

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ayan A. Sharif,	:	
Appellant-Appellant,	:	
v.	:	No. 10AP-796 (C.P.C. No. 10CVF-03-4158)
Children's Hunger Alliance, Inc. et al.,	:	(REGULAR CALENDAR)
Appellees-Appellees.	:	

D E C I S I O N

Rendered on April 28, 2011

Thompson, Meier & Dersom, and Adam H. Leonatti, for appellant.

Michael DeWine, Attorney General, and *Patria V. Hoskins*, for appellee Director, Ohio Department of Job and Family Services.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Appellant, Ayan A. Sharif ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas affirming the decision of the Unemployment Compensation Review Commission ("the Commission"), which reversed the allowance of appellant's claim for unemployment compensation benefits.

{¶2} Appellee Children's Hunger Alliance, Inc. ("employer"), employed appellant as a Nutrition Specialist from January 22, 2007 through April 17, 2009. Appellant's responsibilities included working with a group of home-based childcare providers to

ensure that the providers were certified. Certified providers were eligible for reimbursement for the costs of meals for the children. The certification process included an annual health inspection and fire inspection. Once the health inspector and fire inspector performed these inspections, they provided the inspection reports to appellant. Appellant would then submit the inspection reports to her supervisor, Stella Marshall ("Marshall").

{¶3} One of appellant's providers, Foos Warsame ("Warsame"), was due to have health and fire inspections in February 2009. Warsame's health inspection was conducted on February 26, 2009, and her fire inspection was conducted on March 2, 2009. On March 26, 2009, appellant placed Warsame's inspection reports in Marshall's mail bin. When Marshall retrieved the reports, she discovered that the date on the fire inspection report had been changed from March 2, 2009, to February 2, 2009. The date on the health inspection report had also been changed from March 26, 2009, to February 26, 2009. After investigating when the inspections had been conducted, Marshall determined that the change to the health inspection report reflected the correct date of the actual inspection. However, the change to the fire inspection report reflected an inaccurate inspection date and would have permitted the provider to participate in the reimbursement program for the month of February, when the provider otherwise would have been ineligible to participate based on the lapsed inspection. Marshall confirmed with the health inspector and the fire inspector that they had not altered the dates on the inspection reports. Marshall confronted appellant about the alterations to the inspection reports and appellant denied altering the reports. On April 17, 2009, the employer terminated appellant from employment for altering or falsifying the fire inspection report.

{¶4} Following the termination, appellant filed a claim for unemployment benefits, which was initially allowed. The employer appealed the award, and a hearing officer from the Commission conducted a telephone hearing regarding the appeal on November 12, 2009. Appellant did not attend this telephone hearing. Following the hearing, the Commission denied appellant's claim for unemployment benefits. Appellant appealed the decision, and a second telephone hearing was conducted on February 22, 2010. Appellant participated in this second hearing and offered testimony and evidence on her own behalf. The Commission again denied appellant's claim for unemployment benefits, finding that appellant was not entitled to unemployment benefits because she was terminated for just cause. Appellant appealed the Commission's decision to the Franklin County Court of Common Pleas. On July 27, 2010, the common pleas court rendered a judgment affirming the Commission's decision. Appellant then filed the present appeal.

{¶5} Appellant presents one assignment of error for this court's review:

The Trial Court erred in failing to find that the March 10, 2010 decision of the Unemployment Compensation Review Commission was unlawful, unreasonable, and against the manifest weight of the evidence.

{¶6} "[A] reviewing court may reverse the [Commission's] determination only if it is unlawful, unreasonable, or against the manifest weight of the evidence." *Tzangas, Plakas & Mannos v. Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 697, 1995-Ohio-206. In conducting its review, the court of appeals "must focus on the decision of the commission rather than the decision of the common pleas court." *Brooks v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 08AP-414, 2009-Ohio-817, ¶10. The reviewing court is not

permitted to make factual findings or determine witness credibility. *Irvine v. Unemployment Comp. Bd. of Review* (1985), 19 Ohio St.3d 15, 18. "If some competent, credible evidence supports the commission's decision, the reviewing court, whether a common pleas court or a court of appeals, must affirm." *Brooks* at ¶15. "On close cases, where the commission might reasonably decide either way, reviewing courts must leave undisturbed the commission's decision." *Id.*, citing *Irvine* at 18.

{¶7} "A claimant must carry the burden of proving his entitlement to unemployment benefits." *Houser v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 10AP-116, 2011-Ohio-1593, ¶8, citing *Irvine* at 17. Under the law, a claimant is ineligible for such benefits if he is discharged for " 'just cause in connection with the individual's work.' " *Houser* at ¶8, quoting R.C. 4141.29(D)(2)(a).

{¶8} "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. The employer had a policy prohibiting fraudulent or dishonest conduct, including an express prohibition on forgery or alteration of documents. The employer terminated appellant for violating this policy, and the Commission found that appellant was terminated for cause because she altered the inspection report. We review the Commission's decision to determine whether there is competent, credible evidence supporting the conclusion that appellant was discharged for just cause because she altered the fire inspection report.

{¶9} Marshall testified that, after completing a fire inspection of a provider's facility, the fire inspector would give an original copy of the inspection report to appellant. Marshall saw appellant place the fire and health inspection reports for Warsame in

Marshall's mail bin at the end of the day on March 26, 2009. Marshall retrieved the inspection reports from her mail bin the following morning and discovered that the date of both inspection reports had been altered. Marshall contacted the fire inspector, showed him the fire inspection report, and confirmed that he did not alter the date on the report. Appellant testified that she did not alter the fire inspection report, but offered no further explanation to explain how the report came to be altered. Appellant also submitted to the Commission unaltered copies of the inspection reports, which she had in her possession, and argued that these documents proved she did not alter the reports.

{¶10} The testimony and evidence offered at the Commission hearings constitutes circumstantial evidence that appellant altered the date on the fire inspection report. " 'Circumstantial evidence' is the proof of certain facts and circumstances in a given case, from which the [fact finder] may infer other connected facts which usually and reasonably follow according to the common experience of mankind." *State v. Brown*, 10th Dist. No. 07AP-244, 2007-Ohio-6542, ¶19, quoting *State v. Golden*, 8th Dist. No. 88651, 2007-Ohio-3536, ¶16 (internal citations omitted). " 'Circumstantial evidence is not less probative than direct evidence, and, in some instances, is even more reliable.' " *State v. Nicely* (1988), 39 Ohio St.3d 147, 151, quoting *United States v. Andrino* (C.A.9, 1974), 501 F.2d 1373, 1378.

{¶11} In this case, the evidence demonstrated that appellant received the original copy of the fire inspection report from the fire inspector. At that point, the fire inspection report was unaltered and listed the actual inspection date, as reflected on the copy of the report that appellant kept and offered as evidence. The evidence also establishes that appellant submitted the fire inspection report by placing it in Marshall's mail bin and that,

when Marshall retrieved the report, it contained an altered, incorrect inspection date. This evidence supports an inference that appellant altered the fire inspection report. The fire inspector could not have made the alteration because he no longer had possession of the original report. Marshall also testified that she showed the fire inspector the altered inspection report, and he verified that he had not made the alteration. There is no direct or circumstantial evidence to support any other explanation for the alteration—e.g., that another employee took the fire inspection report from the mail bin and altered the inspection date or that Marshall altered the date on the fire inspection report. Thus, there is competent, credible evidence supporting the Commission's ruling that appellant was terminated for just cause because she altered the fire inspection report.

{¶12} Appellant places a great deal of emphasis on the lack of evidence that she had a motive to alter the fire inspection report. At the first hearing, Marshall testified that altering the date on the fire inspection report would permit Warsame to participate in the reimbursement program for February 2009 and that this would benefit appellant by increasing her caseload. At the second hearing, appellant sought to refute the latter argument, testifying that she exceeded her caseload in February and had no need for additional qualifying providers. When asked at the second hearing whether appellant would have been penalized if Warsame had not qualified in February, Marshall testified that she did not know. Based on this response, appellant argues that the employer failed to prove that appellant had a motive to alter the inspection report and, therefore, failed to establish that the termination was for just cause.

{¶13} We note, however, that the Commission's decision did not rely on appellant's motive for altering the fire inspection report. Although the Commission noted

in its findings of fact that appellant's compensation was partly based on her ability to maintain her caseload and that altering the fire inspection report placed Warsame in compliance for February 2009, the reasoning for the decision did not incorporate any purported motive on appellant's part. The employer's inability to conclusively prove a motive does not negate the other competent, credible evidence supporting the Commission's decision.

{¶14} As appellees suggest, this case is somewhat analogous to the Sixth District Court of Appeals' decision in *In re Claim of Edwards* (Mar. 20, 1992), 6th Dist. No. 91-WD-066. We find the *Edwards* court's reasoning to be persuasive in considering the instant case. The claimant in that case, Edwards, had been a satisfactory worker for a period of time but then began arriving late to work, taking extended breaks and unexcused absences, and leaving work to respond to pages on a beeper. Around this same time, money and property began to disappear from the employer's plant. Shortly before the disappearance of a particular piece of equipment, Edwards asked a coworker about how that piece of equipment was calibrated. The employer suspected that Edwards was stealing equipment and terminated him. After the termination, a police search of Edwards' home resulted in the discovery of some of the missing equipment. Edwards filed for unemployment compensation benefits, which were granted. On appeal, the Commission affirmed the award of benefits, finding that Edwards had been terminated based on mere suspicion of wrongdoing, which did not constitute just cause termination. The common pleas court affirmed, due to its limited scope of review. However, the court of appeals reversed the Commission's decision. While conceding that factual determinations are within the Commission's scope of authority, the court held that an

employer "need not have absolute proof of an employee's dishonesty at the time of an employee's discharge for that discharge to be for just cause." *Id.* "It is sufficient that the employer form a reasonable belief of the employee's dishonesty." *Id.*

{¶15} Likewise, in this case, the employer does not have direct evidence that appellant altered the fire inspection report. Despite this, the available evidence supports a reasonable inference that appellant made the alteration. Thus, even absent absolute proof of appellant's violation of company policy, the employer has demonstrated the basis for a reasonable belief that the violation occurred and that termination was warranted. The evidence leading to this conclusion constitutes competent, credible evidence in support of the Commission's decision.

{¶16} Appellant argues that there was no relevant, probative evidence to support the conclusion that she altered the fire inspection report and to justify her termination. However, the cases appellant cites are distinguishable. In *Corbin v. Ohio Bur. of Emp. Servs.* (1991), 77 Ohio App.3d 626, this court considered the appeal of a maintenance employee who was terminated for allegedly turning off the gas to a building's boiler and then turning it back on, thereby creating a dangerous situation. *Id.* at 628. Upon review of the record, this court found that the employee had never been trained to operate the boiler system, making it unlikely that he located the correct valve or managed to turn the gas off. Moreover, there was no evidence that the employee turned the gas back on. Given this "utter lack of evidence" that the employee had committed the alleged act, this court found that he was terminated without just cause. *Id.* at 631. By contrast, here there is evidence from which the employer could infer that appellant altered the inspection report. Appellant had the original copy of the fire inspection report in her possession, she

was seen placing it in her supervisor's mail bin, and, when the supervisor retrieved the report, it had been altered. Although this is not direct evidence that appellant altered the inspection report, it is competent, credible circumstantial evidence supporting the Commission's decision.

{¶17} Similarly, in *Silkert v. Ohio Dept. of Job & Family Servs.*, 184 Ohio App.3d 78, 2009-Ohio-4399, the Second District Court of Appeals considered the appeal of an employee who was terminated for failing a drug test. The employee challenged the accuracy of the drug test, and the employer offered no evidence to establish the accuracy or reliability of the test. *Id.* at ¶37. The court of appeals reversed the Commission's denial of unemployment benefits and remanded for further proceedings, holding that because the existence of just cause for the termination depended solely on the positive drug test and the employee had put the reliability of the test at issue, the employer had the burden of coming forward with some evidence to prove that the test was reliable. *Id.* at ¶2. Here, appellant has disputed a possible motive for altering the fire inspection report; however, her termination did not depend on the motive but on the act of altering the report. Altering the fire inspection report was a violation of the employer's policy and, therefore, constituted just cause for termination. Therefore, this case is different from the scenario faced by the Second District Court of Appeals in *Silkert*, and we are not persuaded that the logic of that decision applies here.

{¶18} In reviewing the testimony and evidence presented to the Commission, we find that there was competent, credible evidence to support a conclusion that appellant violated the employer's policies by altering the date on the fire inspection report. This

violation of an existing policy constituted just cause for termination. Accordingly, appellant is not entitled to unemployment compensation benefits.

{¶19} For the foregoing reasons, we overrule appellant's assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and SADLER, JJ., concur.
