In the Court of Common Pleas
Cuyahoga County, Ohio

FAR MORE PROPERTIES, d.b.a. FAR MORE ACURA,

Appellant,

v.

JAMES W. WALKER, et al.,

Appellees.

Case No. CV 10 742670

Judge Robert C. McClelland

Opinion and Order on Appeal from Unemployment Compensation Review Commission

Appellant Far More Properties, d.b.a. Motorcars Acura ("Far More") appeals to this Court from the Ohio Unemployment Compensation Review Commission's decision disallowing its request for review of the hearing officer's decision, which had concluded that Far More discharged Appellee James W. Walker from his position as a service technician without just cause.. Far More maintains that the hearing officer "applied the wrong legal standard in her decision" and that, contrary to Ohio law, she "improperly placed the burden of proof" on Far More. Walker and Appellee Director of the Ohio Department of Job and Family Services argue that the Review Commission's decision should be affirmed because it is not unlawful, unreasonable, or against the manifest of the evidence.

For the reasons that follow, the Review Commission's decision is affirmed.

The Record

I. The Hearing

Walker had worked for Far More almost 23 years as a full-time service technician (Tr. 5). Michael Marcellino, Far More's Fixed Operations Manager, testified that Far More had terminated Walker's employment for violating "company policy in regards to working on personal vehicles" (Tr. 5; id. at 6.)

The company policy to which Marcellino apparently referred, titled "Motorcars Group Service Department Policy Regarding Technicians Working on Their Own Vehicles" written on Motorcars Group letterhead, provides guidelines on getting pre-approval to work on personal vehicle (Tr. Exhibits (Correspondence to General and Service Managers of Motorcars Acura and other Motorcars entities, dated 3/17/1992)). Among other things, the guidelines

require a technician to obtain the service manager's approval and a "RO" (repair order) before starting work, and they also state that "[r]epairs should only be made during off duty hours . . . ." (Id.). Separate correspondence on Motorcars Acura stationery indicates that, "because of strict insurance provisions, no one may work on their car inside the dealership without a written repair order established" (Tr. Exs (Correspondence from Dick Marcellino), 2/4/1992)).

Walker purportedly did not obtain an RO on a personal vehicle he intended to work on but had it "up in the air" (Tr. 6). According to Marcellino, this constituted "a violation of our insurance," which "will not cover damages to anyone in the shop" (Tr. 6-7). Essentially, the company would be liable if a car that did not have a RO fell off the lift and injured someone (Tr. 8). "[I]t's a safety policy," he said, and "because of the nature of the policy and the violation uh we had to, we had no other decision but to release Mr. Walker" (Tr. 7).

Marcellino admitted that company had a progressive discipline policy but it did not follow it because of the alleged nature of the violation (Tr. 7.) As he stated, "I guess progressive discipline depends on the severity of the violation" and an employee would know, based on the handbook, that "it's up to our discretion based on the severity of the volition as to uh that level of discipline." (Tr. 15.) And he also admitted that, before the RO incident, Walker had never been disciplined (Tr. 7).

As it turned out, Walker had obtained a RO from the service advisor after 4:00 p.m.; he said he brought the car into the shop shortly thereafter and left the RO in the vehicle (Tr. 10-11, 24 & 26). Marcellino, however, took issue with the *time* at which he obtained the RO: "A repair order was not printed at the time that the car was up in the air and on the rack, that's what I'm saying" (Tr. 11). Marcellino claimed that he saw Walker in the shop and the vehicle on the lift between 3:30 and 4:00 p.m.; Motorcars submitted various owner and employee statements to support its position (Tr. 22 & Exs.).

Walker, however, said that he had the repair order when he first saw Marcellino in the repair shop (Tr. 25.) Walker also admitted that, since he had repaired cars in the past, he was aware that he needed a RO before beginning work. (Tr. 24-25). He had no idea, however, that his employment would be terminated if he didn't have the repair order in his possession (Tr. 25).

II. The hearing officer's decision

The record supports the hearing officer's factual determinations. After pointing out the length of Walker's employment and his awareness of Far More's policies and procedures, the officer found:

> On or about December 7, 2009 claimant was going to work on a personal car and brought it into the shop. It was discovered that claimant may not have properly obtained an RO for this car

before bringing it into the shop. Claimant was discharged for this policy violation. Claimant had no previous discipline.

In deciding that Walker was discharged without just cause, the hearing officer determined that that Far More "failed to establish that claimant's action was a willful disregard of the employer's policy and were so severe to warrant immediate discharge":

> The policy itself does not state that failing to get an RO will result in immediate discharge and a reasonable person would not be aware that this action would result in loss of their job without previous discipline. Since claimant had a long history of employment with no previous discipline, and he was not warned that failure to properly complete the RO would result in discharge, the Hearing Officer finds that claimant was discharged without just cause in connection with work.

Far More asked the Review Commission to review the hearing officer's decision and determine that Walker's claim should be disallowed. The Review Commission issued its decision disallowing Far More's request for review, and Far More appealed to this Court.

The Arguments

Appellant's Assignment of Error No. 1:

> Whether the Unemployment Compensation Review Commission's Decision was unlawful, unreasonable or unsupported by the manifest weight of the evidence as set forth under Ohio Revised Code section 4141.282(H) as the Hearing Officer applied the wrong legal standard in her decision[.]

I The parties' arguments

Far More essentially argues that it discharged Walker for just cause, and the facts demonstrate it. According to Far More, Walker's behavior displays "some degree of fault" in that his actions in having "a large vehicle up on a lift during work hours without an RO" exposed it to "significant liability" *if* it had fallen off the lift. As such, his "behavior displays an unreasonable disregard for his employer's best interests." (Appellant's brief, p. 8.) Far More also argues that the length of his employment and the failure to warn him that an improperly completed RO would result in discharge is not relevant to whether he was discharged for just cause.

The Director argues that the question whether Walker properly obtained a RO was a question of credibility, something that Ohio law leaves to the hearing officer's determination. Also, the question whether the employer has

"just cause" to fire an employee differs from whether the employee's conduct constitutes "just cause" to deny unemployment benefits. Thus, the hearing officer's "just cause" determination comports with the legal standard.

Walker concurs with the Director's arguments and adds that no evidence established that he "intentionally or through fault" violated Far More's RO policy. Walker also points out that, even though Far More's employee handbook referenced progressive discipline, Far More retained discretion to decide whether any particular incident was severe enough to warrant immediate dismissal. Thus, an employee would never know whether his or her actions, whether inadvertent or not, would be subject to progressive discipline or immediate dismissal.

II. Reviewing a just-cause determination

A. The concept of "fault"

As the Eighth District noted a number of years ago, "unemployment compensation statutes should be liberally construed in favor of the claimant." *Adams v. Ohio Bur. of Emp. Servs.* (1986), 31 Ohio App.3d 8, 9, 507 N.E.2d 1144; see *Bates v. Airborne Express, Inc.*, 184 Ohio App.3d 78, 2009-Ohio-4399, 919 N.E.2d 783, ¶9 (The Second District noted that "unemployment-compensation statutes must be liberally construed in favor of awarding benefits to the applicant"); *Abate v. Wheeling-Pittsburgh Steel Corp.* (1998), 126 Ohio App.3d 742, 749, 711 N.E.2d 299 (citing R.C. 4141.46, the Seventh District held that "employees are presumed entitled to benefits"). An employee is not eligible for unemployment benefits, however, if terminated for "just cause." R.C. 4141.29(D)(2)(a).

The Supreme Court of Ohio has described "just cause" as "'that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.'" *Irvine v. Unemployment Comp. Bd. of Review* (1985), 19 Ohio St.3d 15, 18, 482 N.E2d 587, quoting *Peyton v. Sun T.V.* (1975), 44 Ohio App.2d 10, 12, 335 N.E.2d 751. Deciding "whether just cause exists necessarily depends upon the unique factual considerations of the particular case." Id. "[F]ault is essential to the unique chemistry of a just cause determination":

> 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. [*Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 697-698, 1995-Ohio-694, 653 N.E.2d 1207; see id., paragraph two of the syllabus.]

Thus, "[i]f an employer has been reasonable in finding fault on behalf of an employee, then the employer may terminate the employee with just cause." Id. at 698; see, e.g., id. ("To find that an employee is entitled to unemployment compensation when she is terminated for her inability to perform the job for which she was hired would discourage employers from taking a chance on an unproven worker.").

Fault does not require misconduct, but fault must be a factor in the justification for discharge. *Sellers v. Ohio Bur. of Empl. Servs. Bd. of Review*, (1981), 1 Ohio App.3d 161, 164, 440 N.E.2d 550. Usually, a single instance of "misconduct" or "fault" without a potentially imminent adverse effect is not enough to deny unemployment benefits. See *Cusick v. Ohio Bur. of Empl. Servs.* (May 6, 1987), 7th Dist. No. 86-C-33, 1987 WL 10893, *2. Rather, the employee's conduct must be of the type that demonstrates "a willful disregard of the employer's interests." *Stephens v. Bd. of Review* (May 22, 1980), 8th Dist. No. 41369, 1980 WL 355009, *2. The Eighth District has found that the same, repeated misconduct that continues after an employer's warnings is enough to demonstrate an unacceptable disregard of an employer's best interests sufficient to establish "just cause" for the termination and denial of unemployment benefits. *Kiikka v. Ohio Bur. of Emp. Servs.* (1985), 21 Ohio App.3d 168, 169, 486 N.E.2d 1233 (chronic tardiness that continued after warnings); accord *Westphal v. Cracker Barrel Old Country Store, Inc.*, 9th Dist. No. 09CA009602, 2010-Ohio-190, ¶16-25 (concluding that claimant's prior disciplinary actions related to refreezing food after extensive training on proper food handling, and lack of concern about violation, enough to establish "fault" to establish just cause for discharge); see, also, *Williams v. Ohio Dept. of Job & Family Servs.*, ___ Ohio St.3d ___, Slip Op. No. 2011-Ohio-2897, ___ N.E.2d ___, syllabus ("When employment is expressly conditioned upon obtaining or maintaining a license or certification and an employee agrees to the condition and is afforded a reasonable opportunity to obtain or maintain the license or certification, an employee's failure to comply with that condition is just cause for termination for unemployment compensation purposes.").

B. Scope of appellate review

R.C. 4141.282(H) defines the court of common pleas' limited scope of review on appeal of the Review Commission's just-cause determination:

> 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.

This Court cannot "make factual findings or . . . determine the credibility of witnesses." *Irvine,* 19 Ohio St.3d at 18. Indeed, "[d]etermination of purely

factual questions is primarily within the province of the referee and the board." Id. at 17. This Court's duty "is to determine whether the decision of the board is supported by evidence in the record." Id. at 18. Even if reasonable minds might reach different conclusions, this Court cannot reverse the board's decision on that basis. Id. This review comports with the civil manifest-weight-of-the-evidence standard of review:

> [T]he civil manifest-weight-of-the-evidence standard was explained in *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 8 O.O. 3d 261, 376 N.E. 2d 578, syllabus ("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"). We have also recognized when reviewing a judgment under a manifest-weight-of-the-evidence standard, a court has an obligation to presume that the findings of the trier of fact are correct. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81, 10 OBR 408, 461 N.E.2d 1273. This presumption arises because the trial judge had an opportunity "to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." Id. at 80, 10 OBR 408, 461 N.E.2d 1273. "A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." Id. at 81, 10 OBR 408, 461 N.E.2d 1237. [*State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶24.]

III. The just-cause determination

No error of law occurred, and the record evidence supports the just-cause determination.

The hearing officer decided that Walker "may not have properly obtained an RO for this car before bringing it into the shop." *Irvine*, 19 Ohio St.3d at 18. This is not a resounding conclusion one way or the other. But the hearing officer obviously assumed that, although Walker had obtained an RO, he had not done so before he put the car on the lift.

The record, however, lacks evidence that Walker willfully disregarded Far More's RO policy (which presumably reflects its best interests), proof of which this district requires to establish just cause for discharge. *Stephens*, 8th Dist. No. 41369, 1980 WL 355009, *2. And as the Eighth District held in *Kiikka*, "the critical issue is not whether an employee has technically violated some company rule, but rather whether the employee, by his actions,

demonstrated an unreasonable disregard for his employer's best interests." 21 Ohio App.3d 168 at paragraph two of the syllabus. Here, Far More's apparent position is that a single, technical violation of a company policy is enough to establish an unreasonable disregard for the employer's best interest, depending upon the importance of the employer's interest. That, however, is not the law.

Based on Ohio precedent, finding "willfulness" in an employee's disregard of the employer's best interest necessitates some form of prior notice to the employee that the conduct in question is not only unacceptable, it can result in discharge. Here, the hearing officer concluded that the progressive discipline policy, which Marcellino admitted would apply on a discretionary basis, did not give Walker sufficient notice that a technical violation of the RO policy was enough to justify immediate dismissal. And, as the hearing officer noted, Walker had repaired a number of his personal vehicles during his 23-year career and never had been disciplined. This evidence, which was not contradicted by other evidence of record, demonstrated a lack of "willfulness" on Walker's part.

The hearing officer applied the correct legal standard. Therefore, Far More's Assignment of Error No. 1 lacks merit and is overruled.

Appellant's Assignment of Error No. 2:

> Whether the Unemployment Compensation Review Commission's Decision was unlawful, unreasonable or unsupported by the manifest weight of the evidence as the Hearing Officer improperly placed the burden of proof on the Employer in contravention of Ohio law.

I. The parties' arguments

Far More argues that the hearing officer inappropriately shifted the burden of proof when she required it to prove that Walker was not entitled to benefits, rather than to require Walker to prove that he was entitled to benefits. And although the hearing officer determined that Walker violated the RO policy, her conclusion that his actions were "not so severe" as to warrant immediate discharge lacks support and is not the appropriate burden of proof under Ohio law.

In response, the Director says that Far More misunderstands the hearing officer's decision. According to the Director, "the hearing officer has merely found that the weight of the evidence did not support a finding that Claimant was discharged with just cause." (Director's brief, p. 6.)

Walker does not specifically address this assignment of error.

II. Determining the burden of proof

As the Supreme Court of Ohio has recognized, the term "burden of proof" is "ambiguous and confusing" as it is used in two different senses, the first of which is the "burden of production":

> One sense is that of the burden of going forward with, or of producing, evidence, these terms being used interchangeably. The party having this burden on any given issue will lose on that issue as a matter of law if evidence sufficient to make out a case for the trier of fact is not produced. Similarly, if a party has the burden of going forward with evidence of a fact and fails to do so, the judge and the jury must assume the non-existence of the alleged fact. In a civil case, the plaintiff normally has the burden of producing evidence to support his case, and the defendant has the burden of producing evidence of any affirmative defenses. The assignment of the burden of producing evidence on a given issue frequently is influenced by presumptions, judicial policies of handicapping disfavored contentions, and practical judgments that the party with superior access to the evidence should have the burden of producing it. The principle is clear enough, even if its application is more problematic. [*State v. Robinson* (1976), 47 Ohio St.2d 103, 106-107, 351 N.E.2d 88 (footnote omitted).]

The second sense of "burden of proof" is called the "burden of persuasion":

> This refers to the risk [that] is borne by a party if the jury finds that the evidence is in equilibrium. The party with the burden of persuasion will lose if he fails to persuade the trier of fact that the alleged fact is true by such quantum of evidence as the law demands. In a civil case, the burden is to persuade the trier of fact by a preponderance of the evidence, or upon some issues, by clear and convincing evidence. If the trier of fact, whether judge or jury, finds itself in doubt, it must decide the issue against the party having the burden of persuasion.
>
> In civil cases, the burden of persuasion will rarely be decisive, since few cases will involve evidence so evenly balanced that neither side has a preponderance. [Id. at 107-108.]

In an unemployment-compensation case decided by the Second District, the court noted that "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless the law provides otherwise." *Silkert v. Ohio Dept. of Job & Family Servs.*, 184 Ohio App.3d 78, 2009-Ohio-4399, 919 N.E.2d 783, ¶36; see *Irving*, 19 Ohio St.3d at 17 (reiterating that a claimant has the burden of proving entitlement to unemployment compensation benefits under R.C. 4141.29(D)(2)(a)). "This is

especially the case where the subject matter of a negative averment lies peculiarly within the knowledge of the other party – that other party has the burden of proving the fact." *Silkert*, supra.

III. The parties had the burden to prove their respective positions

The Seventh District had occasion to consider "presumptions" in the context of the "burden of proof" in *Abate v. Wheeling-Pittsburgh Steel Corp.* (1998), 126 Ohio App.3d 742, 711 N.E.2d 299. Referring to R.C. 4141.25 and R.C. 4141.46, the court noted that "[c]ommon sense dictates that the legislature would not create an unemployment compensation fund to benefit those involuntarily unemployed and then presume that those individuals are *not* entitled to benefits." Id. at 749. But notwithstanding the liberal construction of the Act required by R.C. 4141.46, "both parties carry a burden of proof as to whether employees are entitled to unemployment compensation under R.C. 4141.29(D)(1)(a)[, which allows compensation where unemployment is due to a labor dispute other than a lockout]." Id.

Here, R.C. 4141.29(D)(2)(a) precludes the award of benefits "[f]or the duration of the individual's unemployment if the director finds that . . . [t]he individual quit work without just cause or has been discharged for just cause in connection with the individual's work[.]" Just as Walker had the burden to prove he was entitled to unemployment compensation benefits, Far More had the burden to prove that he was *not* entitled to unemployment benefits. In other words, Far More had the burden to show that it was reasonable in finding fault with Walker (i.e., it had just cause – that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act – to terminate Walker's employment).

In this regard, the hearing officer's conclusion that "[t]he employer failed to establish that the claimant's action was a willful disregard of the employer's policy and were so severe to warrant immediate discharge" necessarily means that Far More, which had the burden to establish that Walker was discharged *with* just cause, failed to produce "evidence sufficient to make out a case" on that issue. *Robinson*, 47 Ohio St.2d at 106. Walker did not have the burden to prove that he was *not* discharged with cause. *Silkert*, 184 Ohio App.3d 78 at ¶36.

Placing the "burden of proof" on Far More to demonstrate that it had just cause to discharge Walker comports with and, therefore, does not contravene Ohio law. Far More's Assignment of Error No. 2 lacks merit and is overruled.

Disposition

The Review Commission's decision is affirmed. Final.

SO ORDERED:

Judge Robert C. McClelland

Date: 6/29/11

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GERALD E. FUERST, CLERK

BY _____ DEP.