

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ANITA M. CARNER)

JUDGE KATHLEEN A. SUTULA

Appellant)

CASE NO. CV-08-657099



vs)

DIRECTOR, OHIO DEPARTMENT)
OF JOB AND FAMILY SERVICES)

and)

FINAL JUDGMENT ENTRY

CASE WESTERN RESERVE)
UNIVERSITY)

Appellees)

This case came on for consideration as a statutory unemployment compensation appeal filed by Appellant, Anita Carner (Carner), under R.C. §4141.282. Carner appeals from the Decision of the Unemployment Compensation Review Commission (Review Commission) that denied her claim for benefits on the basis that she was discharged from her employment by Appellee, Case Western Reserve University (CWR), for just cause under R.C. §4141.29(D)(2)(a).

According to the evidence in the certified record of the Review Commission, Carner was employed by CWR as a building services worker from August 1, 2005, until she was discharged by CWR on May 8, 2007, for inadequate job performance and excessive absenteeism in violation of CWR disciplinary policy.

According to the evidence in the certified record of the Review Commission, Carner was required to comply with the disciplinary rules contained in the Employee Policy Manual of CWR.

According to the evidence in the certified record of the Review Commission, Carner was provided a copy of the Employee Policy Manual when she was hired by CWR in August, 2005, and Carner was aware that she was required to comply with the Employee Policy Manual of CWR as a condition of her employment at CWR.

On December 28, 2006, CWR issued a Positive Corrective Action Report to Carner in reference to a verbal disciplinary warning for her inadequate job performance, misuse of work time and failure to stay in her assigned work area in violation of CWR disciplinary policy.

On March 8, 2007, CWR issued a second Positive Corrective Action Report to Carner in reference to a written disciplinary warning for her inadequate job performance, misuse of work time, failure to stay in her assigned work area and excessive absenteeism in violation of CWR disciplinary policy.

On May 8, 2007, CWR issued a Positive Corrective Action Report to Carner in reference to her termination from employment for her inadequate job performance, misuse of work time, failure to stay in her assigned work area and excessive absenteeism in violation of CWR policy.

Carner argues in her testimony that the Decision of the Review Commission must be reversed because Director of Employee Relations, Lorraine Watson, and Supervisor, Lavetta Stover, of CWR lied to the Review Commission in a fraudulent attempt to prove that she was discharged by CWR for just cause under R.C. §4141.29(D)(2)(a). However, contrary to the erroneous argument of Carner in her brief about the alleged lying and fraud of CWR, the Review Commission had the exclusive legal authority as the trier of fact to disbelieve the testimony of Carner and hold that she was discharged by CWR for just cause under R.C. §4141.29(D)(2)(a) for inadequate job performance and

excessive absenteeism in violation of CWR disciplinary policy. See *Tzangas, Plakas & Mannos v. OBES* (1995), 73 Ohio St.3d 694; *Moore v. ODJFS*, 9th Dist. No. CA23255, 2006 Ohio 6382; *Bliss v. OBES* (Dec. 14, 2000), 8th Dist. App. No. 78042, unreported; *Harrison v. ODJFS*, 10th Dist. No. 04AP728, 2005 Ohio 638.

In addition, Carner appears to suggest in her testimony and brief that the Decision of the Review Commission should be reversed on the basis that her inadequate job performance and absenteeism do not rise to the level of *substantial fault* or *deliberate misconduct* for purposes of R.C. §4141.29(D)(2)(a). However, contrary to the erroneous legal presumption of Carner, Ohio law does not require that the conduct of an employee rise to the level of substantial fault or deliberate misconduct in order for the Review Commission to decide that the employee was discharged for just cause pursuant to R.C. §4141.29(D)(2)(a). See *Tzangas, Plakas & Mannos v. OBES* (1995), 73 Ohio St.3d 694; *Harrison v. ODJFS*, 10th Dist. No. 04AP728, 2005 Ohio 638.

Finally, Carner appears to suggest that the Decision of the Review Commission should be reversed because the hearing officer relied on hearsay evidence from CWR in order to hold that she was discharged for just cause under R.C. §4141.29(D)(2)(a) for inadequate job performance and excessive absenteeism in violation of CWR disciplinary policy. However, it is well-established under Ohio law that hearsay evidence is legally admissible evidence in hearings before the Review Commission because hearing officers at the Review Commission are not bound by the technical rules of evidence and/or procedure under R.C. §4141.281. See *Simon v. Lake Geauga Printing* (1982), 69 Ohio St.2d 41; *Moore v. ODJFS*, 9th Dist. No. CA23255, 2006 Ohio 6382.

Accordingly, the hearing officer for the Review Commission in this case was authorized by law to rely on any and all evidence in the certified record of the Review Commission, including the disciplinary evidence submitted by CWR during the administrative process. Moreover, the hearing officer for the Review Commission in this case had the exclusive legal authority as the trier of fact to judge the credibility of the testimony of Carner at the hearing held on March 11, 2008, in order to decide whether she was discharged by CWR for just cause under R.C. §4141.29(D)(2)(a). See *Simon v. Lake Geauga Printing* (1982), 69 Ohio St.2d 41; *Fisher v. ODJFS*, 8th Dist. No. 86338, 2006 Ohio 457; *Moore v. ODJFS*, 9th Dist. No. CA23255, 2006 Ohio 6382.

In addition, Carner was given a full and fair opportunity to subpoena witnesses or evidence to appear at the hearing of the Review Commission on March 11, 2008, in order to decide whether she was discharged by CWR for just cause under R.C. §4141.29(D)(2)(a). Specifically, during the administrative hearing process, the Review Commission issued a Notice of Hearing to all parties on February 28, 2008, wherein the parties were advised that a hearing shall be held by the Review Commission on March 11, 2008. Carner was advised in the Notice of Hearing about her legal right to request the issuance of subpoenas by the Review Commission to require the attendance of witnesses and/or the production of documents for the hearing on March 11, 2008.

However, according to the evidence in the certified record, Carner failed to subpoena any witnesses to testify at the hearing held by the Review Commission on March 11, 2008, to prove that she was discharged by CWR without just cause pursuant to R.C. §4141.29(D)(2)(a). Accordingly, the evidence in the certified record reveals that the failure of Carner to prove her own case or

subpoena any additional witnesses from CWR to testify at the hearing on March 11, 2008, was not the result of an unfair strategy on the part of CWR that was somehow beyond the control of Carner. See *Moore v. ODJFS*, 9th Dist. No. CA23255, 2006 Ohio 6382.

Further, Carner appears to suggest that CWR failed to comply with its progressive discipline policy. However, the evidence in the certified record reveals that CWR did comply with the terms of its discretionary progressive discipline policy when Carner was discharged by CWR on May 8, 2007. Specifically, the evidence in the certified record reveals that CWR retained the right to discharge an employee *without warning* for any violation of its Employee Discipline Policy under the terms of its discretionary progressive discipline policy. See *Harrison v. ODJFS*, 10th Dist. No. 04AP728, 2005 Ohio 638.

Accordingly, after due consideration of the certified record of the Review Commission, the legal briefs filed by the parties, and the applicable legal authority, the Court hereby finds that the Decision of the Review Commission in this case, that Carner was discharged from her employment by CWR for just cause under R.C. §4141.29(D)(2)(a), was not unlawful, unreasonable, or against the manifest weight of the evidence and, therefore, must be affirmed under R.C. §4141.282(H). See *Tzangas, Plakas & Mannos v. OBES* (1995), 73 Ohio St.3d 694; *Moore v. ODJFS*, 9th Dist. No. CA23255, 2006 Ohio 6382; *Bliss v. OBES* (Dec. 14, 2000), 8th Dist. App. No. 78042, unreported; *Harrison v. ODJFS*, 10th Dist. No. 04AP728, 2005 Ohio 638; *Coleman v. OBES* (Nov. 30, 1995), 8th Dist. App. No. 68853, unreported; *Li v. OBES* (Feb. 24, 1994), 8th Dist. App. No. 65791, unreported; *Watkins v. ODJFS*, 10th Dist. No. 06AP479, 2006 Ohio 6651.

Finally, pursuant to R.C. §4141.282 and controlling case law from the Supreme Court of Ohio, the fact that reasonable minds might reach different conclusions on the basis of the evidence presented does not mean that the Decision of the Review Commission should be reversed pursuant to R.C. §4141.282(H). See *Tzangas, Plakas & Mannos v. OBES* (1995), 73 Ohio St.3d 694; *Irvine v. Unemp. Comp. Bd. Of Rev.* (1985), 19 Ohio St.3d 15; *Moore v. ODJFS*, 9th Dist. No. CA23255, 2006 Ohio 6382.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the final Decision of the Review Commission that Carner was discharged from her employment by CWR for just cause under R.C. §4141.29(D)(2)(a) was not unlawful, unreasonable or against the manifest weight of the evidence, and is hereby AFFIRMED pursuant to R.C. §4141.282(H). Final judgment is hereby granted in favor of Appellees. Costs to Appellant.

Date:

3-19-09

K.A. Sutula
JUDGE KATHLEEN ANN SUTULA

RECEIVED FOR FILING

MAR 20 2009

GERALD E. FUERST, CLERK
By G. P. Hutto Deputy

NOTICE TO THE CLERK OF COURTS

Pursuant to Civ. R. 58(B), the Cuyahoga County Clerk of Courts shall serve notice of this

Final Judgment Entry and its date of entry on the Journal upon all parties as follows:

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