

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

SUPER LUBE, INC.)	CASE NO.: CV 09 704707
)	
Plaintiff-Appellant,)	JUDGE JOHN P. O'DONNELL
)	
vs.)	
)	
ERIN M. BURNSIDE, et al.)	<u>JOURNAL ENTRY</u>
)	
Defendants-Appellees.)	

John P. O'Donnell, J:

This case is an appeal by the plaintiff, Super Lube, Inc., from the Ohio Unemployment Compensation Review Commission's decision that Erin Burnside quit her job at Super Lube for just cause.

STATEMENT OF FACTS

Erin Burnside was employed by Super Lube as an entry level auto technician from June

employee handbook. The handbook states in pertinent part as follows:

2.2 HARASSMENT POLICY

Super-Lube, Inc./ABS Warehouse, Inc. prohibits and does not tolerate harassment of any employee or applicant or the creation of a hostile or intolerable working environment because of race, color, religion, sex, age, national origin, veteran status, disability, or as a result of filing a complaint against Super-Lube, Inc./ABS Warehouse, Inc. No person, no matter his or her title or position, has the authority, expressed, actual, apparent or implied, to harass any employee or applicant of Super-Lube, Inc./ABS Warehouse, Inc.

Violators of this policy are subject to disciplinary action, up to and including discharge, for any violation reasonably believed to have been committed.

Reporting Procedure

If you are harassed, you must report the act of harassment to your immediate supervisor or the President of Super-Lube, Inc./ABS Warehouse, Inc. immediately. If you feel uncomfortable doing so or if your supervisor is the source of the problem, condones the problem, or ignores the problem, report to the supervisor's supervisor or the President of Super-Lube, Inc./ABS Warehouse, Inc.

If neither of these alternatives is satisfactory to you, then you can direct your questions, problems, complaints, or reports to the President of Super-Lube, Inc./ABS Warehouse, Inc. You are not required to directly confront the person who is the source of your report, question, or complaint before notifying any of those individuals listed. Nevertheless, you are required to make a reasonable effort to make harassment known should it exist.

By signing an Employee Acknowledgment Form on July 17, 2008, Burnside agreed that she:

Read this Employee Handbook and I understand the policies and reporting procedures this Handbook contains.

Read this Employee Handbook, I understand the policies and reporting procedures this Handbook contains, and I discussed the information with my supervisor.

Burnside testified that her co-workers began harassing her about a month after the employment commenced. She was subjected to vulgar jokes, called a whore, asked to view pornography on a company computer, and told about bets placed on her sexual preference. The harassment came mostly from one co-worker, David English. English's comments prompted Burnside's direct supervisor, Peter Diciccio, to tell English to "watch what he was saying because what he was saying was harassment."¹ However, Diciccio also participated in the harassment. He directed racist comments toward Burnside and referred to her as his "prize black girl."²

¹ Tr., p. 6.

² Tr., p. 7.

Burnside approached Diccio sometime in 2008 about the harassment.³ She told him that she found the jokes to be inappropriate. Although he told her that he would speak with English and remedy the situation, the behavior continued. She did not complain again about the harassment until Friday, February 13, 2009, when she once more asked Diccio to curb English. He told Burnside that he would take it up with English the next Monday.

On February 14, 2009, Burnside told Diccio that she was leaving because the response to her complaints was unacceptable. She then called the president and general manager of Super Lube, Fred Tavakoli, to explain what had been happening. Believing Takavoli would do nothing, she quit. She admits that she never gave Tavakoli the opportunity to investigate any of the charges. She also admits that she was ready to quit even before the telephone call.

After quitting, Burnside filed an application for determination of unemployment benefit rights with the Ohio Department of Job and Family Services for a benefit year beginning February 8, 2009. The ODJFS accepted her application but issued a determination denying benefits, finding that she quit her employment without just cause. Burnside appealed that decision and submitted additional facts. On April 10, 2009, the ODJFS affirmed the initial determination.

Burnside then appealed to the Unemployment Compensation Review Commission. The ODJFS transferred jurisdiction to the review commission, and on June 29, 2009, a hearing was held via telephone by a review commission hearing officer. Burnside and Tavakoli each testified. On July 21, 2009, the hearing officer found that Burnside quit with just cause, reversing the ODJFS's conclusion. The hearing officer issued the following opinion:

The evidence shows that the claimant attempted to correct the situation by reporting the harassment to her supervisor, who also harassed her. The situation did not change and the claimant once again reported the ongoing

³ Burnside cannot recall exactly when she first reported the harassment to Diccio.

harassment to her supervisor on a Saturday. The supervisor told her he would talk to the offending employee on Monday. The employer failed to remedy the harassment upon the second time the claimant reported it. The employee quit when no action was taken by the employer to stop the harassment, and in fact participated in the harassment himself.

The hearing officer finds that the claimant quit for just cause in connection with work.

On August 10, 2009, Super Lube requested a review of the hearing officer's decision, which was denied. This appeal followed and is now decided on the appellant's merit brief, the appellees' opposition brief, the appellant's reply brief, and the transcript of proceedings filed by appellees.

STANDARD OF REVIEW

This appeal is brought pursuant to Ohio Revised Code section 4141.282, which provides, in pertinent part:

If the court finds that the decision of the [review] 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.

The hearing officer determines purely factual questions.⁴ As such, a reviewing court is not permitted to make factual findings or determine the credibility of witnesses.⁵ The court's duty is limited to determining "whether the decision of the board is supported by the evidence in the record."⁶ A hearing officer's decision cannot be reversed as being against the manifest weight of the evidence if it is supported by some competent, credible evidence going to each element of the controversy.⁷

⁴ See, e.g., *Irvine v. Unemploy. Comp. Bd. of Review* (1985), 19 Ohio St.3d 15, 17.

⁵ *Hall v. American Brake Shoe Co.* (1968), 13 Ohio St.2d 11, 13.

⁶ *Kilgore v. Bd. of Review* (1965), 2 Ohio App.2d 69, 71.

⁷ See, e.g., *DiGiannantoni v. Wedgewater Animal Hospital, Inc.* (1996), 109 Ohio App.3d 300, 305.

LAW AND ANALYSIS

Super Lube's sole assignment of error is as follows:

I. Defendant/Appellee Unemployment Compensation Review Commission ("the Commission") erred in declining to review the Hearing Officer's determination that the Claimant, Erin Burnside, quit her employment with "just cause" pursuant to O.R.C. § 4141.29(D)(2)(a).

A claimant is not eligible for unemployment benefits if she quit her employment without "just cause."⁸ The Ohio Supreme Court has defined just cause as "that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act."⁹ Because there is "not a slide-rule definition of just cause," whether just cause exists must be determined upon the facts of each case.¹⁰

The Eighth District Court of Appeals has said that when an employer outlines a grievance procedure for its employees to follow concerning harassment in the workplace, the employee ordinarily must make a good faith effort to follow that procedure to ensure that the employer has notice of the problem and is afforded an opportunity to correct the situation.¹¹ Therefore, an employee who quits before providing the employer with a reasonable opportunity to correct the harassment will generally be deemed to have quit without just cause.¹²

Nevertheless, there is no *per se* rule that a failure to follow an employer's harassment reporting procedure will negate the existence of just cause, and there may be situations where an employee is not required to adhere to the employer's grievance procedure in order to resign from the employment with just cause.¹³ The critical issue underlying whether an employee has quit with just cause is not whether the notice was given, but rather whether an ordinarily intelligent

⁸ O.R.C. § 4141.29(D)(2)(a).

⁹ *Irvine* at 17.

¹⁰ *Id.*

¹¹ *Krawczynszyn v. Ohio Bureau of Employment Services* (1989), 54 Ohio App.3d 35, 37; see also, *DiGiannantoni v. Wedgewater Animal Hospital, Inc.* (1996), 109 Ohio App.3d 300, 307.

¹² *Id.*

¹³ *DiGiannantoni* at 307.

person would have quit without giving notice under the circumstances of the case.¹⁴ Whether an employee followed a known grievance procedure is just another piece of evidence to consider when deciding the existence of just cause.

In this case, Super Lube argues that Burnside could not have quit with just cause because she did not adhere to Super Lube's internal grievance procedure. But she is not required to follow the handbook's procedure to the letter. Instead, she is only required to make a reasonable effort to attempt to solve the problem before solving it herself by quitting.¹⁵ The evidence showed that although Burnside's supervisor, Diccio, participated in the harassment, English was the principal offender. When Burnside first approached Diccio, it was to request that all inappropriate jokes cease. It appears from the testimony that the behavior that prompted Burnside to again report to Diccio was solely English's. So while Diccio did participate in the harassment, he was not the main source of the problem. Diccio then told English to "watch what he was saying because what he was saying was harassment." So Diccio did not completely ignore Burnside's complaints, and the hearing officer could find that Burnside made a reasonable effort to get her employer to solve the problem, and that the failure to stop the harassment provided just cause to quit.

Super Lube's assertion that "[t]he present case is on all fours with *Krawczynyn*"¹⁶ is not correct in one important respect: in *Krawczynyn* it was the claimant who appealed a review commission's finding that she quit without just cause. By declining to reverse that decision, the court of appeals simply found that *Krawczynyn* did not meet her burden of proof to show that the hearing officer's determination was unlawful, unreasonable, or against the manifest weight of the evidence. By contrast, the hearing officer in this case did find, under similar circumstances,

¹⁴ *DiGiannantoni* at 308.

¹⁵ *Id.*, at 307.

¹⁶

that Burnside quit with just cause – *i.e.*, that the circumstances of her employment justified an ordinarily intelligent person to resign – and Super Lube, the reasoning in *Krawczynsyn* notwithstanding, is unable to show that the decision was unlawful, unreasonable, or against the manifest weight of the evidence. In short, the hearing officer did not abuse his discretion so the court, despite being unimpressed with the gravity of Burnside’s situation, given the fact that she had angled for a promotion soon before quitting, is powerless to disturb the hearing officer’s finding on the evidence.

Because there is competent evidence that the hearing officer considered credible and that supports a conclusion that Burnside quit with just cause, the hearing officer’s decision is affirmed and Super Lube’s appeal is denied.

IT IS SO ORDERED:

Date: _____

SERVICE

A copy of this Journal Entry was sent by regular U.S. mail, this 16th day of November, 2011, to the following:

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