[Cite as *State ex rel. Haywood v. Indus. Comm.*, 2013-Ohio-2658.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Jewel Haywood,	:	
Relator,	:	
v.	:	No. 11AP-1154
Industrial Commission of Ohio and ABM Janitorial Midwest, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on June 25, 2013

Philip J. Fulton Law Office, and *Chelsea J. Fulton*; *Law Offices of William M. Wohl*, and *Judith R. Swirsky*, for relator.

Michael DeWine, Attorney General, and *LaTawnda N. Moore*, for respondent Industrial Commission of Ohio.

Willacy, Lopresti & Marcovy, and *Thomas P. Marotta*, for respondent ABM Janitorial Midwest, Inc.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

McCORMAC, J.

{¶ 1} Relator, Jewel Haywood, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its June 7, 2011 order denying her temporary total disability compensation beginning October 27, 2010 on eligibility grounds, and to enter an order granting the compensation.

I. History

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth Appellate District Court of Appeals, this matter was referred to a magistrate who issued the appended decision, including findings of fact and conclusions of law. In his decision, the magistrate determined this court should deny relator's request for a writ of mandamus on the basis that she voluntarily departed from her employment, precluding her receipt of temporary total disability compensation.

{¶ 3} As the magistrate explained, here the issue was whether relator actually violated a company rule that prohibits an employee from using a cell phone while on duty or from taking a cell phone into the work area. The commission, in its June 7, 2011 order, determined that relator violated the work rule by taking the cell phone into the work area, even before she received a call from her daughter in what can be described only as exigent circumstances. As the magistrate aptly noted, "the exigent circumstances arose after relator had violated the rule, as the commission's order finds. The exigent circumstances did not prompt or compel relator to take her cell phone with her to her work area at the start of her shift on July 6, 2010." (Appendix, Magistrate's decision, at ¶ 40.)

{¶ 4} Accordingly, the magistrate determined the commission did not abuse its discretion in finding a violation of the rule and that the subsequent emergency circumstances did not excuse the rule violation. Although relator challenges the language of the rule that suggests this violation can result in reprimand, suspension, or discharge, the magistrate properly noted the rule cannot be viewed in isolation from the three disciplinary warnings relator received on August 28, and December 30, 2009, and June 24, 2010. The latest of the three suspended relator for three work days for, in part, having her cell phone charging on the wall in the work area. The August 28, 2009 notice warned that further incidents would be cause for suspension or termination. The December 30, 2009 notice warned of suspension. As the magistrate concluded, "the work rule and the three warnings, the last of which resulted in a three-day work suspension, made it clear that 'depending [o]n the severity' meant that discharge was the likely next step in the event of another cell phone violation." (Appendix, Magistrate's decision, at ¶ 48.)

{¶ 5} Finding the rule, coupled with the prior violations, not to be ambiguous and concluding relator violated the work rule before ever receiving a phone call from her daughter, the magistrate determined the requested writ should be denied.

II. Objections

{¶ 6} Relator filed two objections to the magistrate's conclusions of law:

> [I] The Magistrate Erred As a Matter of Law by Finding that Employer's Work Rule Was Sufficiently Clear.
>
> [II] The Magistrate Reweighed Evidence in Contravention of *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203, 248-249.

Because relator's two objections are interrelated, we address them jointly.

{¶ 7} Relator violated her employer's work rule. The rule prohibited her having her cell phone in the work area and she, despite three cited violations of that rule, continued to take her cell phone into her work area. Rather, relator contests the clarity of the rule, suggesting she did not understand the "severity" of the punishment that could ensue from a violation.

{¶ 8} The magistrate adequately addressed relator's contentions, noting, as did the commission, that relator was well aware of the consequences, especially in light of the results of her prior violations of the same rule. Accordingly, relator knew, as a result of prior violations, that a subsequent violation could result in her being discharged from employment.

{¶ 9} Relator alternatively contends that the work rule here is unreasonable in light of the circumstances. On the evening at issue, relator received a phone call from her daughter whose babysitter had expired from a heart attack. Relator's daughter, in her teens, was understandably distraught and sought to speak with her mother. Failing to contact anyone at the main desk, relator's daughter called relator, and relator accepted the call. Relator suggests her actions can be deemed nothing but reasonable, and to allow her employer to terminate her employment under such circumstances falls outside the parameters of the voluntary abandonment doctrine. As the magistrate properly noted, however, relator's violation occurred when she took her cell phone into her work area, not when she subsequently accepted the call from her daughter.

{¶ 10} Here, relator knew she violated a work rule, the rule was clear and, coupled with her previous violations, advised her of her potential for discharge from employment. Moreover, the reasonableness of taking the phone call is not the issue in the work rule violation; rather, her having taken her cell phone into her work area in the first place was the violation. Accordingly, the commission did not abuse its discretion in failing to address whether the work rule was reasonable in light of the emergency circumstances posed. Although we recognize the compelling nature of relator's receiving the phone call from her daughter, the violation of the work rule occurred prior to that phone call and after relator had violated the same work rule on three prior occasions. Relator's objections are overruled.

III. Disposition

{¶ 11} Following independent review, we find the magistrate has properly determined the pertinent facts and applied the salient law. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections overruled;
writ denied.

KLATT, P.J., and CONNOR, J., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of the Ohio Constitution, Article IV, Section 6(C).

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Jewel Haywood,	:	
Relator,	:	
v.	:	No. 11AP-1154
Industrial Commission of Ohio and ABM Janitorial Midwest, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on January 10, 2013

Philip J. Fulton Law Office, and *Chelsea J. Fulton*, for relator.

Michael DeWine, Attorney General, and *LaTawnda N. Moore*, for respondent Industrial Commission of Ohio.

Willacy, Lopresti & Marcovy, and *Thomas P. Marotta*, for respondent ABM Janitorial Midwest, Inc.

IN MANDAMUS

{¶ 12} In this original action, relator, Jewel Haywood, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission"), to vacate its June 7, 2011 order denying her temporary total disability ("TTD") compensation beginning October 27, 2010 on eligibility grounds, and to enter an order granting the compensation.

Findings of Fact:

{¶ 13} 1. On March 5, 2008, relator injured her lower back while employed as a cleaner for respondent ABM Janitorial Midwest, Inc. ("ABM" or "employer"), a self-insured employer under Ohio's workers' compensation laws.

{¶ 14} 2. Initially, ABM certified the industrial claim (No. 08-816910) for "lumbar sprain."

{¶ 15} 3. On November 22, 2010, physician of record Stephen Bernie, M.D., completed form C-9 on which he recommended that the claim be additionally allowed for "herniated lumbar disc L5-S1." The recommendation was based upon an October 30, 2010 MRI of the lumbar spine.

{¶ 16} 4. On January 4, 2011, Dr. Bernie completed a C-84 on which he certified temporary total disability beginning October 27, 2010, the date of his last examination. The C-84 asks the physician of record to "[l]ist diagnosis(es) for allowed conditions being treated, which prevent return to work."

{¶ 17} In the space provided, Dr. Bernie wrote:

> 847.2 - Lumbar sprain
> 722.10 - Herniated disc at L5-S1

{¶ 18} 5. On January 11, 2011, relator moved for an additional claim allowance and for TTD compensation beginning October 27, 2010 based upon the C-9 and C-84 of Dr. Bernie.

{¶ 19} 6. Earlier, on July 9, 2010, ABM terminated relator's employment following a July 6, 2010 incident at the Key Tower office building in Cleveland, Ohio regarding relator's cell phone.

{¶ 20} 7. On July 9, 2010, supervisor Audrey Koontz completed an ABM form captioned "Termination Report." On the form, Koontz indicated by her mark that relator was being terminated for "Violation of Policy/Rule." In the space provided under "Explanation/Remarks," Koontz wrote:

> Ms. Haywood was given a written warning about the cell phone on 8/28/09—12[/]30[/]09 and were [sic] suspended for 3 days on 6-24-10, 6-25-10 and 6-28-10. When Ms. Haywood return[ed] I Audrey Night [Manager] talk[ed] to Ms. Ha[y]wood about the Safety Rules.

{¶ 21} 8. Earlier, on February 8, 2008, relator signed a one-page document captioned "American Building Maintenance[,] Key Tower Employees Company Rules." The document provides the written work rule at issue here:

> Violation of Safety Rules or Practices and using cell Phones, pagers, head phones, watching televisions. None of these items is to be taken to your work area.
>
> Written reprimand, suspension, or discharge depending [o]n the severity.
>
> Being in an unauthorized area or allowing any unauthorized personnel in your work area.
>
> 1st- 3 Days Off 2nd- Discharge

(Sic. Passim)

{¶ 22} 9. The record contains an ABM internal document captioned "Employee Corrective Action Notice." The form was completed on August 28, 2009 and signed by ABM supervisors Audrey Koontz and Judy Swopes. On the document, ABM wrote:

> Violation of safety rules on practices and using cell phones - rule #15. Jewel was caught taking an unauthorized[d] break and talking on her cell phone at 11:50 p.m. on floor 25. This is a violation of company policy. #24 Taking an unauthorized break in an unauthorized area. Any further incidents will be cause for suspension or termination.

{¶ 23} 10. On December 30, 2009, ABM completed another "Employee Corrective Action Notice" which was signed by Koontz and Swopes. On the document, ABM wrote:

> Today 12-30-09 Jewel was caught using her cell-phone while on duty. [W]hen she saw me (Judy Swopes) she immediately hung up and told me she was speaking with her daughter who was home alone. In September all employees signed off and received a copy of company work rule #15 which states it's a violation of safety rules and practices and use of cell phones are prohibited. This is a written warning. If Jewel is caught [using] her cell phone again while on company time she will be suspended for 3 days. Suspension is waived at this time.

{¶ 24} 11. On June 24, 2010, ABM completed another "Employee Corrective Action Notice" which was signed by supervisor Koontz. On the document, ABM wrote:

> On 6-23-10 you violated company work rule #15. Violation of Safety Rules or Practices and using cell phones, pagers, head phones, etc. On 6-23-10 security and supervisors John and Ivonne found you in your area without [sic] your shoes off, smock off (out of uniform). Also you had your cell phone charging in the wall. These are violations of Safety Practices and you are being suspended for 3 days.

{¶ 25} 12. The record contains a July 6, 2010 handwritten statement authored by ABM supervisor Denise Mitchell:

> Tonight after lunch break (10-10[:]30 p.m.) the ABM office received call to inform Charmaine . . . her mother had pass[ed] away at home. As her supervisor respond[ed] to call - another call came to ABM office. It was Jewel Haywood upset and crying, telling me (Denise) to tell Charmaine her daughter (Jewel's) was coming to get her. I (Denise) ask[ed] Jewel how did she know about her co-worker Charmaine's mother. Jewel said they lived at the same residen[ce] (2-family unit). I told Jewel to calm down and I would be there shortly after taking care of Charmaine. Upon arrival on the 4th floor freight lobby, Jewel [was] still very emotional. After several minutes she calm[ed] down. Later I ask[ed] Jewel for the cell phone and told her that she knew it was wrong to have cell in work area.
>
> At the end of shift I gave Jewel her cell phone back. Jewel then ask[ed] me (Denise) if I would not tell project [manager] Al Nakasian about incident. I told Jewel [I] would not keep any information from my boss. At that point Jewel turn[ed] and walk[ed] away saying alright whatever. Denise

{¶ 26} 13. On February 22, 2011, relator's January 11, 2011 motion was heard by a district hearing officer ("DHO"). The hearing was not recorded. Following the hearing, the DHO issued an order additionally allowing the claim for "herniated disc at the L5-S1 level" but denying the request for TTD compensation on eligibility grounds. The DHO's order explains:

> Temporary total disability compensation from 10/27/2010 through 02/28/2011 is denied as the Injured Worker has voluntarily abandoned her position of employment.

> Regarding the issue of temporary total disability compensation and voluntary abandonment, the District Hearing Officer concludes that the Injured Worker violated a written work rule. She knew when she violated this written work rule that she could be terminated from her employment. The written work rule involved use of cell phones in the work area. The Employer [h]as a specific written policy prohibiting the use of cell phones in the work area. It indicates that the Injured Worker can be suspended for violation of this policy. The rule [also] [indicates] that further violation of the rule can result in termination from employment.
>
> It is noted that the Injured Worker had been suspended for violation of this work policy. Ultimately the Injured Worker violated the work rule again after serving a suspension. On 07/06/2010 when she took a call on her cell phone in her work area. This violation of the written work policy after being suspended for using cell phones resulted in her ultimately being terminated from her position of employment on 07/09/2010. It is noted that the use of cell phones in the work area is considered a safety violation by the employer.
>
> Given that the Injured Worker was on notice of the written work rule regarding use of cell phones in the work area and given that the Injured Worker had previously been suspended for use of a cell phone in the work area, there is sufficient evidence by a preponderance that her termination from employment on 07/09/2010 constitute[d] a voluntary abandonment of her employment for purposes of receipt of temporary total disability compensation.
>
> Therefore, the requested period of temporary total disability compensation is denied.

{¶ 27} 14. Following an April 6, 2011 hearing, a staff hearing officer ("SHO") issued an order that vacates the DHO's order. The SHO's order additionally allows the claim for "herniated disc at L5-S1" and awards TTD compensation beginning October 27, 2010. The SHO's order explains the TTD award:

> The real issue at the hearing is the dispute over temporary total disability compensation from 10/27/2010 through 02/28/2011 and whether or not the Injured Worker voluntarily abandoned her position of employment. The Staff

Hearing Officer grants temporary total disability compensation from 10/27/2010 through the present and to continue upon submission of medical evidence. The Staff Hearing Officer makes a finding of fact and law that the Injured Worker did not voluntarily abandoned her position of employment.

The Employer argues that the Injured Worker violated a written work rule by answering her cell phone while at work as a housekeeper doing ordinary housekeeping duties. The Employer argued and the Injured Worker agreed that she had been previously disciplined including suspended from employment due to the use of a cell phone on the job. The Employer further argues that the reason and content of the phone call are irrelevant.

The Staff Hearing Officer finds that in fact this was a violation of a written work rule, however, the Staff Hearing Officer finds exigent and emergency exception which justifies the use of the cell phone in July of 2010 which led to her termination. The Staff Hearing Officer notes that the exigent and emergency circumstances justify violation of the written work rule. Specifically, the Injured Worker testified that she was working second shift and received an unusual phone call after 11:00 p.m. from her residence and from her daughter.

Her daughter indicated that the babysitter in the apartment below who had been watching this 13 year old girl had died of a heart attack. Coincidentally, the babysitter's daughter was a co-worker of the Injured Worker. The 13 year old girl was obviously upset, crying and very panicky as to what to do with the situation of a dead babysitter. The 13 year old first called the office of the Employer and received no response according to the testimony of the Injured Worker. It was only after being unable to reach her mother through the Employer that she called her mother/Injured Worker on her personal cell phone.

The Staff Hearing Officer finds that Injured Workers' termination the following day for the use of a cell phone in this circumstance is not justified and therefore cannot be construed as an abandonment of her employment. Such strict interpretation of the prohibition of cell phones is not absolute and clearly the above fact pattern justifies the prohibited conduct notwithstanding the Injured Worker's previous unjustified use of the cell phone. Therefore,

> temporary total disability compensation is awarded from 10/27/2010 through the present based on the newly allowed condition pursuant to the C-84 forms filed 01/12/2011. Further temporary total disability compensation is to continue upon submission of medical evidence.

{¶ 28} 15. ABM appealed the SHO's order to the three-member commission.

{¶ 29} 16. Following a June 7, 2011 hearing, the commission issued an order that vacates the SHO's order of April 6, 2011. The June 7, 2011 commission order additionally allows the claim for "herniated disc at L5-S1," but denies TTD compensation beginning October 27, 2010. Regarding the denial of TTD compensation, the order explains:

> Notwithstanding the granting of the additional allowance and payment of medical bills, it is the order of the Commission that temporary total disability compensation is denied beginning 10/27/2010 until the date of this hearing, 06/07/2011.
>
> The Commission finds the Injured Worker's termination on 07/09/2010 was a voluntary abandonment of her employment under the holding of State ex rel. Louisiana-Pacific Corp. v. Indus. Comm., (1995), 72 Ohio St.3d 401, thereby precluding the payment of temporary total disability compensation. The Court in Louisiana-Pacific found that a discharge was voluntary, when termination resulted from a violation of a written work rule or policy that (1) clearly defined the prohibited conduct, (2) had been previously identified by the Employer as a dischargeable offense; and (3) was known or should have been known to the employee.
>
> The commission finds that the Employer had a written work rule in place, and that the work rule clearly defined the prohibited conduct. The Employer's "Company Rules" specifically states, "Violation of Safety Rules or Practices and using cell phones (sic), pagers, head phones, watching televisions. None of these items is to be taken to your work area...discharge depending On (sic) the severity." The Commission finds that the Employer's work rule clearly prohibited employees from taking or using cell phones in the work area.
>
> Further, the Commission finds that the Employer had previously identified the violation as a dischargeable offense. The work rule clearly states that the Employer has the right

to discharge an employee "depending on the severity." Further, the work rule states that the "1st - 3 days off ...2nd - Discharge." The Commission finds this to mean that employees may be discharged after a second violation of the same rule occurs.

The Commission also finds that the Injured Worker had actual knowledge of the work rule and its potential for discharge. The Commission finds that the Injured Worker signed the "Company Rules" handout on 02/08/2008. Further, the Commission notes that the Injured Worker had previously been disciplined for violation of the rule on three occasions.

The Commission finds that the Injured Worker violated the Employer's written work rule. Pursuant to State ex rel. Brown v. Hoover, 10th Dist. No. 10AP-21, 2010-Ohio-6174, prior to entering a finding of voluntary abandonment, the Commission is required to determine whether an injured worker actually violated his or her employer's work rule.

On 07/08/2010, the Injured Worker had her cell phone with her and received a call from her 13 year-old daughter who was hysterical as a result of her babysitter dying of a heart attack while watching her. The daughter wanted to know what to do, and attempted to contact the Injured Worker by calling the office; however, when no one answered, the daughter called the Injured Worker's cell phone. While in her work area, the Injured Worker took the call. The Commission finds that the Injured Worker violated the work rule prior to taking the phone call from her daughter, and by carrying her cell phone with her into the work area. The Commission also notes that the Injured Worker had been disciplined three times for a violation of this particular work rule, the most recent of which resulted in a three-day suspension prior to her termination on 07/09/2010. The Commission further notes that the Injured Worker conceded at today's hearing that she knew she violated the work rule.

At hearing, the Injured Worker's counsel argued that emergency and exigent circumstances should excuse the Injured Worker's behavior on 07/08/2010. The Commission rejects this position, and finds that there is no legal basis for creating an additional requirement for employers to prove when attempting to raise a voluntary abandonment defense. The Commission finds that it has no authority to determine

> whether or not it thinks the rule, or the rule's application, is reasonable. The Injured Worker clearly violated the written work rule, conceded she had violated the work rule; and thus, she voluntarily abandoned her employment, and is not entitled to temporary total disability compensation.

{¶ 30} 17. On July 12, 2011, relator moved for reconsideration of the commission's June 7, 2011 order.

{¶ 31} 18. On August 25, 2011, the commission mailed an order denying relator's motion for reconsideration.

{¶ 32} 19. On December 29, 2011, relator, Jewel Haywood, filed this mandamus action.

Conclusions of Law:

{¶ 33} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶ 34} A voluntary departure from employment precludes receipt of TTD compensation. An involuntary departure does not. *State ex rel. Rockwell Internatl. v. Indus. Comm.*, 40 Ohio St.3d 44 (1988).

{¶ 35} In *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995), the claimant was fired for violating the employer's policy prohibiting three consecutive unexcused absences. The court held that the claimant's discharge was voluntary, stating:

> [W]e find it difficult to characterize as "involuntary" a termination generated by the claimant's violation of a written work rule or policy that (1) clearly defined the prohibited conduct, (2) had been previously identified by the employer as a dischargeable offense, and (3) was known or should have been known to the employee. Defining such an employment separation as voluntary comports with [State ex rel. Ashcraft v. Indus. Comm. (1987), 34 Ohio St.3d 42, 517 N.E.2d 533] and [State ex rel. Watts v. Schottenstein Stores Corp. (1993), 68 Ohio St.3d 118, 623 N.E.2d 1202]— i.e., that an employee must be presumed to intend the consequences of his or her voluntary acts.

{¶ 36} In *State ex rel. McKnabb v. Indus. Comm.*, 92 Ohio St.3d 559 (2001), the court held that the rule or policy supporting an employer's voluntary abandonment claim must be written. The court explained:

> Now at issue is *Louisiana—Pacific's* reference to a *written* rule or policy. Claimant considers a written policy to be an absolute prerequisite to precluding TTC. The commission disagrees, characterizing *Louisiana—Pacific's* language as merely illustrative of a TTC-preclusive firing. We favor claimant's position.
>
> The commission believes that there are common-sense infractions that need not be reduced to writing in order to foreclose TTC if violation triggers termination. This argument, however, contemplates only some of the considerations. Written rules do more than just define prohibited conduct. They set forth a standard of enforcement as well. Verbal rules can be selectively enforced. Written policies help prevent arbitrary sanctions and are particularly important when dealing with employment terminations that may block eligibility for certain benefits.

(Emphasis sic.)

{¶ 37} It was the duty of the commission to determine whether relator actually violated the company rule that prohibits an employee from using a cell phone while on duty or taking a cell phone to the work area. The commission, in its June 7, 2011 order, determined that relator violated the work rule "prior to taking the phone call from her daughter, and by carrying her cell phone with her into the work area."

{¶ 38} It is largely undisputed that relator took her cell phone with her to her work area on July 6, 2010. There is clearly some evidence, if not substantial evidence, that relator was in violation of the rule before she received the call from her daughter.

{¶ 39} As indicated in the SHO's order of June 7, 2011, relator's counsel argued that "emergency and exigent circumstances" should excuse the violation. Relator furthers the argument here:

> Here, there were clearly emergency and exigent circumstances that warranted Ms. Haywood violating the written work rule. If Employer is going to prevent their employees from carrying a cell phone on the job during the

> night shift, backstops must be in place to enable employees to be reached during emergency.
>
> * * *
>
> To find that an individual may lose their workers['] compensation benefit rights by tending to their children, during an emergency, at nighttime, would be unjust to Ms. Haywood, all injured workers, and to society as a whole.

(Relator's brief at 6-7, 14.)

{¶ 40} Clearly, the exigent circumstances arose after relator had violated the rule, as the commission's order finds. The exigent circumstances did not prompt or compel relator to take her cell phone with her to her work area at the start of her shift on July 6, 2010. Under these circumstances, it was not an abuse of discretion for the commission to find a violation of the rule and that subsequent exigent or emergency circumstances should not excuse the rule violation.

{¶ 41} Relator also argues that the rule is unreasonable as applied to her. Relator asserts here that "[s]he had to carry [her cell phone] out of necessity as she had a minor daughter, aged 13, at home, and [she] worked the nightshift." (Relator's brief at 4.)

{¶ 42} Relator asks, "[s]hould claimants be required to work in conditions where family members cannot reach them in times of emergency (especially during night hours." (Relator's brief at 6.)

{¶ 43} The commission states in its order that "it has no authority to determine whether or not it thinks the rule, or the rule's application, is reasonable." Relator suggests that the commission abused its discretion in refusing to address the question of whether the rule is reasonable as applied to her. Apparently, relator invites this court to determine that the rule was unreasonable as applied to her and to thus conclude that no work-rule violation occurred.

{¶ 44} This magistrate need not address the question of whether the commission correctly held that a claimant cannot be excused from violation of a work rule on grounds that the rule is unreasonable as applied to the claimant. Here, the rule was not unreasonably applied. As ABM points out:

> [D]espite Relator's claim that her daughter could not contact her, it is clear that the supervisor's office was staffed and taking calls relating to the death.

(Respondent's brief at 16.)

{¶ 45} There is no evidence indicating that ABM had a policy of not accepting calls from an employee's family in cases of emergency or exigency, or that it failed to act on such calls promptly and appropriately. There is no evidence that ABM's cell phone policy unreasonably restricted family contact during an emergency or exigency.

{¶ 46} As the court held in *Louisiana-Pacific Corp.*, the written work rule must not only clearly define the prohibited conduct, the employer must have previously identified the violation as a dischargeable offense. Here, as relator points out, the rule states that the consequence of violating the rule can be "[w]ritten reprimand, suspension, or discharge depending [o]n the severity." Arguing that the word "severity" is not defined, relator concludes that the rule failed to warn her that taking her cell phone into her work area on July 6, 2010 could result in her discharge. According to relator, the rule is impermissibly vague as to the consequence of violating the rule. The magistrate disagrees with relator's argument.

{¶ 47} The company rule at issue cannot be viewed in isolation from the three disciplinary warnings relator received respectively on August 28, 2009, December 30, 2009, and June 24, 2010. *State ex rel. Leaders Moving & Storage Co. v. Indus. Comm.*, 10th Dist. No. 05AP-455, 2006-Ohio-1211. The June 24, 2010 "Employee Corrective Action Notice" suspended relator for three work days, in part, for having her cell phone charging on the wall in the work area. The December 30, 2009 notice warned relator that she would be suspended for three days if caught using her cell phone again while on company time. The August 28, 2009 notice regarding her talking on her cell phone while on duty warned that "further incidents will be cause for suspension or termination."

{¶ 48} Taken together, the work rule and the three warnings, the last of which resulted in a three-day work suspension, made it clear that "depending [o]n the severity" meant that discharge was the likely next step in the event of another cell phone violation.

{¶ 49} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/S/ MAGISTRATE
KENNETH W. MACKE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).