

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

CITY OF ASHTABULA,	:	O P I N I O N
Appellant,	:	
- vs -	:	CASE NO. 2011-A-0020
DAVID RIVAS, et al.,	:	
Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2010 CV 755.

Judgment: Reversed and remanded.

Lori B. Lamer, Assistant Ashtabula City Solicitor, Ashtabula Municipal Court, 110 West 44th Street, Ashtabula, OH 44004 (For Appellant).

David Rivas, pro se, 5334 Stark Avenue, Ashtabula, OH 44004 (Appellee).

Mike DeWine, Ohio Attorney General, and *Susan M. Sheffield*, Assistant Attorney General, 20 West Federal Street, Third Floor, Youngstown, OH 44503 (For Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, the city of Ashtabula (“Ashtabula”), appeals from the judgment of the Ashtabula County Court of Common Pleas affirming the Unemployment Compensation Review Commission’s (“Commission”) decision granting Appellee-David Rivas unemployment compensation as a result of its finding that Mr. Rivas was not terminated for just cause. For the reasons discussed below, the trial court’s judgment is reversed and remanded.

{¶2} In April of 2001, Mr. Rivas applied for employment with the city of Ashtabula as a maintenance worker. A question on the application queried whether Mr. Rivas had ever been convicted of a crime (excluding misdemeanors and summary offenses). Mr. Rivas responded “no” to the question. The application contained the following caveat: “The facts set forth in my application for employment are true and complete. I understand that if employed, false statements on this application shall be considered sufficient cause for dismissal. You are hereby authorized to make any investigation of my employment history.” Mr. Rivas signed the application and was hired by Ashtabula.

{¶3} In August of 2006, Mr. Rivas entered pleas of guilty to misdemeanor charges of telephone harassment and fleeing and eluding in the Ashtabula Municipal Court. The trial court ordered a presentence investigation report prior to imposing sentence. While conducting a criminal background check, probation officer Frederick Rounds discovered Mr. Rivas had been previously convicted of two felonies in the state of New Jersey; to wit: felony burglary in 1987 and felony cocaine possession in 1991. Probation Officer Rounds subsequently sent a letter to the city solicitor, Thomas J. Simon, advising him of his findings.

{¶4} In late April 2009, Mr. Rivas applied for and was awarded a job denoted as “Building Maintenance Person II.” Because the job required Mr. Rivas to have access to potentially sensitive and confidential areas where police worked, the Ashtabula Police Department conducted a criminal background check. The police learned of the prior felony convictions and, as a result, in June of 2009, the chief of police advised the city manager that he could not recommend that Mr. Rivas have

access to the secure areas. Mr. Rivas was subsequently placed on administrative leave pending a pre-disciplinary hearing. On July 29, 2009, after the hearing, Mr. Rivas was terminated from his employment with Ashtabula for falsifying information on his initial job application. In support, Mr. Cantagallo concluded Mr. Rivas' action constituted a Class I, subsection (f) violation of Ashtabula's Rules and Disciplinary Procedures, which triggered "immediate discharge."

{¶5} Mr. Rivas applied for unemployment compensation, which was denied. The ruling was appealed to the Commission and a telephonic hearing was held before a hearing officer. At the hearing, Mr. Rounds testified, after discovering the felony convictions, he advised Mr. Simon, the city solicitor, by writing "to see if any further action is needed by [the solicitor's] office." Mr. Rounds also recalled speaking with Ashtabula City Manager, Anthony Cantagallo, regarding the implications a sentencing recommendation would have on Mr. Rivas' employment. It was unclear whether the issue of the felony conviction arose during the Rounds-Cantagallo conversation. Regardless, no termination proceedings were initiated at that time.

{¶6} Mr. Simon testified he recalled receiving Mr. Rounds' 2006 letter regarding Mr. Rivas' felony history. After receipt of the letter, Mr. Simon testified he remembered transmitting the information to Mr. Cantagallo. Mr. Cantagallo, however, denied receiving the information regarding Mr. Rivas' felonies in 2006. Rather, he testified he did not learn of Mr. Rivas' criminal history until the spring of 2009, when the police chief conducted his background check.

{¶7} Mr. Rivas initially testified he did not recall answering “no” to the question regarding his past criminal history. He stated that he had applied for positions with Ashtabula on three other occasions and, although he was never hired, he had always answered “yes” to the question. Ultimately, Mr. Rivas conceded he responded “no” to the felony question, and further testified he knew he was providing false information when he answered. Mr. Rivas testified he presumed Ashtabula did a background check and simply ignored his criminal history. Given this presumption, Mr. Rivas testified he expected a reprimand for falsely certifying his criminal history, but not termination. In his own words, Mr. Rivas explained:

{¶8} Well I figured they would probably find out it was a small fib and they, you know, again, I didn't see it, I mean, now that this happened, I mean there have been more severe instances in the city that's on record, been through the newspaper, people sexting their genitals over the phone and looking at pornographic stuff on city computers and whatnot and stealing on the job that this is absolute petty nonsense.

{¶9} After the hearing, the hearing officer issued a decision concluding Mr. Rivas was terminated without just cause. In support of her position, the hearing officer found:

{¶10} The entirety of Mr. Cantagallo's testimony was not credible. His testimony was evasive, inconsistent, and demonstrated an intent to mislead the hearing officer. Mr. Cantagallo's testimony that he never had any contact with Mr. Simon regarding claimant's

employment after the discovery of claimant's convictions in 2006 was not credible and [was] contradicted by all other evidence and testimony presented. * * *.

{¶11} The employer was aware of claimant's criminal history on September 11, 2006, when Mr. Rounds forwarded the information about claimant's convictions to Mr. Simon, and Mr. Simon then notified Mr. Cantagallo. The testimony of Mr. Rounds, Mr. Simon, and claimant demonstrates that Mr. Cantagallo was aware of claimant's criminal convictions in September of 2006.

{¶12} While it may have been reasonable for the employer to discharge claimant for falsifying his employment application at some point in time – such is within a reasonable time after he was initially hired or within a reasonable time after discovery of his convictions – it was wholly unreasonable for the employer to wait 2 ½ years after discovering the convictions to discharge claimant. This is particularly true since the letter from Mr. Rounds that explicitly notified the employer that claimant 'listed no convictions' on his employment application. The employer was specifically and explicitly aware on September 11, 2006 that claimant had falsified his employment application and opted not to act. The employer cannot reasonably, 2 ½ years later discharge claimant for this action.

{¶13} Based upon the foregoing, the decision of the Director was reversed and Mr. Rivas' application for benefit rights was "no longer disallowed."

{¶14} Ashtabula appealed the hearing officer's decision to the Unemployment Review Commission, but the commission denied the request for review. This denial was appealed to the Ashtabula County Court of Common Pleas. After consideration, the court of common pleas affirmed the decision of the commission. This appeal now follows. Ashtabula assigns the following error for our review:

{¶15} "The court below erred in affirming the decision of the unemployment compensation review commission."

{¶16} A reviewing court may reverse a "just cause" determination by the Unemployment Compensation Review Commission "only if it is unlawful, unreasonable or against the manifest weight of the evidence." *Tzangas, Plakas & Mannos v. Admr., Ohio Bur. Of Emp. Serv.*, 73 Ohio St.3d 694 (1995), paragraph one of the syllabus. An appellate court's obligation is to consider whether the decision is based upon evidence in the record, without substituting its judgment regarding witness credibility for those of the commission. *Id.* Thus, "the fact that reasonable minds might reach a different conclusion is not a basis for the reversal of the board's decision * * * 'Where the board might reasonably decide either way, the courts have no authority to upset the board's decision.'" *Irvine v. State Unemployment Comp. Bd. of Review*, 19 Ohio St.3d 15, 17 (1985), quoting *Charles Livingston & Sons, Inc. v. Constance*, 115 Ohio App. 437, 438 (7th Dist.1961).

{¶17} In *Irvine, supra*, the Supreme Court discussed the goal of Ohio's Unemployment Compensation Act, as follows:

{¶18} Essentially, the Act's purpose is "to enable unfortunate employees who become and remain *involuntarily* unemployed by adverse business and industrial conditions, to subsist on a reasonably decent level and is in keeping with the humanitarian and enlightened concepts of this modern day." (Emphasis sic.) *Leach v. Republic Steel Corp.* (1964), 176 Ohio St.221, 223. * * * Likewise, "the act was intended to provide financial assistance to an individual who had worked, was able and willing to work, but was temporarily without employment through no fault or agreement of his own." quoting *Salzi v. Gibson Greeting Cards*, 61 Ohio St.2d 35, 39 (1980). *Irvine, supra*.

{¶19} Although the Act must be construed liberally, see R.C. 4141.46, it prohibits the payment of benefits if an employee "has been discharged for just cause in connection with the individual's work." R.C. 4141.29(D)(2)(a). "'Just cause' in the statutory sense is that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act." *Irvine, supra*; see also *Talley v. Coe Mfg. Co.*, 11th Dist. No. 2002-L-015, 2003-Ohio-1395, ¶26. Just cause, in the context of unemployment benefits, is inherently predicated upon employee fault. *Id.* The Supreme Court has observed:

{¶20} 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. Thus, fault is essential to the unique chemistry of a just cause termination. *Tzangas, supra*, at 697-698.

{¶21} Keeping these principles in mind, we consider Ashtabula's assigned error. Ashtabula contends the underlying decision is unreasonable and against the weight of the evidence. Ashtabula argues it was not aware of Mr. Rivas' felony convictions until 2009. And, even accepting the finding that it was aware in 2006, the two and one-half year lag time was not an unreasonable delay because the record demonstrated appellant willingly and voluntarily falsified the application in direct violation of a known city policy.

{¶22} We first note that Ashtabula's argument essentially attacks the hearing officer's findings regarding witness credibility. While Mr. Cantagallo testified he was unaware of the convictions until 2009, both Mr. Rounds and Mr. Simon testified differently. The hearing officer, as the finder of fact, is the sole arbiter of credibility. As the evidence supported her factual finding regarding Mr. Cantagallo's credibility, it will not be disturbed. Nevertheless, the hearing officer's assessment of Mr. Cantagallo's credibility is irrelevant to the just cause determination in this case.

{¶23} The hearing officer in this case determined Mr. Rivas was not terminated for just cause because Ashtabula failed to act within a reasonable time after discovering Mr. Rivas' criminal history. In effect, the hearing officer determined Ashtabula acted in an inequitable fashion when, after obtaining knowledge of Mr. Rivas' felony convictions, it waited over two years to terminate him.

{¶24} Even if Ashtabula waited two years after discovering Mr. Rivas' felony record, he was nevertheless terminated as a result of knowingly falsifying his application

and certifying the information as true. He was not a casualty of a random economic downturn or the victim of a coincidental staffing cut. To the contrary, the record is clear: Mr. Rivas was the engine of his own termination. Because he voluntarily falsified information on his application knowing such an act could result in his discharge, he was at fault for his own circumstances. As the Supreme Court has noted, such culpability separates Mr. Rivas “from the Act’s intent and the Act’s protection.” *Tzangas, supra*.

{¶25} The trial court’s judgment affirming the commission’s decision is therefore inherently unreasonable and must be reversed.

{¶26} Ashtabula’s assignment of error is well-taken.

{¶27} For the reasons discussed above, the judgment of the Ashtabula County Court of Common Pleas is hereby reversed and the matter remanded for further proceedings.

DIANE V. GRENDALL, J.,

THOMAS R. WRIGHT, J.,

concur.