

[Cite as *Washington v. Cleveland Civ. Serv. Comm.*, 2010-Ohio-5608.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94596

TONY WASHINGTON

PLAINTIFF-APPELLANT

vs.

**CITY OF CLEVELAND
CIVIL SERVICE COMMISSION**

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-698984

BEFORE: Gallagher, A.J., Blackmon, J., and Stewart, J.

RELEASED AND JOURNALIZED: November 18, 2010

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SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant, Tony Washington, brings this administrative appeal challenging the judgment of the Cuyahoga County Court of Common Pleas that upheld the decision of the City of Cleveland Civil Service Commission

("the Commission") regarding his employment termination. For the reasons stated herein, we affirm the decision of the trial court.

{¶ 2} This administrative appeal arises from Washington's discharge from his position as the labor relations manager in the City of Cleveland's Department of Personnel and Human Resources ("the City"). Washington was employed in that position since 2001. The events giving rise to his termination began in July 2008.

{¶ 3} On July 14 and 15, 2008, Washington reported off work because of illness. On July 16, he left a telephone message that he was seeking bereavement leave for the death of his brother-in-law. Washington did not report to work July 16 through 18. Trudy Hutchinson, the director of personnel, sent Washington a letter informing him that he could not take a bereavement leave for a brother-in-law. Thereafter, Washington left a message that he was correcting his earlier request to a bereavement leave for a brother.

{¶ 4} Washington again reported off work from July 21 to 23, stating he was ill. In a letter dated July 23, 2008, the City requested that he provide a doctor's statement for his extended absence.

{¶ 5} Washington continued to call in sick each day by leaving voicemail messages. On July 28, 2008, correspondence was sent to Washington indicating that his continued unapproved absence may result in

his being deemed resigned pursuant the City's absence-without-leave ("AWOL") policy under Civil Service Rule 8.45. Washington was given two weeks to provide a satisfactory explanation for his absence.

{¶ 6} On or about August 11, 2008, Washington submitted a request for leave under the Family and Medical Leave Act ("FMLA"), and included a doctor's statement indicating Washington required multiple medical treatments but stating questions concerning the performance of the employee's job were inapplicable. On August 14, 2008, the City sent Washington a letter informing him that the information was insufficient to conclude that he had a serious medical condition and that his FMLA request was denied. The letter further indicated that Washington's failure to report to work would be deemed AWOL.

{¶ 7} Washington had also filed a workers' compensation claim that was disallowed. He claimed he suffered a back injury while at work on July 2, 2008. However, he did not advise his supervisor that day. He later failed to appear at a medical examination for this claim.

{¶ 8} On August 18, 2008, Washington provided the City with additional medical documentation from treating chiropractors. These reports, issued in August, indicated that Washington had a "lumbar sprain/strain." There were inconsistencies in these reports, and the dates of

disability were different. One of the reports indicated a weight restriction of ten pounds, which was not a factor relative to Washington's job.

{¶ 9} On September 2, 2008, Director Hutchinson sent Washington a letter informing him that the medical documentation he provided did not establish that he was totally disabled to perform the duties of his position and that the supplemental documentation failed to support the legitimacy of his continued absence. The City informed Washington that his employment was terminated effective August 11, 2008, pursuant to Civil Service Rule 8.45.

{¶ 10} Washington appealed his termination to the Commission. A full evidentiary hearing was conducted on March 4, 2009. Washington maintained that he had suffered a back injury at work, causing him significant pain, and that he had over 50 days of accumulated sick leave to use for illness. He claimed that he called in sick each day and that he provided medical documentation excusing him from work beginning July 2, 2008, through October 20, 2008.

{¶ 11} The referee's report and recommendation recognized that although Washington reported in sick, once his absence became extended and supporting documentation was required, he was not deemed eligible for any leave and his status became AWOL. The referee found that "[i]t is the appointing authority's responsibility to ascertain if the explanation for absence from work is satisfactory" and that the documentation submitted by

Washington was “not sufficient to support the disability he claimed.” The referee considered the correspondence between the parties, the documentation submitted, and the testimony provided.

{¶ 12} The referee found “serious credibility issues” with Washington’s actions and determined that “the chiropractor reports are not convincing that their patient was so disabled that he could not conduct an office job.” The referee concluded that “[t]he inconsistency in [Washington’s] testimony, as well as the failure to submit a clear and concise medical opinion verifying the serious back disability that would not allow him to conduct an office job, leads to the recommendation that he was properly terminated due [to] an AWOL resignation.” Following a hearing before the Commission on June 26, 2009, the Commission voted to accept the report of the referee.

{¶ 13} Washington filed an appeal from the Commission’s decision in the common pleas court. The trial court affirmed the Commission’s decision, finding that the “decision is not unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by a preponderance of substantial, reliable, and probative evidence.” Washington then filed the instant appeal, raising three assignments of error for our review.

{¶ 14} The scope of our review in an R.C. 2506.04 administrative appeal from a common pleas court decision is extremely limited. We review the common pleas court’s decision “only on ‘questions of law,’ which does not

include the same extensive power to weigh ‘the preponderance of substantial, reliable and probative evidence,’ as is granted to the common pleas court.” *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34 fn. 4, 465 N.E.2d 848. “Within the ambit of ‘questions of law’ for appellate court review would be abuse of discretion by the common pleas court.” *Id.*

{¶ 15} Washington’s first assignment of error provides as follows: “The trial court erred as a matter of law in upholding the discharge of appellant since the discharge was accomplished in violation of written city policies that constitute legally binding work rules between the City and its employees.”

{¶ 16} Washington argues that his termination was contrary to law because it was in violation of the rule the City relied upon for his termination.

Civil Service Rule 8.45 encompasses the City’s policy for when an absence without leave may be construed as a resignation. The rule provides in pertinent part as follows:

{¶ 17} “Absence from duty without leave for ten (10) or more consecutive scheduled work days shall be deemed a resignation from the service of the City by the absent employee, however, * * * [p]rior to deeming an employee [AWOL] resigned * * *, the appointing authority shall notify the employee * * * that his/her *unexcused failure to appear for duty as scheduled* will be construed as a resignation, unless the employee advises the appointing

authority within two (2) weeks of the date of transmittal of the notice of a satisfactory explanation for his/her absence. * * *.” (Emphasis added.)

{¶ 18} Washington argues that the definition of “absent without leave” in the City’s attendance policy requires a situation where an employee does not report for work and does not call in to report his or her absence in accordance with the City’s call-in procedure. Therefore, he argues that the AWOL resignation can only be applied to a “no call/no show” situation. We find no merit to this argument.

{¶ 19} Director Hutchinson testified that the attendance policy does not contain the exclusive definition of AWOL and that this policy must be read in conjunction with Civil Service Rule 8.45. She further explained that initial reports of illness are taken at face value and the employee is extended sick leave, but as the absence becomes extended, the City requires increasing levels of documentation to establish the legitimacy of the absence.

{¶ 20} Our review reflects that the clear language of the AWOL policy under Civil Service Rule 8.45 encompasses an “unexcused failure to appear for duty as scheduled.” Thus, as a matter of law, the City could terminate Washington under Civil Service Rule 8.45 upon his failure to submit a “satisfactory explanation” for his absence in accordance with the rule.

{¶ 21} Next, Washington argues that the City could have petitioned for a fitness-for-duty examination as allowed for under Civil Service Rule 9.10(14).

However, this provision was not the basis for Washington's termination by the City, and it was Washington's responsibility to provide a satisfactory explanation for his absence to avoid an AWOL resignation.

{¶ 22} Washington also claims that his termination was in violation of Cleveland Codified Ordinances Section 171.31, which he states entitled him to sick leave with pay. He further states that he provided unrefuted medical documentation for his absence. He argues that he should be deemed to have offered a satisfactory explanation for his absence as a matter of law. We are unpersuaded by his argument. Questions of credibility and the weight to be given evidence were clearly within the discretion of the Commission as fact finder. The referee found serious credibility issues with Washington's actions and found the documentation submitted by Washington was insufficient to support his absence. Upon our review of the record before us, we cannot find the trial court abused its discretion in affirming the administrative decision.

{¶ 23} Washington's first assignment of error is overruled.

{¶ 24} Washington's second assignment of error provides as follows: "Appellant's termination of employment was in violation of his rights to procedural due process as guaranteed classified civil service employees of the City of Cleveland."

{¶ 25} Washington argues the City violated the requirements of procedural due process, the Cleveland City Charter, and applicable regulations by failing to provide him with required pre-deprivation procedures. He argues he was not provided with adequate notice and was never afforded a pre-deprivation hearing.

{¶ 26} As a classified civil service employee, Washington had a constitutionally protected property interest in his continued employment. Due process requires that prior to termination of such an employee, he must be afforded notice and some sort of “pretermination opportunity to respond.” *Cleveland Bd. of Edn. v. Loudermill* (1984), 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494.

{¶ 27} In *Loudermill*, the Court held generally that “the pretermination ‘hearing,’ though necessary, need not be elaborate” and that “something less’ than a full evidentiary hearing is sufficient prior to adverse administrative action.” *Id.* at 545. More specifically, the Court set forth the basic requirements as follows: “The essential requirements of due process * * * are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. * * * The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story. *

* * To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." Id. at 546.

{¶ 28} The *Loudermill* court further recognized that "the existence of post-termination procedures is relevant to the necessary scope of pretermination procedures." Id. at 547, fn. 12. The Court indicated that "the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions — essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." Id. at 545-546.

{¶ 29} Upon remand of the matter in *Loudermill*, the Sixth Circuit Court of Appeals recognized that "courts construing the Supreme Court's language in *Loudermill* have required only the barest of a pretermination procedure, especially when an elaborate post-termination procedure is in place." *Loudermill v. Cleveland Bd. of Edn.* (C.A. 6, 1988), 844 F.2d 304, 310-312; see, also, *Macon v. Ohio Dept. of Job & Family Servs.*, Franklin App. No. 08AP-1036, 2009-Ohio-3229, ¶ 35; *Swigart v. Kent State Univ.*, Portage App. No. 2004-P-0037, 2005-Ohio-2258. The Ohio Supreme Court has followed *Loudermill* in determining the process due an Ohio employee in a pretermination hearing. *Kennedy v. Marion Correctional Inst.*, 69 Ohio St.3d

20, 1994-Ohio-83, 630 N.E.2d 324; *Local 4501, Communications Workers of Am. v. Ohio State Univ.* (1990), 49 Ohio St.3d 1, 3, 550 N.E.2d 164, cert. denied, 497 U.S. 1025, 110 S.Ct. 3274, 111 L.Ed.2d 783.

{¶ 30} In this case, after already requesting Washington provide medical documentation to support his extended absence, the City sent Washington written notice on July 28, 2008, indicating that Washington's continued unapproved absence may result in his being deemed "AWOL resigned" under Civil Service Rule 8.45. Washington was given two weeks to respond with a satisfactory explanation for his absence. The City issued another letter on August 14, 2008, informing Washington that he provided insufficient information to support his leave request and instructing him to return to work or he would be deemed AWOL. After continuing to call off work and submitting further insufficient medical documentation, Washington received a letter from the City on September 2, 2008, informing him that he was terminated effective August 11, 2008, pursuant to Civil Service Rule 8.45.

{¶ 31} The letters sent to Washington were sufficient to inform him of the charges against him and to explain the evidence. He also was afforded an opportunity to respond. In addition, Washington had a full post-termination hearing with the Commission. Relying on the above authority, we are unable to find Washington was not afforded the requisite

due process prior to his termination, and we overrule his second assignment of error.¹

{¶ 32} Washington's third assignment of error provides as follows: "Appellant's termination is illegal since the termination violates the Ohio Workers' Compensation Act and the Family and Medical Leave Act."

{¶ 33} The record in this case reflects that the City had sufficient evidence to support Washington's termination pursuant to Civil Service Rule 8.45. The Commission determined that Washington provided insufficient medical documentation to justify his extended absence, and that the evidence supported Washington's termination by the City. The Commission could reasonably conclude that he failed to prove his termination violated the FMLA or the Ohio Workers' Compensation Act. We find that the trial court's decision to uphold Washington's termination was supported by substantial, reliable, and probative evidence, and we overrule Washington's third assignment of error.

Judgment affirmed.

¹ This case is distinguishable from *Clipps v. Cleveland*, Cuyahoga App. No. 86887, 2006-Ohio-3154, which was relied on at oral argument by appellant. In *Clipps*, the city did not provide notice of all incidents being considered for a potential termination for sexual harassment, such that the employee was not provided a meaningful opportunity to respond prior to being discharged. In this case the due process requirements were met because Washington was informed of the grounds for his termination, the City's letters adequately explained the evidence against him, he was afforded an opportunity to respond, and he was given a full post-termination hearing.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

PATRICIA A. BLACKMON, J., and
MELODY J. STEWART, J., CONCUR