

IN THE COMMON PLEAS COURT OF DARKE COUNTY, OHIO

WEAVER BROTHERS, INC.	:	CASE NO. 12-CV-00155
	:	
Appellant,	:	
	:	
vs.	:	JONATHAN P. HEIN, Judge
	:	
WESLEY D. MERCER, et. al.	:	
	:	
Appellees.	:	DECISION AND ENTRY - Review of Administrative Agency

This matter came before the Court pursuant to the Notice of Appeal of Appellant filed March 16, 2012 and the modified Briefing Schedule filed on June 28, 2012. The issues are ready for adjudication.

Case Facts

Wesley Mercer was employed by Weaver Brothers, Inc. as a house manager for one of Appellant’s many chicken layer buildings.¹ Employed since February, 2008, his job duties at the time of employment separation included ensuring that cleanliness and nutrition were accomplished for the poultry raised in his building.

The termination issue herein involves Mr. Mercer’s propensity to be tardy or absent.

¹Weaver Brothers, Inc. is widely recognized as a major producer of eggs. Its history transcends four generations. The business has received numerous state and federal awards for responsible agri-business practices. Weaver Brothers, Inc. is one reason that Darke and Mercer Counties regularly claim the title of largest egg producing counties in the United States.

The facts indicate that Mr. Mercer received 20 written memoranda regarding tardiness or absenteeism with 14 memoranda having been issued during the 12 months preceding his termination. These memoranda each contained a description of the reason for the memorandum and language which emphasized that continued tardiness would not be tolerated and that employment could be terminated if such problem persisted.

On August 16, 2011, Mr. Mercer had an unexcused absence and on August 17, 2011 he was discharged from employment. Mr. Mercer sought unemployment benefits and the employer objected based on the claim that employee's tardiness and absence was "just cause" for dismissal. Employment benefits were initially granted by the Department; Appellant pursued an appeal which was denied by the Hearing Officer. It is from this administrative action that Appellant brings this appeal.

Legal Analysis

In reviewing the decision of an administrative agency, the Court must determine whether the decision by the agency was based upon a "preponderance of substantial, reliable and probative evidence." See R.C. 2506.04; *Sell v. Adams Twp. Board of Zoning Appeals*, Darke App. No. 1518 (December 22, 2000). Further, based upon the record as submitted, the Court should presume that the agency's decision was reasonable and valid and should give deference to the decision. *Amser Corp. v. Village of Brooklyn Heights*, Cuyahoga App. No. 62140 (May 6, 1993); *In Re: Application of Watkins*, Montgomery App. No. 17723 (February 18, 2000).

The recent Franklin County Court of Appeals decision in *Brooks v. Ohio State Department of Job & Family Services* 2009-Ohio-817 (10th Dist.) is instructive: "The court may reverse, vacate, modify, or remand the decision to the commission only if the court finds that the decision was unlawful, unreasonable, or against the manifest weight of the evidence. Otherwise,

the court must affirm the commission's decision.”

Both the administrative process and the judicial review require a determination of whether the employer terminated employment for “just cause.” There is no statutory definition of “just cause” which, instead, has been defined by the Supreme Court of Ohio as “that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.” *Irvine v. Unemployment Compensation Board of Review*, 19 Ohio St.3d 15, 482 N.E.2d 587 (1985). In the context of the employer terminating employment, just cause has been defined to be “conduct that would lead a person of ordinary intelligence to conclude the surrounding circumstances justified the employee's discharge.” *Carter v. Univ. of Toledo*, 2008-Ohio-1958 (6th Dist.).

When taken together, the above cases require the circumstances of the employment relationship to be considered when deciding the reasonableness or proper justification of the employer when terminating employment.

Decision

In this case, the Appellant’s discipline process as described in its employment handbook provided as follows:

Corrective Action

The Company’s own best interest lies in ensuring fair treatment of all employees and in making certain that corrective action steps are prompt, uniform, and impartial. The purpose of any corrective action is to correct a problem, prevent recurrence, and prepare the employee for satisfactory service in the future. Corrective action is never intended to serve as punishment.

Although employment with the Company is based on mutual consent, and both the employee and the Company have the right to terminate employment “at will”, with or without cause or advance notice, the Company reserves the right to use appropriate correction action at its discretion.

Disciplinary action is generally comprised of, but not limited to, the following steps:

- . Verbal Warning
- . Written Warning

- . Final Warning and/or Suspension
- . Termination of Employment

Generally speaking, an employee may be subject to termination of employment after three (3) separate occurrences of corrective action; however, it is also possible that warnings more than twelve (12) months prior may not be considered in ongoing corrective action.

The Company recognizes there are certain types of behavior that are serious enough to justify either a suspension, or, in extreme cases, termination of employment, without going through the normal corrective action process. The level of discipline is oftentimes dependent upon the severity of the problem and/or the number of occurrences and the Company reserves the right to take whatever steps that are necessary to address the problem.

Further, the handbook expressly addresses the importance of timeliness and the reasons to avoid tardiness:

Attendance / Tardiness

Absenteeism and tardiness place a burden on your coworkers and the Company. To maintain a safe and productive work environment, the Company expects employees to be reliable and punctual in reporting to work. If an employee cannot avoid being late to work or is unable to work as scheduled, they should notify their supervisor at least one (1) hour in advance of work start time.

Employees should keep in mind that poor attendance and/or excessive tardiness are disruptive and can lead to disciplinary action, up to and including termination of employment.

Decisions by the Department relied upon the conclusion that the employer did not follow established disciplinary progressions set forth in the handbook. Further findings included the conclusion that (1) the “memo” handed to the employee following tardy / absence violations was not labeled a “warning,” (2) that the memo was not signed by an individual, and (3) that the memo did not warn the employee that the violation was a final warning.

However, such conclusions are a strained interpretation of the notices and are an incomplete reading of the handbook. Each of the 20 discipline memos provided to hearing officers clearly articulated the reason for the notice (eg. “unexcused absence” or “late for the start of your

shift” and gave the date of the incident. Also, each memo warned that “after three memos, your employment is subject to termination.”

While progressive discipline measures are outlined in the policy handbook, such procedures are not mandatory. Clearly, the final paragraph under the discipline processes demonstrates that the employer reserved the right to terminate employment without following progressive discipline.

In an egg production facility like Weaver Brothers which involves a large number of live poultry, the need for employment urgency is axiomatic – for both the biological viability of the hens and the economic viability of the employer. Such “life or death” circumstances may not be the same as those expected for humans, but are nonetheless critical to the workplace involved herein.

During both the initial review of the unemployment application and during the administrative appeal, the Department disregarded the final sentence of the final paragraph of the policy that “[t]he level of discipline is oftentimes dependent upon the severity of the problem and/or **the number of occurrences** and the Company reserves the right **to take whatever steps that are necessary** to address the problem.” [Emphasis added.]

By failing to apply the handbook in its entirety, the Court finds that Department of Job and Family Services acted in an arbitrary and unreasonable manner that is not supported by the facts as existed in the employment relationship between Weaver Brothers, Inc. and Wesley Mercer.

The apparent picking and choosing of portions of the handbook are a result-oriented process by the Department that does not properly apply all the facts in the record; as such, the conclusion of the Department is unreliable. The Court finds that the circumstances surrounding the termination of

Mr. Mercer's employment would "lead a person of ordinary intelligence to conclude the surrounding circumstances justified the employee's discharge." *Carter, supra*.

IT IS THEREFORE ORDERED AND DECREED that the decision of The Ohio Department of Job and Family Services is reversed. Appellant's appeal is granted. Final Appealable Order. Costs to the Appellant.

Jonathan P. Hein, Judge

cc: John R. Folkerth, Jr., Attorney for Appellant (via fax)
Michelle T. Sutter, Ass't. Attorney General for ODJFS (via fax)
Wesley Mercer, 20374 County Road 245, Mount Victory, OH 43340

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