[Cite as *Astro Shapes, Inc. v. Sevi,* 2010-Ohio-750.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

ASTRO SHAPES, INC.,	)	
	)	CASE NO. 09 MA 105
APPELLANT,	)	
	)	
- VS -	)	O P I N I O N
	)	
ANTHONY SEVI, et al.,	)	
	)	
APPELLEE.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 08CV4309.

JUDGMENT: Affirmed.

APPEARANCES:

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JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: February 24, 2010

VUKOVICH, P.J.

¶{1} Appellant Astro Shapes, Inc. appeals the decision of the Mahoning County Common Pleas Court which upheld the decision of the Unemployment Compensation Review Commission finding that Anthony Sevi was terminated without just cause and was thus entitled to collect unemployment compensation. We are asked to determine whether the fact-finder gave proper consideration to police reports concerning similar behavior by Mr. Sevi. We are also asked to review the weight of the evidence in general and with specific reference to certain arguments on just cause job termination. Because of our limited standard of review requiring deference to the fact-finder, we hereby uphold the allowance of unemployment compensation. For the reasons expressed below, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{2} Sevi worked at Astro Shapes for over twenty years. He was involved in the union over the years and had recently been replaced as union president. He was concerned that the union was considering accepting a wage reopener to decrease the wages for new hires. A petition was circulating regarding this issue. Sevi was upset at hearing rumors that he was in favor of the petition. Chris Green was one of the employees who had signed the petition.

¶{3} On April 15, 2008, Sevi approached Green as Green was leaving work in order to discuss the petition and the rumors. According to Green, Sevi cornered him and would not let him pass even though he stated that he had to get home. (Tr. 8). Green said that Sevi was one inch away from him and yelling so that spit landed on Green's face. (Tr. 8, 15). Green stated that Sevi was pointing his finger and that he poked Green in the chest before leaving and saying, "Fuck you." (Tr. 8, 10, 29). Green disclosed that Sevi had a reputation as a bully. (Tr. 17). Green, who noted that he is more than six inches shorter than Sevi, stated that he felt intimidated, threatened, and scared. (Tr. 14-15, 40).

¶{4} Upon Green's written complaint, Astro Shapes suspended Sevi and provided a union hearing. On April 23, 2008, Astro Shapes issued a letter discharging Sevi for violating the harassment policy and the code of conduct. On April 25, 2008,

Sevi filed for unemployment compensation. He also requested a "third step" grievance hearing according to the union contract.

¶{5} That hearing was held on May 1, 2008. Sevi's supervisor briefly mentioned that Sevi had once treated him in a similar manner a year ago. On May 6, 2008, Astro Shapes issued a letter to Sevi noting that due to his longevity at the company, he could return to work on May 12 on three conditions: (1) there would be no back pay; (2) he would be placed on six months of probation; and, (3) he would enroll in and pay for a certified anger management class. Sevi refused these conditions.

¶{6} On May 15, 2008, Sevi's application for unemployment benefits was denied on the grounds that he was fired for just cause. He appealed this denial. On June 16, 2008, the director of the Department of Job and Family Services reversed the denial and allowed Sevi's application for unemployment compensation. Astro Shapes appealed this decision to the Unemployment Compensation Review Commission.

¶{7} Green and Sevi testified by telephone before a hearing officer on September 22, 2008. Green told his version of the encounter as set forth above. Sevi testified that he was merely explaining to Green that he did not support the petition. (Tr. 34). He distinguished that although he may have been upset and animated, he did not intend to convey that he was angry at Green. He stated that he did not swear at Green but swore about a situation to Green. He denied that his finger made physical contact with Green. (Tr. 34-36).

¶{8} Astro Shapes introduced their code of conduct and their harassment policy, which was contained in their employee handbook. Astro Shapes also introduced a police report filed by a fellow employee in April 2006 that concerned allegations that Sevi approached a fellow employee at work, spoke to him chest-to-chest while almost spitting in his face, poked him in the chest, pushed him, and threatened to kill him if Sevi lost the upcoming union election or if Sevi saw him outside of work. Sevi denied that this incident occurred. (Tr. 42-43).

¶{9} Sevi was also questioned regarding a police report filed in 2003 by another employee who claimed that appellant called him, threatened him, and then arrived at his home to engage in a street fight. Sevi denied that this ever occurred and

noted this employee was vice-president of the union when he was president. (Tr. 33, 41).

¶{10} He noted that he had heard rumors about police reports but had never been questioned by the police and nothing had ever become of the allegations. (Tr. 33). He also denied that he engaged in similar behavior with his supervisor, explaining that he once turned abruptly when his supervisor was following him and that he then asked his supervisor to stop walking so close to him. (Tr. 38). He explained that all of these accusers campaigned against him and wished to damage his reputation. (Tr. 43).

¶{11} On September 26, 2008, the hearing officer issued a decision which affirmed the director's decision. The hearing officer found that Sevi did not physically harm or threaten Green. The hearing officer noted that despite his reputation in the plant, Sevi had never received any discipline for verbal or physical intimidation in more than twenty years of employment. The hearing officer pointed out that the police reports did not result in any legal action and that an old felonious assault conviction, which stemmed from a domestic incident, had no connection to his work. While the hearing officer acknowledged that Sevi exercised poor judgment in becoming animated regarding a union issue and pointing his finger in Green's chest, he found that Sevi's actions on April 15, 2008 did not represent sufficient fault or misconduct to constitute just cause for discharge.

¶{12} Astro Shapes sought review by the full Unemployment Compensation Review Commission; however, the commission disallowed the request for review. Astro Shapes appealed to the trial court under R.C. 4141.282. The parties filed briefs in the trial court. On May 20, 2009, the trial court issued a decision affirming the decision of the hearing officer. The within timely appeal followed.

STANDARD OF REVIEW

¶{13} A reviewing court can only reverse the Unemployment Compensation Review Commission's decision if it is unlawful, unreasonable, or against the manifest weight of the evidence. *Geretz v. Ohio Dept. of Job & Fam. Serv.*, 114 Ohio St.3d 89, 2007-Ohio-2941, ¶10, citing *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.* (1995), 73 Ohio St.3d 694, 697 (specifically regarding whether termination was with

just cause). See, also, R.C. 4141.282(H). We apply the same standard as the trial court, and thus, we are technically reviewing the decision of the Commission rather than the decision of the trial court. See id.

¶{14} The question of just cause is dependent upon the unique facts of each particular case. *Irvine v. Unemployment Comp. Bd. of Rev.* (1985), 19 Ohio St.3d 15, 17-18. Questions of fact are primarily for the trier of fact; in this case, the hearing officer. See id. Our power of review is limited to determining whether the hearing officer's decision was supported by the evidence in the record, and we are not permitted to make factual findings or to determine the credibility of witnesses as long as reasonable minds can reach different conclusions. Id. at 18.

ASSIGNMENT OF ERROR NUMBER ONE

¶{15} Astro Shapes sets forth two assignments of error, the first of which provides:

¶{16} "THE HEARING OFFICER ABUSED HIS DISCRETION BY RULING AGAINST THE WEIGHT OF THE EVIDENCE IN LIGHT OF [THE] NORDONIA [CASE]."

¶{17} First, Astro Shapes states that the evidence of the prior police reports should have been admitted and weighed by the hearing officer as such evidence was relevant to determining just cause. Astro Shapes believes that the hearing officer excluded the police reports from consideration because they did not result in legal action.

¶{18} R.C. 4141.281(C)(2) provides in pertinent part:

¶{19} "In conducting hearings, all hearing officers shall control the conduct of the hearing, exclude irrelevant or cumulative evidence, and give weight to the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of serious affairs. Hearing officers have an affirmative duty to question parties and witnesses in order to ascertain the relevant facts and to fully and fairly develop the record. Hearing officers are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure."

¶{20} In the case cited by Astro Shapes in the text of their assignment of error, the hearing officer refused to consider the transcript from the discharge hearing. See

Nordonia Hills City Sch. Dist. Bd. of Edn. v. Unemployment Comp. Bd. of Rev. (1983), 11 Ohio App.3d 189. The appellate court noted that the hearing officer was not bound by technical rules of procedure and should gather all relevant evidence. Id. at 190. The court concluded that the hearing officer should have considered all of the evidence relied upon by the employer in deciding to dismiss the employee. Id. at 190-191. This case (and another case relied upon by Astro Shapes) also found that an employee can be discharged for just cause for allegations of stealing even if the employee was acquitted of the charge in criminal court, noting that the standard of proof is much higher in a criminal case. Id. at 191; *Dana Corp v. Ohio Bur. of Emp. Serv.* (July 21, 1989), 6th Dist. No. L-88-393.

¶{21} As appellee points out, the hearing officer did not exclude the police reports from evidence. To the contrary, the reports were accepted as evidence. Moreover, Sevi was questioned about the police reports during his testimony before the hearing officer. He noted that the police never questioned him about the allegations and that the people filing the reports were merely trying to make him look bad so he would lose the union election.

¶{22} The hearing officer's notation that the police reports did not result in legal action is not akin to an exclusion from evidence. Nor is it a blanket statement that police reports are irrelevant. Rather, the statement merely showed that the hearing officer did not place great weight upon the police reports because those making the reports never followed through to file criminal complaints. (A police report is not equivalent to a criminal complaint as Astro Shapes seems to suggest.) As such, there was no violation of the *Nordonia* premise that evidence relied upon by the employer should be admitted by the hearing officer.

¶{23} Any allegations regarding the general weight of the evidence have been relocated to follow the contentions within the next of assignment of error where Astro Shapes makes specific contentions regarding the weight of the evidence concerning the determination that Sevi was discharged without just cause.

ASSIGNMENT OF ERROR NUMBER TWO

¶{24} The second assignment of error set forth by Astro Shapes contends:

¶{25} "THE TRIAL COURT ERRED AFFIRMING THE HEARING OFFICER'S REASONING BASED ON ABSENCE OF PHYSICAL HARM BECAUSE IT IS NOT RELEVANT TO JUST CAUSE FOR TERMINATION."

¶{26} Here, Astro Shapes states that physical harm was not necessary to find just cause. Astro Shapes states that there was just cause because Sevi violated the harassment policy and because their knowledge gained about Sevi in the union hearing process made them potentially liable to other employees for maintaining a hostile work environment. Astro Shapes also urges that Green's testimony was bolstered by the police reports concerning similar incidents and should have been accepted as credible. Astro Shapes complains that the hearing officer placed a burden on it to repeatedly warn Sevi prior to termination. Thus, Astro Shapes contends that the hearing officer's decision was unreasonable or against the manifest weight of the evidence in general and for several specific reasons.

¶{27} Contrary to Sevi's response, the harassment policy is in the certified record. This policy provides that it is the policy of the company to provide an environment free of harassment and other verbal and non-verbal acts or physical contact which harasses another, which disrupts or interferes with another's work performance, or which creates an intimidating, offensive, or hostile working environment.[1] This policy also warns that after an investigation of a report of harassment, the company can impose discipline ranging from a warning to termination.

¶{28} As Astro Shapes points out, physical contact is not required for violation of this policy. However, the hearing officer did not state that physical contact was required. Rather, the hearing officer was simply providing support for its decision that Sevi's conduct was not sufficiently inappropriate to warrant dismissal. That is, the hearing officer essentially concluded that Sevi's outburst to Green as Green was

[1]The policy also states: "Harassment shall include any act which belittles, offends or impedes an employee on the basis of race, color, religion, national origin, citizenship status, mental or physical disability, sex or age." This portion is not applicable here. However, contrary to the suggestion in the brief filed by ODJFS, this is merely one example of harassment and does not eliminate the general policy statement that the workplace shall be free of "verbal or physical contact or communication which harasses, disrupts or interferes with another's work performance or which creates an intimidating, offense or hostile working environment."

leaving work did not constitute harassment under the policy as it did not create an intimidating or hostile work environment.

¶{29} We now address the contention of Astro Shapes that the company's "Plant Code of Conduct" provides for automatic termination for violation of the harassment policy. It is important to note that said Code of Conduct has two procedures as set forth in "Group A Rules" and "Group B Rules." "Group A" violations that result in automatic termination, refers only to violation of the *sexual* harassment policy. It also refers to fighting on company property. Here, the conduct was not found to constitute a fight but rather an animated argument. Moreover, this Code of Conduct states that it supersedes prior rules. Since non-sexual harassment is not listed in the Group A rules, one could argue that the harassment rule about intimidation constitutes a Group B violation, which requires verbal counseling, then two written warnings, and then a last chance agreement. It is not unreasonable to find that an employee could rationally rely on a progressive disciplinary schedule such as this.

¶{30} In any event, the hearing officer did not place a burden on Astro Shapes to warn the employee prior to termination. Rather, the hearing officer was merely noting the fact that, notwithstanding the employer's categorization of Sevi as a temperamental bully, he had never received any discipline for verbal or physical intimidation in more than twenty years of service. This was not the creation of a duty to warn. Rather, it was merely the placing of weight on evidence and the provision of an example of why the hearing officer believed that Sevi's conduct was not something which a reasonable person would believe would result in termination. In other words, it was just a fact pointed out in support of the hearing officer's conclusion that Sevi would not have been aware that becoming animated about a rumor being spread about him would result in termination as some kind of last straw.

¶{31} Concerning Astro Shapes' argument that Green's testimony was credible and should not have been discarded, we note that the hearing officer did not totally discredit Green's version of events. The hearing officer agreed that Sevi "exercised poor judgment in becoming animated regarding a union issue and pointing his finger in Mr. Green's chest". However, the hearing officer found credible Sevi's claim that he was not yelling and swearing *at* Green but *to* him regarding a union issue in order to

let him to know that he was not in fact the proponent of the petition that was being circulated in his name.

¶{32} Finally, it is not disputed that an employer can consider its potential liability for maintaining a hostile work environment. However, appellant was not disciplined for any prior allegations, such as the one his supervisor alleged occurred a year prior to this incident. And, appellant had an explanation for that event: his supervisor was walking on his heels so he pivoted and asked him to back off.

¶{33} As for the police reports, which the employer states that it was unaware of until the termination hearing, one police report was filed five years prior to this event and one was filed two years prior. The older report did not occur on work premises. The more recent event, while it was alleged to have occurred at work, was never reported to the employer and never progressed into a sworn criminal complaint.

¶{34} Unemployment compensation is not available to an employee who quit work without just cause or who was discharged for just cause. R.C. 4141.29(D)(2)(a). Just cause in this context is that which, to an ordinarily intelligent person, is a justifiable reason for terminating an employee or for an employee's act of quitting. See *Irvine*, 19 Ohio St.3d at 17. "If an employer has been reasonable in finding fault on behalf of an employee, then the employer may terminate the employee with just cause." *Tzangas*, 73 Ohio St.3d at 698. "The critical issue is not whether an employee has technically violated some company rule, but * * * whether the employee, by his actions, [has] demonstrated an unreasonable disregard for his employer's best interests." *Manor West Health Care & Ret. Ctr. v. Ohio Bur. of Emp. Serv.* (Dec. 23, 1994), 7th Dist. No. 93CA95, citing *Kiikka v. Ohio Bur. of Emp. Serv.* (1985), 21 Ohio App.3d 168, 169.

¶{35} The hearing officer was the trier of fact who occupied the best position to judge the credibility of witnesses and the weight of the evidence. The hearing officer could reasonably find that a brief outburst of anger about people falsely circulating a petition in his name was not just cause for termination (or for later adding conditions to further employment) and that the discovery of past police reports did not transform this event into a just cause termination. The hearing officer could rationally choose to believe Sevi's claim that various accusers were out to get him for his union

background and his controversial position on the current topic of wage reopener. We cannot substitute our judgment on credibility here.

¶{36} This is especially true in light of the employer's Code of Conduct which suggests to a rational employee that its progressive discipline superseded the right to automatically terminate under the general harassment policy. Considering this fact and our limited standard of review, the decision to allow unemployment benefits is affirmed.

Donofrio, J., concurs.
DeGenaro, J., concurs.