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LUCAS COUNTY

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

Michael P. Napolski, Sr.,

*

Case No. CI-12-5483

Appellant,

*

Judge Gene A. Zmuda

vs.

*

OPINION AND JUDGMENT ENTRY

Preferred Properties, Inc., et al.,

*

Appellees.

*

This matter comes before the Court on Appellant Michael P. Napolski, Sr.'s ("appellant") administrative appeal pursuant to Ohio Revised Code Section 4141.282 from the final order of the State of Ohio Unemployment Compensation Board of Review mailed August 23, 2012 which held that appellant was discharged for just cause by Appellee Preferred Properties, Inc. ("appellee") and thus not entitled to benefits.

A brief summary of the facts and proceedings in this matter are as follows:

Appellant was employed with appellee from July 9, 2001 until May 13, 2011 as a Maintenance Specialist. (Transcript of Testimony from May 16, 2012 hearing ("TT1"), pp.6 and 22). As a maintenance specialist, appellant would report for work at the maintenance office and

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receive his work orders from his supervisor. (TT1, pp.10 and 29). The work day consisted of a shift from 8:30 a.m. to 4:30 p.m. with a one hour lunch break. (TT1, p.10). During the course of the work day, the maintenance specialists would go to different property locations¹ in and around Toledo, Ohio, using company trucks, to execute their work orders. (TT1, p.30). On May 13, 2011, appellant was terminated by appellee following an April 22, 2011 incident in which appellant used a company vehicle to engage in personal errands on company time, violating a number of appellee's policies. (TT1, pp.7-8).

On April 22, 2011, Ed Moran, a twelve year employee of appellee who had retired just a few months earlier, learned from Ron Collins, one of appellant's co-workers, that appellant's supervisor, Dean Spriggs, was going to be gone for the day. (TT1, p.8; Transcript of Testimony from June 7, 2012 hearing ("TT2"), pp.5-6, 19). Mr. Moran had been appellant's supervisor before his retirement and knew that appellant sometimes took extended break times and ran personal errands while on appellee's time and while using company vehicles. (TT2, p.6). Mr. Moran had expressed to Lewis Ellis, Executive Director of appellee, that appellee should invest in devices to track its employees' whereabouts to prevent theft of company time and misuse of company vehicles. (TT1, p.8; TT2, pp.7-8, 15).

To validate this point, Mr. Moran followed appellant on April 22, 2011 and took notes about his whereabouts, suspecting that appellant was likely to commit these violations of policy while his supervisor was out of the office. (TT1, p.8; TT2, pp.7-10). Mr. Moran was not aware of appellant's work orders for April 22, 2011 and did not know where appellant was supposed to be

¹Appellee is a not-for-profit 501(c)(3) housing corporation established to create and operate housing for persons with disabilities and receives approximately 75% of its revenue from tax payer supported dollars. (TT1, p.9).

at any given time. (TT2, p.8). In fact, at one point, Mr. Moran admitted that he had lost appellant for a bit and had Mr. Collins call appellant to determine his location.² (TT2, p.18). Mr. Moran observed and noted that appellant spent almost an hour at the bank and eating breakfast at a restaurant with a co-worker. (TT2, pp.8-10, 12-14). According to Mr. Moran, appellant further spent roughly two and a half hours at Westfield shopping center, visiting his wife at Midwest Tape and sitting in the company vehicle at Swan Creek Metropark. (TT2, pp.8-10, 13-14). Appellant agrees that he went to breakfast and to Chick-fil-a on April 22, 2011, but that employees one hour lunch break can be used at any time during the day and his lunch break on April 22, 2011 came in right at an hour. (TT1, pp.23-24, 25, and 31).

Mr. Moran reported appellant's conduct to his supervisor and Mr. Spriggs issued a warning on April 25, 2011 to appellant for his conduct on April 22, 2011. (TT1, p.17; TT2, p.12). Mr. Moran also told Mr. Ellis what he observed while following appellant and Mr. Ellis disagreed with Mr. Spriggs' handling of the situation, particularly because this was not the first time that appellant had been disciplined for using a company vehicle for non-work activities and for taking extended break times.³ (TT1, p.13, 22-23; TT2, pp.21-22). As a result, Mr. Ellis terminated appellant on May 13, 2011. (TT1, pp.6-7, 33).

On June 11, 2011, the Director of the Ohio Department of Job and Family Services ("ODJFS") issued a determination of eligibility for unemployment compensation benefits finding that appellant was discharged without just cause and awarded him benefits. (Appellant's Brief,

²Mr. Collins was issued discipline for his complicity in Mr. Moran's investigation. (TT1, pp.20-21).

³Appellant had previously received a two-week suspension for engaging in this same conduct and was warned in writing that he could have been discharged at that time and that further similar conduct would not be tolerated. (TT1, pp.12, 17-18, 22-23, and 28).

p.2). Appellee timely appealed the Director's decision. On July 14, 2011, the Director affirmed the initial determination and appellee appealed to the Unemployment Compensation Review Commission ("UCRC"). (Appellant's Brief, p.2). On August 25, 2011, a telephone hearing was held with hearing officer Lisa Slotnick. (Appellant's Brief, p.2).

In a September 9, 2011 decision, the UCRC reversed the Director's redetermination finding that appellant was terminated for just cause. (Appellant's Brief, p.2). Appellant submitted his request for review to the Review Commission on September 27, 2011. (Appellant's Brief, p.2). On October 19, 2011, the UCRC denied appellant's request for review. (Appellant's Brief, p.2).

On November 17, 2011, appellant filed a notice of appeal with the Lucas County Common Pleas Court which was assigned Case No. CI0201106609. On January 27, 2012, this Court granted ODJFS' Motion for Remand to the UCRC due to ODJFS' inability to produce a transcript of the telephone hearing as the recording was inaudible. (Appellant's Brief, p.2; Appellee's Brief, p.2). A telephone hearing was held on May 16, 2012 with hearing officer Robert Bush. (Appellant's Brief, p.3). A second telephone hearing was held on June 7, 2012 with hearing officer Robert Bush to complete witness testimony. (Appellant's Brief, p.3). On August 23, 2012, the UCRC affirmed its September 9, 2011 decision finding that appellant was terminated for just cause. (Appellant's Brief, p.3).

On September 21, 2012, appellant filed this appeal. (Appellee's Brief, p.2). The Director of ODJFS filed the transcript of the record of the proceedings on November 28, 2012. Appellant filed his brief on January 7, 2013. On January 22, 2013, appellee filed its brief and the Director of ODJFS filed its brief on February 6, 2013. Lastly, appellant filed a reply brief on February 11, 2013. This matter is now decisional.

Appellant asserts that the UCRC's decision was unlawful, unreasonable, or against the manifest weight of the evidence in that the hearing officer determined appellant was terminated with just cause. Appellant argues that appellant was terminated based upon the hearsay of a former employee who conspired with a current employee of appellee. Appellant further argues that no reasonable person would believe such actions to be the fair implementation of the employer's policies. Appellant also argues that no reasonable person would believe that he was going to be terminated for the same offense he was disciplined for twenty days earlier without an opportunity to present his side of the story. Appellant asks this Court to reverse the decision of the UCRC.

Appellee contends that the UCRC decision was supported by the evidence, including appellant's own testimony, and was not unlawful, unreasonable, or against the manifest weight of the evidence. Appellee argues that the evidence in this case demonstrates that appellant violated company policy, disregarded his employer's best interest, and was at fault for his discharge by misusing company property and theft of company time. Appellee asserts that the hearing officer rejected the argument regarding hearsay as his concern was not with the manner of discovery, but whether or not appellant violated company policy. Appellee also asserts that appellant's argument regarding the reasonableness of his termination after he was already disciplined for the April 22, 2011 incident is meritless. Appellee argues that there was no error in the hearing officer's conclusion that appellant was terminated for just cause and therefore, appellee asks this Court to affirm the UCRC decision.

Director, ODJFS urges this Court to affirm the decision of the UCRC for the reasons stated in the brief filed by appellee. The Director agrees the Review Commission's decision denying appellant's claim for unemployment benefits is supported by some competent credible

evidence.

Ohio Revised Code Section 4141.28 provides for the determination of benefit rights for employees. R.C. §4141.282 sets forth the rights an interested party may have to appeal a final decision of the UCRC to a court of common pleas. Specifically, R.C. §4141.282(H) states that:

"The 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." *Id.*

"Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C. E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St. 2d 279, syllabus by the Court (Ohio 1978). The Supreme Court of Ohio in *Irvine v. State, Unemployment Compensation Bd. of Review*, 19 Ohio St. 3d 15 (Ohio 1985), found that:

"Determination of purely factual questions is primarily within the province of the referee and the board. * * *. Like other courts serving in an appellate capacity, we sit on a court with limited power of review. Such courts are not permitted to make factual findings or to determine the credibility of witnesses. *Hall v. American Brake Shoe Co.* (1968), 13 Ohio St. 2d 11, 13. The duty or authority of the courts is to determine whether the decision of the board is supported by the evidence in the record. *Kilgore v. Bd. of Review* (1965), 2 Ohio App. 2d 69, 71. The fact that reasonable minds might reach different conclusions is not a basis for the reversal of the board's decision. *Craig v. Bur. of Unemp. Comp.* (1948), 83 Ohio App. 247, 260." *Id.* at 17-18.

Hearing Officer Robert Bush made the following findings of fact in the UCRC decision of August 23, 2012.

Claimant was employed by Preferred Properties, Inc. from July 9, 2001 until May 13, 2011, as a Maintenance Specialist. (Exhibit A attached to Appellant's Notice of Appeal, p.2). He

was an hourly employee. *Id.* The employer's work rules allow for the discharge of an individual who misuses company policy, and for theft of company time. *Id.* Claimant was aware of the employer's policies. *Id.* On February 19, 2007, the claimant was issued a warning and suspended for misusing company time. *Id.* He was returned to work on March 5, 2007. *Id.* The claimant assured the employer that he would not engage in the same type of misconduct in the future. *Id.* Edward Moran had been the claimant's supervisor. *Id.* Prior to Mr. Moran's retirement he had discussed with Lou Ellis his concerns that the claimant was misusing company property, and was not working his scheduled hours. *Id.* They had discussed placing tracking devices on the company vehicles. *Id.* Mr. Ellis had considered using Mr. Moran to follow employees to make sure they were performing their job, and not misusing the employer's equipment. *Id.* On April 22, 2011, Edward Moran spent a large portion of his day following the claimant. *Id.* The claimant's supervisor, Dean Spriggs, was off work this day. *Id.* Moran started following the claimant when he left the office. *Id.* He watched the claimant drive to a restaurant where he watched the claimant go into the restaurant. *Id.* The claimant did not leave the restaurant for nearly an hour. *Id.* Later in the day Mr. Moran watched the claimant drive to Chick-fil-A where he went through a drive thru. *Id.* The claimant drove to his wife's place of employment where he dropped food off for his wife. *Id.* He then drove to a park where he sat in the company van for at least 45 minutes. *Id.* The claimant did not document this time as non-work personal time on his time sheet, and did not have authorization to spend time during the work day doing personal activities. *Id.* Claimant was discharged by Preferred Properties, Inc. on May 13, 2011 for misuse of company property, and for theft of company time. *Id.*

One of the issues⁴ determined by the hearing officer in the UCRC's August 23, 2012 decision was whether appellant's discharge by appellee was for just cause in connection with his work. (Exhibit A attached to Appellant's Notice of Appeal, p.2). The hearing officer determined that since appellant failed to report his non-work personal time on his time sheet, without seeking authorization, and since he had been warned and suspended in 2007 for this same misconduct, appellant's discharge was for just cause. *Id.*

Appellant argues that he was terminated upon the hearsay testimony of a former employee who conspired with a current employee that was ultimately disciplined for his complicity in Mr. Moran's investigation.⁵ Appellee argues that the hearing officer rejected this reasoning by stating that his concern was not the manner in which appellant's conduct was discovered, but whether or not appellant had violated company rules. The transcript of testimony from the May 16, 2012 hearing states that:

"Francis Landry: Alright, and, um, now, so the source of Mr. Moran's information, uh, regarding Mr. Napolski, uh, came from Ron Collins, is that correct?

Louis Ellis: No.

Hearing Officer: I will interrupt you, though, Mr. Landry. Uh, why do I need to know where it came from? Don't I really need to be concerned about whether it happened or not?

Francis Landry: Well, the . . . I think the issue is it's tainted, uh, because it derives from a violation of company rules.

Hearing Officer: Oh, I don't think we really look at the fruit of the poisonous tree argument in an administrative appeal. That may

⁴There were two issues before the hearing officer: 1) was the claimant discharged by Preferred Properties, Inc. for just cause in connection with work?; and 2) was the claimant paid benefits to which he was not entitled? The only issue relevant to this action is the first issue of discharge for just cause.

⁵The Director of ODJFS argues that the UCRC is permitted to consider hearsay testimony in making unemployment compensation decisions. See *Simon v. Lake Geauga Printing Co.*, 69 Ohio St. 2d 41, 44 (Ohio 1982).

work in a criminal setting, but we have different standards here, so we'll leave that argument, if you need it, for someone else." (TT1, pp.21-22).

Therefore, based upon the transcript of testimony of the May 16, 2012 hearing, appellant's argument regarding hearsay testimony is without merit.

Next, appellant argues that no reasonable person would believe such actions to be the fair implementation of the employer's policies nor would a reasonable person believe that he was going to be terminated for the same offense he was disciplined for twenty days earlier. Appellee argues that the hearing officer properly found that appellant was at fault for his termination because he violated appellee's policies and that he had been warned before that he could be discharged for future violations. Appellee further argues that Mr. Ellis testified that Mr. Spriggs was not authorized to make decisions as to the manner of disciplining appellee's employees.

Under R.C. §4141.29(D)(2)(a), a claimant is not entitled to unemployment compensation benefits if he or she has been terminated for just cause in connection with his or her work. "Just cause for dismissal exists when an employee's actions demonstrate an unreasonable disregard for an employer's best interests." *Janovsky v. Ohio Bureau of Empl. Servs.*, 108 Ohio App. 3d 690, 694 (Ohio Ct. App., Montgomery County 1996). "Just cause for discharge may be established by proof that the employee violated a specific company rule or policy." *Jones v. Bd. of Review* (Sept. 28, 1993), 10th Dist. No. 93AP-430, 1993 Ohio App. LEXIS 4788.

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." *Irvine* at 17; citing *Salzl v. Gibson Greeting Cards* (1980), 61 Ohio St.2d 35, 39. The Ohio Supreme Court in *Tzangas, Plakas & Mannos v. Administrator, Ohio Bureau of Employment Servs.*, 73 Ohio St. 3d 694 (Ohio 1995),

found that:

"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." *Id.* at 697-698.

After carefully reviewing the evidence submitted by the parties in this case, including, but not limited to, the Transcript of Testimony of the May 16, 2012 and June 7, 2012 hearings before hearing officer Robert Bush of the UCRC, briefs and arguments of counsel, Ohio Revised Code Section 4141.29(D)(2)(a), all relevant case law, and pursuant to R.C. §4141.282(H), the Court finds that appellee's decision to terminate appellant for just cause for theft of company time and misuse of company property "was supported by some competent, credible evidence going to all the essential elements of the case." *C. E. Morris Co.*, supra. Therefore, UCRC's August 23, 2012 decision to deny appellant's application for unemployment benefits is affirmed.

The ruling herein is a full and complete adjudication of all issues incipient in appellant's notice of appeal as they relate to appellees and a complete adjudication of all genuine issues, merits and matters in controversy between the parties. It appears there is no just cause for further delay, and that, pursuant to Civ. R. 54, Final Judgment should be entered for appellees Preferred Properties, Inc. and Director, Ohio Department of Job and Family Services.

Date

4/15/13

Judge Gene A. Zmuda