skyline Corporate with regard to its franchisees' stores' activities, information generally not available to the franchisees, at least not in the form maintained by the

corporate office. Simms surveyed information related to the previous ninety days. He found that in that period Brown's store had thirty "zero-outs." When a manager checks the contents of a cash register drawer, which is done for each shift, she is required to count the contents and input the total into the system. She then receives from the system a response as to what the total should be. Any explanation for the excess or deficit of cash is to be noted by the manager in the store's logbook. However, on the thirty occasions Brown zeroed-out, she would input zero as the result of her cash count, receive the register's figure of what the drawer should contain (which amount would be noted as a shortage since Brown had input zero as her actual count), then within seconds Brown would enter a new figure as the actual count (a figure identical to or close to the reported shortage), then the system would record a new shortage or overage.

On other occasions, instead of zeroing out Brown would apparently count the drawer contents, input that figure, receive a different figure from the system, and within a few seconds (not enough time to recount the money) she input another total that was closer to the register's, thereby reducing the gap between the register's and her initial counts.

Simms' review of corporate records also disclosed a high number of incidents where customer checks were voided or substantially reduced. The employer's policy required the manager to explain the reason for voided or reduced checks in a logbook, for example, whether the check was incorrect and then replaced by another correct version, whether the customer left without paying, whether it was to placate a dissatisfied customer, or for some other reason. None of the voids or reductions about which testimony was offered were explained in the manager's logbook. Brown testified that the only voids she explained in the logbook were those for unhappy customers.

DISCUSSION

The Commission, through its hearing officer, found that CCC discharged Brown without just cause in connection with work, reasoning:

The evidence and testimony presented to the Hearing Officer fail to establish that claimant misappropriated or stole company funds. Claimant has provided credible testimony as to why she placed entries of zero in

the system with respect to cash register balances. The records submitted by the employer demonstrate that those numbers were adjusted a few seconds later to reflect the actual amount in the register or an amount that was close as it was not uncommon for there to be slight overages or shortages in register funds. Claimant has credibly testified that she made other adjustments to keep the safe balance of \$500.00 and that she had legitimate business reasons for voiding some transactions. While the claimant had received a prior warning on July 19, 2010, regarding the overall performance of the store, was [sic] not given a reasonable opportunity to improve the store's performance as she was discharged four days later. Therefore claimant was discharged from employment with Clermont Chili Co. without just cause in connection with work.

The accusations against Brown were constantly changing. The warning given her on July 19, 2010, related to the store's overall performance resulting from its excessive costs (failure to stay at or below the 30% cost factor) and employee discounts in excess of other stores'. The written discharge four days later was more generic, mismanagement of company funds and assets. However, at the meeting between Trautman and Brown, it was made clear that the alleged mismanagement included theft. Then at the hearing, the testimony focused on "zero-outs" and voided or reduced checks. Both practices were presented as the prime examples of Brown's mismanagement or theft. Along the way the two reasons for Brown's July 19, 2010 reprimand (the 30% rule and excessive employee discounts) were lost.

The hearing officer observed that the four days between reprimand and discharge did not offer Brown reasonable opportunity to improve her store's performance. That is correct, however, Brown was clearly not discharged for her store's performance. She was fired for mismanagement (theft) of money. When Simms and others with CCC investigated money issues related to Brown's store through records maintained by Skyline Corporate, they discovered that over the ninety day period surveyed, Brown's activity surrounding cash drawer accounts, her record keeping and her lack of record keeping related to void and reduced checks raised questions regarding the possibility of theft. The hearing officer concluded that the evidence failed to establish misappropriation or theft of the employer's funds. There is some competent credible evidence to support that

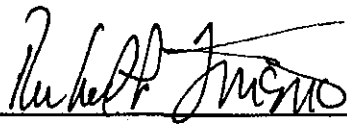
finding. This Court is unable to conclude that it is against the manifest weight of the evidence.

The hearing officer concluded that Brown offered credible evidence to explain her zero-outs, that they were done simply to reflect the actual amounts in the register. The results recorded by Brown reflected slight overages or shortages which was not an uncommon occurrence for any manager performing the same task. Other adjustments were found by the hearing officer to have been a function of Brown's maintaining a safe balance of \$500.00. With respect to the voiding and adjustment of meal checks, the hearing officer found them to be the result of legitimate business decisions by Brown.

This Court is bound to accept the hearing officer's assessment of the credibility of witnesses. This Court cannot make factual findings but again must defer to those of the hearing officer. While reasonable minds might reach different conclusions, that is not a basis for reversal. There is nothing in the Commission's decision that is unlawful, unreasonable or against the manifest weight of the evidence. Based upon this analysis, the decision of the Commission from which this appeal was taken is hereby affirmed.

Based upon the above analysis,

IT IS HEREBY ORDERED, that the decision of the Commission be and hereby is affirmed. This Decision and Entry shall constitute the final appealable order in this matter.



Richard P. Ferenc, Judge

INSTRUCTIONS TO THE CLERK:

Please serve a copy of this Decision and Entry on all counsel of record by regular U.S. Mail.



Richard P. Ferenc, Judge