IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

ANTWON TAYLOR, Appellant	*	Case No. G-4801-CI-201502643-000
vs.	*	
FIRST SOLAR, INC., ET AL., Appellees.	*	**OPINION AND JUDGMENT ENTRY**
	*	JUDGE STACY L COOK

This matter is before the Court upon the appeal of Appellant Antwon Taylor ("Taylor") of the Ohio Unemployment Compensation Review Commission's April 15, 2015 final decision denying him unemployment benefits. The matter, having been fully briefed, is decisional.

I. Background

Taylor began working for Appellee First Solar, Inc. ("First Solar") on July 21, 2008. Taylor worked as a manufacturing associate for First Solar, a company that produces solar panels. On December 20, 2014, Taylor was scheduled to work at 6:00 p.m. While at a gas station in Perrysburg, however, police took Taylor into custody on an outstanding warrant. Police

released Taylor about an hour after taking him into custody.

First Solar provided Taylor with 10.5 days of vacation time and 60 hours of emergency time off, or ETO leave. First Solar requires 30 minutes notice prior to use of ETO but does not require any reason for its use. First Solar enforces its attendance policy through a three-step process consisting of coaching, followed by a Level 1 write, and ending with Level 2 disciplinary action, usually termination. First Solar also permits employees to argue extenuating circumstances, beyond their control, to excuse up to two incidents of tardiness so long as they report within 10 minutes of the start of shift. First Solar strictly enforces its attendance policy, as stated in the company's employee handbook. On December 20, 2014, Taylor had no benefit time to use to cover any absence, and had already received leniency based on two incidents of extenuating circumstances.

Prior to December 20, 2014, Taylor had numerous attendance issues. On February 6, 2014 and February 20, 2014, Taylor reported late to work without calling 30 minutes prior to the start of his shift. First Solar responded to Taylor's failure to call in on February 6 with coaching, and the February 20 incident was treated leniently, based on extenuating circumstances. On October 7, 2014, Taylor reported late again, with the incident resulting in coaching. On November 8, 2014, Taylor received a Level 1 write-up for failing to call 30 minutes prior to his shift and reporting late, as First Solar previously addressed the issue with coaching. On November 12, 2014, Taylor failed to report to work, and was forced to cover his absence with the last of his vacation benefit time as he had used all of his ETO leave.

On December 20, 2014, while on his way to work, Taylor stopped at a gas station in Perrysburg, Ohio, and a police officer approached him regarding either an issue with his license plates or regarding an outstanding warrant.1 Taylor denied any valid warrant, but police took him into custody until the issue was resolved, about an hour later. Taylor missed work on December 20, 2014 as a result, and on December 22, 2014, First Solar suspended him pending an investigation into the absence. On December 26, 2014, First Solar notified Taylor he was terminated for violating the company's ETO policy.

On December 29, 2014, Taylor applied for unemployment compensation benefits. First Solar responded with information, demonstrating Taylor's termination was based on violation of the company's ETO policy, as Taylor had exhausted his available leave time as of the absence on December 20, 2014 and no other type of leave was available to Taylor to cover the absence.

On January 16, 2015, the Director, Ohio Department of Job and Family Services ("Director") disallowed Taylor's claim for benefits based on unexcused absenteeism or tardiness in "disregard of the employer's interest." Taylor filed a timely appeal of that determination.

On February 6, 2015, the Director again disallowed Taylor's claim, with the initial determination modified to reflect that First Solar discharged Taylor for excessive absenteeism or tardiness and that "the employer followed an established disciplinary policy." Taylor's termination, moreover, was found to be with just cause. Taylor again filed a timely appeal, and

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[1] Taylor claims he was stopped based solely on an outstanding warrant, while First Solar maintains that Taylor reported an issue to them regarding improper plates on his vehicle.

the matter was transferred to the Unemployment Compensation Review Commission.

On March 2, 2015, the Commission held hearing on Taylor's appeal. Taylor and Tom Foos of First Solar participated in the telephonic hearing and gave testimony. On March 4, 2015, the Commission issued its decision, affirming the Director's finding to disallow Taylor's claim for benefits. Taylor timely sought a review of that decision. On April 15, 2015, the Commission disallowed Taylor's request for review.

On May 14, 2015, Taylor filed a timely appeal to this Court, naming First Solar and the Director as appellees. On May 21, 2015, First Solar entered an appearance. On May 26, 2015, the Director entered an appearance. On June 15, 2015, the Director filed a copy of the record of proceedings.

On July 14, 2015, Taylor filed his brief. On August 13, 2015, the Director filed a brief in opposition. On August 19, 2015, First Solar filed a brief, adopting and incorporating the Director's opposition. On August 26, 2015, Taylor filed his reply brief.

II. Unemployment Compensation Appeal

An appeal of a decision regarding unemployment compensation benefits is governed under R.C. 4141.282, which provides:

> Any interested party, within thirty days after written notice of the final decision of the unemployment compensation review commission was sent to all interested parties, may appeal the decision of the commission to the court of common pleas.
> * * *
> 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. R.C. 4141.282(A) and (H).

The Director denied Taylor's application for benefits based on his termination for just cause for violation of workplace policy, and the Commission affirmed that determination. Taylor filed a timely appeal. Eligibility for unemployment compensation benefits is defined by statute, and pursuant to R.C. 4141.29(D)(2)(a), an employee is ineligible for benefits if he "has been discharged for just cause in connection with [his] work * * *." *Tzangas, Plakas & Mannos v. Adm. Ohio Bur. Of Emp. Servs.,* 73 Ohio St.3d 694, 697, 653 N.E.2d 1207 (1995), citing R.C. 4141.29(D)(2)(a).

There is no "slide-rule definition of just cause." See *Irvine v. Unemployment Comp. Bd. of Rev.*, 19 Ohio St.3d 15, 17, 482 N.E.2d 587 (1985) (citation omitted.) "Just cause" is "that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act." *Napolski v. Preferred Props.*, 6th Dist. Lucas No. L-13-1088, 2013-Ohio-5347, ¶5, quoting *Irvine*, at 17, quoting *Peyton v. Sun T.V. & Appliances*, 44 Ohio App.2d 10, 12, 335 N.E.2d 751 (10th Dist. 1975). A "just cause" determination depends on the facts of each case, with issues of fact "primarily within the province of the hearing officer and the [Commission]." *Napolski*, ¶5, citing *Tzangas*, at 697.

Taylor, as claimant, bears the burden of proving entitlement to unemployment compensation benefits. *Irvine*, at 17. In reviewing whether "just cause" exists, a court must affirm the determination and disallowance of benefits if the factual findings at the administrative

level demonstrate competent and credible evidence to support the finding of "just cause." *Id.*, citing *C.E. Morris & Foley Constr. Co.* 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), at the syllabus. The findings of fact and determinations regarding credibility belong to the Commission, and "[t]he fact that reasonable minds might reach different conclusions is not a basis for the reversal of the [Commission's] decision." *Irvine*, at 18 (citations omitted.)

In his appeal, Taylor argues that the basis for his termination was not justified, as "just cause" must be determined "from the employee's perspective" and based "upon conduct of the employee." *Morris v. Ohio Bur. of Emp. Serv.*, 90 Ohio App.3d 295, 299, 629 N.E.2d 35 (10th Dist. 1993), quoting *Sellers v. Unemployment Comp. Bd. of Review*, 1 Ohio App.3d 161, 440 N.E.2d 550 (1981), paragraph two of the syllabus. Taylor argues that his firing was based on a wrongful arrest, over which he had no control.

In response, the Director and First Solar argue that while Taylor's arrest could have been beyond his control, Taylor's absenteeism and his prior exhaustion of ETO leave was within his control. Taylor had also received leniency on two additional occasions within the year. As to the arrest, moreover, the Director and First Solar argue that the record demonstrated some circumstances within Taylor's control, such as issues with his registration, license plates not properly registered to the current vehicle, and a missing front license plate, all factors argued as resulting in the police officer's initial stop of Taylor, separate from a mistaken warrant.

A termination for "just cause" requires some fault on the part of the employee. *Morris*, at 299, citing *Sellers v. Unemployment Comp. Bd. of Review*, 1 Ohio App.3d 161, 164, 440 N.E.2d

550 (1981). "Such fault does not require misconduct; but, nonetheless, fault must be a factor in the justification for discharge." *Sellers*, at 164. In arguing a lack of misconduct, Taylor likens his conduct to absenteeism due to a reported illness, found insufficient to demonstrate "just cause" by the Sixth District Court of Appeals. See e.g. *Schultz v. Herman's Furniture, Inc.*, 62 Ohio App.2d 161, 368 N.E.2d 1269 (6th Dist. 1976) at the syllabus ("Absenteeism and tardiness caused by a bona fide illness reported to an employer is not just cause, in connection with the work, for a discharge.") This focus on the mistaken warrant and arrest, however, disregards Taylor's pattern of absenteeism for various other reasons, his exhaustion of leave time to cover absences, and First Solar's use of its progressive discipline policy, culminating with termination.

Taylor also argues that First Solar's policy, as applied, is unfair under the circumstances and that First Solar may not claim strict compliance when extenuating circumstances are considered to deviate from policy at times. Taylor's own disciplinary history, he argues, demonstrates a failure to strictly comply with the attendance policy based on use of the extenuating circumstances rule resulting in leniency on two occasions. In response, the Director and First Solar argue that company policy was fairly applied, and that any lapse in enforcement to Taylor's advantage does not negate that policy.

First, as to fairness, courts have applied a fairness analysis, considering "(1) whether the employee received the policy; (2) whether the policy could be understood by the average person; and (3) whether there is a rational basis for the policy." *Napolski*, ¶9, citing *Shaffer v. Am. Sickle Cell Anemia Assn.*, 8th Dist. Cuyahoga No. 50127, 1986 Ohio App. LEXIS 7116, *2 (Jun. 12,

1986). Taylor cites these factors, but makes no claim he never received First Solar's policy or that he could not understand the policy. Taylor also does not argue a lack of any rational basis for the policy. Instead, he argues the policy is unfair because he couldn't control a mistaken warrant or the resulting arrest.

The record demonstrates Taylor's signed acknowledgement of receipt of the policy and agreement to abide by the handbook. Taylor also testified at hearing that he understood that missing work after exhausting all ETO and other leave could lead to termination. Finally, the attendance policy arguably has a rational basis, as the policy limits absenteeism by employees with no requirement that the employer engage in a case by case review of each absence. However, this fairness analysis – while helpful – has not been adopted by the Ohio Supreme Court in considering whether an employee was discharged for "just cause." See *Napolski*, ¶10, quoting *Williams v. Ohio Dept. of Job and Family Servs.*, 129 Ohio St.3d 332, 2011-Ohio-2897, 951 N.E.2d 1031, ¶29 ("We have never adopted such a [fairness] standard.")

Taylor next argues that First Solar may not claim strict enforcement of its policy, as First Solar grants employees leniency at times, and granted Taylor leniency on two occasions prior to enforcing the policy and terminating his employment. As previously noted, First Solar provides vacation and ETO leave, and uses a progressive discipline approach beginning with coaching, followed by a Level 1 write-up, and ending with a Level 2 action, usually termination. First Solar also considers extenuating circumstances twice in each calendar year. Despite Taylor's argument, therefore, the record demonstrates First Solar applied the policy in all aspects. The First Solar

ETO policy, moreover, is a "no fault" type of policy.

> First Solar provides ETO leave, described in the handbook as:
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> > ETO is a no fault emergency time off policy. It is not vacation, a disability policy, or a substitute for FMLA Leave. While we will not track the reason for your ETO usage, if you fail to come to work as scheduled for any reason when you have no ETO time left and you are not eligible for the time off under any other leave of absence policy, you may be subject to discipline, usually your employment will be terminated. **This policy is strictly enforced.** Thus, it is worthwhile to save your ETO for true emergencies. (emphasis sic.)

These "no fault" attendance policies have been found to support a "just cause" determination, regardless of the reason for the final absence in violation of the policy. While the policy applies without consideration for the underlying reasons for absences, the purpose of the policy is to "(1) provide the worker with control over his continued employment with the company, and (2) relieve the employer of the task of determining whether an employee has a valid or exculpating reason for absences." *Sutherlin v. Interstate Brands Corp.*, 79 Ohio App.3d 635, 637, 607 N.E.2d 1076 (1st Dist. 1992).

The fact that First Solar did consider extenuating circumstances in extending the number of allowed absences, furthermore, does not require a finding that First Solar failed to strictly enforce its policy. First Solar excused two of Taylor's absences, on February 20, 2014 and on October 7, 2014, based on extenuating circumstances. Such consideration was not a departure from established policy. Additionally, even if consideration of extenuating circumstances could be considered a deviation from policy, First Solar's deviation benefitted Taylor. Courts do not hold an employer's leniency against it in considering "just cause" for termination. See e.g.

Spayde v. Hi-Stat Florida Mfg. Co., 5th Dist. Richland No. 92-CA-37, 1992 Ohio App. LEXIS 5949 (Nov. 23, 1992) (penalizing leniency would "work to the detriment of the other employees" as employer would be forced to abandon leniency as to all employees to avoid losing the ability to terminate one employee.)

In arguing lack of "just cause," Taylor restricts his argument to the underlying reason for his final absence after a lengthy history of absenteeism. However, the Director and Commission, and this Court, correctly consider the entire record. See *Sutherlin*, 79 Ohio App.3d at 637. The fairness of Taylor's arrest on December 20, 2014, therefore, is not at issue in the present appeal. In similar cases, courts upheld termination under a "no fault" attendance policy as termination for "just cause," despite the employee's lack of control over the circumstances of the final, triggering absence.

In *Sutherlin v. Interstate Brands Corp.*, the First District Court of Appeals found "just cause" for termination, precluding entitlement to unemployment compensation benefits where the employee was arrested during his shift, and consequently forced to leave work early. 79 Ohio App.3d at 636. The employer had a "no-fault" attendance-control point system, assessing points for absences and tardiness, and for leaving work prior to the end of a shift. *Id.* The policy provided for progressive discipline, with written warnings after four and six points, a three-day suspension after eight points, and termination after the tenth point. *Id.*

The employee had previously accumulated nine points, and his arrest resulted in his tenth point and subsequent dismissal. *Id.* After his application for unemployment compensation

benefits was denied, the employee appealed, arguing the final and tenth point was wrongfully assessed as he had no control over his arrest. *Id.* The trial court agreed, and reversed the decision disallowing benefits. *Id.* at 637. On appeal, the First District reversed the trial court, and reinstated the order denying benefits. *Id.* at 638.

The First District held that the trial court improperly focused on only the final instance of absenteeism, and that "[s]uch a piecemeal analysis is contrary to the function of the attendance-control policy and ignores the [employee's] numerous absences from work during the entire twelve-month period." *Id.* Because competent, credible evidence in the record supported the determination of dismissal for "just cause," the trial court abused its discretion in reversing and finding the employee entitled to receive benefits. *Id.*

In *Coleman v. Admr.*, the Eighth District Court of Appeals found the reasoning of *Sutherlin* persuasive, and focused on the employee's entire employment history in determining "just cause" for termination. 8th Dist. Cuyahoga No. 68853, 1995 Ohio App. LEXIS 5288 (Nov. 30, 1995). The employee in *Coleman* had accumulated nine absences of the permitted twelve under her employer's no-fault attendance policy. *Id.* at *1-2. After receiving a gunshot wound she missed three more days of work, triggering her twelfth and final absence in a twelve month period in violation of the policy.[2] *Id.*

The employee applied for and was denied unemployment compensation benefits, with

[2] There was no argument that her last three absences were due to a reported bona fide illness in this case, which would exempt these absences from a "just cause" analysis based on the "no

that determination affirmed on appeal. *Id.* The Eighth District also affirmed, rejecting the employee's argument that her last three absences were beyond her control. *Id.* at *6-7. In affirming, the Eighth District held that the entire record must be considered in determining "just cause." *Id.* at *6 ("Rather than focusing entirely upon the reasons for her final three absences, we review her employment history for application of the just cause analysis.")

In *Coleman*, the Eighth District noted that the employee received "written warnings regarding excessive absenteeism * * * on three separate occasions, * * * [and other warnings] regarding tardiness[.]" *Id.* at *7. The record demonstrated that the employee "contributed to the accumulation of absences and was thus, at least partially, at fault with regard to the violation of her employer's work rule." *Id.* Regardless of the reason for the final absences, therefore, competent and credible evidence supported the finding of "just cause," as the employee continued to be absent or tardy without justification despite numerous warnings. *Id.*

Taylor focuses mainly on the mistaken arrest, but also characterizes some of his previous absences as excusable or slight. Even the slightest infractions of a "no-fault" attendance policy, however, will support a finding of "just cause" for termination. In *Hurst v. State Unemployment Comp. Bd. of Review,* the Eleventh District Court of Appeals upheld a finding of "just cause" after a final instance of tardiness triggered dismissal based on a late clock-in by three and one-one hundredth minutes. 11th Dist. Trumbull No. 94-T-5084, 1995 Ohio App. LEXIS 501 (Feb. 10, 1995).

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fault" policy.

In *Hurst*, the employer assessed points under the "no-fault" attendance policy, with dismissal after accumulation of twelve points in a twelve month period. *Id.* at *1-2. An absence equaled one point, while late arrival of more than three minutes equaled one-half point. *Id.* Between February 7, 1992 and February 18, 1993, the employee received eight separate warnings for absenteeism, and his point total "continually hovered around eleven points." *Id.* at *2. On February 24, 1994, the employee was scheduled to begin work at 10:30 p.m., but clocked in at 10:33.01 p.m. *Id.* at *2. The employer assessed one-half point resulting in a twelve point violation and termination. *Id.*

In his appeal of the denial of unemployment compensation benefits, the employee argued the underlying facts, including a faulty time-clock and policy related to weather truancies. *Id.* at *6-7. The Eleventh District found, however, that the employee "was aware of the attendance policy and continually flirted with the discharge process." While he ultimately "crossed the line" through a minor infraction, moreover, the Court refused to substitute its judgment for that of the administrative body where there was evidence to support the determination. *Id.* at *6.

In this case, Taylor does not dispute his accumulation of absences and tardiness, or that he had exhausted both his vacation leave as well as his ETO leave before his arrest on December 20, 2014. Taylor also does not dispute that missing work after exhausting all leave subjected him to termination under First Solar's policy. Instead, Taylor appears to argue that the injustice of his arrest requires reversal of the Commission's final decision for a lack of "just cause." The Commission considered the entire record, however, and found competent, credible evidence

demonstrating Taylor's violation of the ETO leave policy, with consideration of Taylor's entire work history instead of just the final, triggering incident related to his arrest on a mistaken warrant.

Upon review of the record, the Court finds competent, credible evidence supports the Commission's finding. Taylor's pattern of absenteeism resulted in exhaustion of his leave prior to the arrest on December 20, 2014. Pursuant to the First Solar policy, subsequent absences subjected Taylor to dismissal. Whether the arrest was unjust, therefore, is not the issue before the Court for determination. Accordingly, upon due consideration of the appeal, the record, the argument of the parties, and applicable law, this Court must affirm.

JUDGMENT ENTRY

It is therefore ORDERED that the Ohio Unemployment Compensation Review Commission's April 15, 2015 final decision disallowing further review and denying Antwon Taylor unemployment compensation benefits upon finding that he was discharged for just cause is hereby AFFIRMED.

JUDGE STACY L. COOK