

DANIEL M. HERRIGAN
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SUMMIT COUNTY
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IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

ALCO-CHEM, INC.,)	CASE NO.: CV 2014 02 0614
)	
Plaintiff-Appellant,)	JUDGE CALLAHAN
)	
v.)	
)	<u>JUDGMENT ENTRY</u>
OHIO DEPARTMENT OF JOB & FAMILY)	Final, Appealable Order
SERVICES, et al.,)	
)	
Defendants-Appellees.)	

This matter is before the Court upon the Administrative Appeal filed on February 7, 2014 by the Plaintiff-Appellant, Alco-Chem, Inc.¹ (“Alco-Chem”). Alco-Chem appeals the January 8, 2014 Decision of the Unemployment Compensation Review Commission (“Review Commission”), that disallowed Alco-Chem’s request for review of the Hearing Officer’s decision finding that the Claimant-Appellee Paul D. Wisner (“Claimant”) was discharged by Alco-Chem without just cause in connection with work.

A transcript of proceedings has been filed and the parties have filed their briefs in accordance with the Court’s March 24, 2014 Order. The Court-ordered briefing schedule is now complete and the issues raised by this administrative appeal are deemed submitted for this Court’s consideration.

I. Background

The Claimant worked for Alco-Chem from December 9, 2010 through June 4, 2013. The Claimant was a Repair Technician who travelled to service accounts located in the Toledo

¹ Employer/Appellant is identified as Aco-Chem, Inc. and is captioned as such on the Clerk of Court’s docket. The record reflects that proper spelling of the employer/appellant is Alco-Chem, Inc. and will be identified as such in this Order.

area, Michigan and Indiana. The Claimant serviced dishwasher machines and laundry machines. The Claimant would drive the company truck from his home to the service sites. Technicians were not allowed to use company vehicles for private use. The Claimant was to keep a daily log of the accounts that he serviced on a weekly basis. Alco-Chem states that Claimant had a history of not turning in his driver's logs which he had been disciplined for. Unbeknownst to the Claimant, Alco-Chem placed a GPS tracking device on all of its company trucks in early May, 2013. Alco-Chem states that the GPS reports revealed that Claimant had been using his truck for personal business.

According to Alco-Chem, on May 30, 2013, the Claimant was asked to perform a service call for the Brown Derby in Sandusky, Ohio. Claimant stated that he was in Indiana and would take care of it on May 31, 2013. Alco-Chem states that upon inquiring of Claimant on the evening of May 31, 2013 as to whether he had taken care of the Brown Derby, the Claimant stated that he had. On June 4, 2013, the Claimant's supervisor, John Potts ("Potts") and Alco-Chem's vice president, John Mandala ("Mandala") travelled to visit the Claimant at his home to discuss the Claimant's concerns about working too many hours. On the way to Claimant's house, Alco-Chem received a call from the Brown Derby upset that no one had been there to service their account.

Upon inquiring of the Claimant about the Brown Derby, the Claimant stated that he went to the Brown Derby, but was sent away because they were busy. (Tr. 1, p. 26). Mandala then terminated Claimant for lying, citing lack of paperwork and falsifying accounts that Claimant had visited.

The Claimant filed an application for determination of benefit rights for the benefit year

beginning June 2, 2013. On June 27, 2013, the Director issued an initial determination finding the Claimant was discharged from employment without just cause.

Alco-Chem filed an appeal of the initial determination. The Director issued a redetermination which reversed the determination and found Claimant was discharged for just cause in connection with work.

The Claimant filed an appeal on July 22, 2013 and the Ohio Department of Job and Family Services transferred jurisdiction to the Review Commission.

On October 1, 2013 and November 6, 2013, hearings were held before the Hearing Officer via telephone. The Claimant was present on October 1, 2013 and the employer was present on both days and presented testimony of Potts, Mandela and two other company representatives, Kevin Lacey, and Grace Evans on behalf of Alco-Chem. In a decision mailed on November 8, 2013, the Hearing Officer reversed the Director's redetermination decision and held that the Claimant had been discharged from employment without just cause.

Alco-Chem appealed that decision. On January 8, 2014, the Review Commission mailed its Decision disallowing the Alco-Chem's request for further appeal. Alco-Chem timely files the instant appeal.

II. Decision

The Hearing Officer considered the sole issue of whether the Claimant was discharged by Alco-Chem without just cause. The Hearing Officer considered the evidence and the testimony of Potts, Mandala, Kevin Lacey, and Grace Evans on behalf of Alco-Chem. Alco-Chem was represented by Luanne Worthington, in Human Resources, both days. The Claimant was present on the first day of the hearings.

In her finding of facts, the Hearing Officer found that Alco-Chem terminated Claimant for lack of paperwork and falsifying accounts that he had visited. The Hearing Officer found that the last reported issue occurred on or about May 30, 2013, in which Alco-Chem contends that the Claimant lied to them about visiting Brown Derby at the end of May. The Hearing Officer further noted the Claimant earlier provided a response that he did not visit the client because he did not have the right replacement parts for the job. The Hearing Officer found that the Claimant did not receive any written warnings or formal discipline for falsifying records or for failing to respond to a service call. The Hearing Officer found that because the Claimant did not receive the benefit of a write-up or progressive discipline for falsification, and under the facts of the case, the Claimant was discharged without just cause.

III. Arguments

Alco-Chem presents three grounds upon which it argues that the Review Commission's decision is unlawful, unreasonable and against the weight of evidence. Alco-Chem argues that the weight of the evidence establishes that Claimant was discharged for lying about servicing an account; if Claimant was discharged for falsifying accounts, the Commission's decision would be unlawful for violating R.C. 4141(D)(2)(e); and the Commission's decision is unlawful and unreasonable because failing to turn in required paperwork and falsifying accounts constitutes just cause for termination.

Alco-Chem cites to the testimony of Mandala in which he states that he terminated the Claimant because Claimant lied to him twice during a conversation on June 4, 2013, thus factually substantiating that the Claimant was discharged for lying about servicing the Brown Derby. Alco-Chem further argues that if Claimant was discharged for lack of paperwork and

falsifying accounts, then the Review Commission's decision would be unlawful because R.C. 4141.29(D)(2)(e) prohibits the payment of benefits if "[T]he individual became unemployed because of dishonesty in connection with the individual's most recent or any base period work. ***." Lastly, Alco-Chem argues that the Claimant was at fault for his termination since he chose to falsify accounts and lie about the Brown Derby account.

The Defendant-Appellee Director, Ohio Department of Job and Family Services ("Director") counters that Mandala terminated the Claimant for lying about the Brown Derby account, but that no one talked to him about falsifying his time and location. The Director points to the previously noted response of Claimant whereby he notified Alco-Chem that he did not have the proper replacement parts to service Brown Derby. The Director further argues that the testimony of Alco-Chem's witnesses were inconsistent, therefore the Hearing Officer could properly consider Claimant's written statement.

The Director also argues that the Claimant was not afforded any disciplinary action regarding the basis of his termination, in violation of the Alco-Chem's disciplinary policy. The Director points to a questionnaire that is included in the Director's file in which Alco-Chem responds that the disciplinary policy includes a write up with a supervisor. The Director states that the only "write up" submitted by the Alco-Chem in the certified Record related to Claimant was dated April 1, 2013 and is not related to a falsification issue for which Claimant was terminated. The Director concludes that even if the Court could interpret the evidence differently, the Court should defer to the Review Commission and affirm the Review Commission's decision.

In its reply, Alco-Chem restates its argument that as the Claimant was discharged for

falsifying the accounts, and R.C. 4141.29(D)(2)(e) prohibits an employee who was discharged for dishonesty from collecting benefits, the Review Commission's Decision is unlawful, unreasonable and against the manifest weight of the evidence.

IV. 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). Where the commission might reasonably decide either way, the courts have no authority to upset the commission's decision. *Id.* at 17. The reviewing court must defer to the commission on decisions involving close questions. *Id.* at 18. "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.

V. Analysis

A practical reading of the Hearing Officer's Decision reflects that the Hearing Officer accepted Alco-Chem's reason for the Claimant's termination, that is, lack of paperwork and falsifying accounts. The Hearing Officer determined that Alco-Chem failed to provide any written warnings or formal discipline for these claimed reasons and therefore, the Claimant was terminated without just cause.

The record reflects (Director's File, Fact Finding Questions for Discharge) that Alco-Chem had a discipline policy in place that required a write-up with a supervisor, of which the Claimant was not afforded. Because Alco-Chem failed to follow such policy in its termination of the Claimant, the Hearing Officer properly found that the Claimant was discharged without just cause.

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, the Court can find no error in the Hearing Officer's Decision that the Claimant was discharged without just cause for Alco-Chem's failure to follow its disciplinary policy or similar discipline for the claims of falsification against the Claimant. The only other cited reprimands against Claimant were in relation to failing to timely turn in driver's logs. Any other issues with discrepancies with the Claimant's driver's logs and the GPS were neither discussed with the

Claimant nor the claimed reason for termination on June 4, 2013.

While the Claimant was discharged without just cause, it is still necessary to examine whether the Claimant is eligible to receive benefits under the statute based on the reason found for the discharge. In this case, the Hearing Officer determined the Claimant was terminated for lack of paperwork and falsifying accounts that he had visited. Falsifying accounts related to the Claimant's employment with Alco-Chem is at a minimum a deceitful act and thus constitutes dishonesty under R.C. 4141.29(D)(2)(e). Because the reason for Claimant's termination arises out of an act of dishonesty, he is prohibited by statute from receiving unemployment compensation benefits. Accordingly, the Commission's determination that the Claimant was entitled to unemployment compensation benefits is unlawful under R.C. 4141.29(D)(2)(e).

VI. Conclusion

The Court finds that the decision of the Review Commission's Decision was unlawful, unreasonable and against the manifest weight of the evidence.

Wherefore, it is the order of this Court that Alco-Chem, Inc.'s appeal is well-taken and **granted**. It is further ordered that the January 8, 2014 Decision of the Review Commission is **reversed and vacated**. Costs are taxed to Appellees.

This is a final, appealable order.

IT IS SO ORDERED.

JUDGE LYNNE S. CALLAHAN

cc: Attorneys Amy Berman Hamilton / Timothy D. Carnahan
Attorney Susan M. Sheffield
Appellee Paul D. Wiser