

DANIEL M. HERRIGAN

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SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

BRIAN K. THOMAS,

Plaintiff-Appellee,

v.

UNIVERSITY OF AKRON,

Defendant-Appellant.

) CASE NO.: CV 2011 06 3576

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) JUDGE CALLAHAN

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) JUDGMENT ENTRY

) Final, Appealable Order

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Case No. CV 2011 06 3576 - 10/12/12 2:27 PM

This matter is before the Court upon the Administrative Appeal filed on June 30, 2011 by the Defendant-Appellant, University of Akron appealing the June 2, 2011 Decision of the Unemployment Compensation Review Commission ("Review Commission"). The Review Commission affirmed the allowance of unemployment benefits to Plaintiff-Appellee Brian K. Thomas ("Thomas") upon a finding that Thomas was discharged from his employment from the University of Akron without just cause. A transcript of proceedings has been filed and the parties have filed their briefs. The court-ordered briefing schedule is now complete and the issues raised by this administrative appeal are deemed submitted.

I. Background

Thomas was employed with the University of Akron from January 27, 1999, until he was discharged from employment on September 10, 2010, as a Head Server in the Dining Services. Relative to this case, Thomas first received a verbal warning on July 7, 2009 for attendance.

Thomas then received his first written warning on July 29, 2009. This was followed by eight additional recorded warnings in July 2009. Thomas received a second written warning on December 15, 2009 for attendance and behavior. On June 18, 2010, Thomas received a three-day suspension for attendance, specifically for leaving the job without clocking out and without notifying his supervisor. Thomas' attendance concerns were noted in his 2009 Annual Performance Review conducted on July 1, 2010. Thomas continued to exhibit attendance problems throughout August 2010. On September 10, 2010, Thomas was discharged for attendance.

Thomas filed an application for unemployment benefits on September 16, 2010. His application for benefits was approved by the Director of the Review Commission on October 6, 2010 holding that Thomas was discharged from employment without just cause and allowed benefits. The University of Akron timely appealed. A Redetermination Decision was issued on November 9, 2010 affirming the Director's Decision. The University of Akron appealed the Director's Decision. The Director transferred jurisdiction to the Review Commission pursuant to R.C. 4141.281(B). On March 15, 2011, an evidentiary hearing was held. The Hearing Officer heard testimony and issued a Decision on March 23, 2011, affirming the Director's Redetermination Decision. On April 12, 2011, the University of Akron requested further review by the Review Commission, which was denied on June 2, 2011 and is the subject of the instant appeal.

II. Standard of Review

R.C. 4141.282(H) governs the common pleas court's standard of review in an administrative appeal regarding a decision in an unemployment compensation review case:

“The court shall hear the appeal upon receipt of 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.” R.C. 4141.282(H).

The trial court's power to review the Review Commission's decision is strictly limited to determining whether the board's decision is supported by evidence in the certified record. *Tzangas, Plakas & Mannos v. Adm'r. Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 696, 653 N.E.2d 1207 (1995). The trial court is not permitted to make factual findings, determine the credibility of witnesses, or substitute its judgment for that of the commission. *Irvine v. Unemployment Comp. Bd. of Review*, 19 Ohio St.3d 15, 18, 482 N.E.2d 587 (1985). The reviewing court must defer to the commission on decisions involving close questions. *Id.* “Every reasonable presumption must be made in favor of the [decision] and the findings of facts [of the Review Commission].” *Ro-Mai Industries, Inc. v. Weinberg*, 176 Ohio App.3d 151, 2008-Ohio-301, 891 N.E.2d 348, ¶7 (9th Dist.), quoting *Karches v. Cincinnati*, 38 Ohio St.3d 12, 19, 526 N.E.2d 1350 (1988). As long as the certified record contains evidence supporting the Review Commission's decision, then the trial court cannot substitute its judgment for the Review Commission's. *Ro-Mai Industries, Inc.*, 2008-Ohio-301, at ¶8. A judgment supported by some competent, credible evidence will not be reversed as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

III. Arguments

The hearing officer considered the sole issue of whether Thomas was discharged without just cause in connection with his employment at the University of Akron. The hearing officer considered the evidence and the testimony of Alex Teodosio, Director of Labor Relations for the University of Akron. Also participating in the hearing was the attorney for the University of Akron, Barbara Knapic. Brian Thomas did not participate in the hearing.

In her finding of facts, the hearing officer found that the University of Akron had in place during Thomas' employment a progressive discipline policy. The hearing officer held that when such policy is established, an employer must follow that policy for an employee's termination to be found to be with just cause. The hearing officer stated that a progressive discipline policy establishes expectations on which employees rely. The hearing officer found that while Thomas exhibited a poor attendance record, the evidence shows that the employer failed to follow their established, progressive discipline policy by allowing Thomas to proceed through the process so many times and not being discharged created false expectations. Therefore, the hearing officer found that Thomas was discharged without just cause.

The University of Akron argues that the Review Commission's Decision is unreasonable and against the weight of evidence for failing to analyze the employee's fault in the situation leading to his discharge. *See Autozone, Inc. v. Steven J. Herring*, 9th Dist. No. 22824, 2006-Ohio-1039, 2006 Ohio App. LEXIS 954, ¶13. The University of Akron argues that the record is abundant with facts that Thomas continued to be absent and leave his work station without notifying his direct supervisor, even after he had been given verbal and written warnings. The University of Akron additionally argues that the Review Commission's reliance on *Eagle-*

Picher Industries, Inc. v. OBES, 65 Ohio App.3d 548, 584 N.E.2d 1295. (3d Dist.1989) is misplaced and unlawful as in *Eagle-Picher*, the employer failed to give the employee a written notice as required by their progressive disciplinary plan as opposed to the instant case whereas Thomas received a verbal warning, two written warnings, a full pre-termination hearing and the opportunity to produce medical evidence. The Director files a brief arguing that while Thomas did have attendance problems, the record supports the hearing officer's Decision that Thomas was discharged without just cause in connection with work.

IV. Analysis

The determination of whether just cause exists for an employee's dismissal under R.C. 4141.29 is based upon whether there was some fault on the part of the employee that led to the dismissal. *Tzangas*, 73 Ohio St.3d 694, at paragraph two of the syllabus. "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*, 19 Ohio St.3d at 17, quoting *Peyton v. Sun T.V.*, 44 Ohio App.2d 10, 12, 335 N.E.2d 751 (10th Dist.1975). A discharge is considered for just cause when an employee demonstrates an unreasonable disregard for the employer's best interest. *Autozone*, 2006-Ohio-1039, at ¶14. The determination is not whether there has been a technical violation of a company policy, but whether the employee's actions demonstrate an unreasonable disregard for his employer's best interest. *Kiikka v. Ohio Bur. of Employ. Serv.*, 21 Ohio App.3d 168, 169, 486 N.E.2d 1233 (12th Dist.1985).

The evidence presented at the hearing and the findings of fact set forth by the hearing officer clearly illustrates Thomas had a work history replete with verbal and oral warnings for attendance violations. The evidence and findings of fact also reflect the University of Akron's

warnings were in excess of those required by the school's progressive discipline policy. The Court finds *Eagle-Picher*, cited by the hearing officer, distinguishable from the instant case. In *Eagle-Picher*, the company had a progressive disciplinary policy in place which provided that if an employee breached company rules, the first notice was to be verbal, the second notice to be written, the third notice to be a three-day layoff, and the fourth notice would result in dismissal. In *Eagle-Picher*, the employee made defective castings and was given a four-day layoff and was informed that upon returning, any further mistakes would result in dismissal. Upon the employee's return, he was discharged twelve days later for producing defective casings. The employer's representative admitted that the policy was not followed and further, the employee testified at the hearing that he did not receive the oral warning of termination.

The Court finds this case more factually in line with *Williams v. State of Ohio Unemployment Comp. Rev. Comm.*, 11th Dist. No. 2010-T-0094, 2011-Ohio-2458, 2011 Ohio App. LEXIS 2089, ¶51 and *Rose v. Hercules Tire & Rubber Co.*, 3d Dist. No. 5-87-9, 1990 Ohio App. LEXIS 345, *5-6 (Feb. 1, 1990) in which the Courts found that where the employer provided more warnings than required by the general disciplinary policy, the employees were found to be terminated with just cause. In the instant case, the Court finds no error in the hearing officer's recitation of the facts. However, the Court finds that the hearing officer improperly relied on *Eagle-Picher* and erred in concluding that the employer's having gone through their established, progressive discipline policy so many times and not discharging the employee created false expectations. The Court in *Mullen v. Adm. Ohio Bur. of Emp. Serv.*, 8th Dist. No. 49891, 1986 Ohio App. LEXIS 5278, *13 (Jan. 16, 1986) noted that "[p]rogressive disciplinary systems create expectations on which employees rely." That court further stated

that “[f]airness requires an employee not be subject to more severe discipline than that provided for by company policy.” *Id.*

In this case, there was evidence before the Review Commission regarding the University of Akron’s progressive disciplinary policy and the warnings, including verbal and written, and other actions taken in relation to the progressive disciplinary policy. There is evidence in the record that the University of Akron gave Thomas more warnings than were required under the progressive disciplinary policy. However, there was no evidence in the record that the progressive disciplinary policy was improperly accelerated or of the imposition of a more severe discipline than provided for by the disciplinary policy. Additionally, there was evidence before the Review Commission that the University of Akron provided Thomas opportunities to provide any medical documentation that may have impacted his attendance issue, but he did not do so. Further, Alex Teodosio on behalf of the University of Akron testified that it was made very clear to Thomas at the last suspension hearing that the next step was termination. (Transcript p.32).

Based upon the review of the certified record, the Review Commission’s Decision, the applicable law and the legal standard for the Court’s review of the Commission’s Decision, and the parties’ briefs, the Court finds the Review Commission’s Decision was unlawful, unreasonable and against the manifest weight of the evidence. Accordingly, the June 2, 2011 Decision of the Review Commission is reversed.

V. Conclusion

The Court finds that the decision of the Review Commission finding Thomas was discharged by the University of Akron without just cause in connection with his employment was unlawful, unreasonable and against the manifest weight of the evidence.

Wherefore, it is the Order of this Court that the University of Akron's appeal is well-taken and is granted. It is further ordered that the June 2, 2011 Decision of the Review Commission is reversed. Costs are taxed to Appellees.

This is a final, appealable Order.

IT IS SO ORDERED.

JUDGE LYNNE S. CALLAHAN

cc: Attorneys Barbara A. Knapic / Jon A. Oldham
Attorney Susan M. Sheffield
Appellee Brian Thomas