

[Cite as *State ex rel. Sanderson v. Indus. Comm.*, 2011-Ohio-5285.]
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Barbara Sanderson, :
Relator, :
v. : No. 10AP-771
The Industrial Commission of Ohio and : (REGULAR CALENDAR)
Hirri Foods, Inc., :
Respondents. :
:

D E C I S I O N

Rendered on October 13, 2011

Daniel L. Shapiro and Leah P. VanderKaay, for relator.

Michael DeWine, Attorney General, and *Gerald H. Waterman*, for respondent Industrial Commission of Ohio.

Kegler Brown Hill & Ritter LPA, and *Cathryn R. Ensign*, for respondent Hirri Foods, Inc.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Barbara Sanderson ("relator"), filed an original action in mandamus asking this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied relator

temporary total disability ("TTD") compensation, and to enter an order granting that compensation.

{¶2} This matter was referred to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court grant the requested writ. No objections have been submitted concerning the magistrate's findings of fact, and we adopt them as our own.

{¶3} In brief, relator sustained a work-related injury in August 2009. She received TTD compensation until November 19, 2009, when her doctor released her to return to work with restrictions. Relator returned to work on November 20 and performed light-duty work at a table in the front of the store. She attempted to call off work on the morning of November 21. She was told that she would have to speak to Phillip Moody directly, and she refused to do so. She began work at 10:00 a.m. that morning and left without speaking with anyone at 3:07 p.m. Her shift was to end at 4:00 p.m. Relator's employer, Hirri Foods, Inc. ("employer"), terminated relator for violating its internal rule against leaving a job without permission.

{¶4} Thereafter, relator applied for TTD compensation beginning January 13, 2010. A district hearing officer found that relator had abandoned her employment voluntarily and denied the application. A staff hearing officer affirmed. The magistrate concluded that the commission erred by not determining whether relator was ill when she left work and, if so, whether she needed to leave work quickly and without a supervisor's permission. Accordingly, the magistrate recommended that this court grant

a writ ordering the commission to vacate its prior order and to enter a new order that determines the question of voluntary abandonment.

{¶5} The commission and the employer submitted objections to the magistrate's decision. Together, the objections contended that the magistrate erred in the following ways: (1) by finding that the employer had not met its burden to show that relator abandoned her employment voluntarily; (2) by finding that the commission had not determined whether relator violated a work rule; (3) by finding that the employer's rule was unreasonable; and (4) by undertaking an analysis that went beyond determining whether some evidence supported the commission's order. We address these objections together.

{¶6} It is well-established that a claimant is not entitled to TTD compensation if she abandoned her employment voluntarily. *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401, 402, 1995-Ohio-153, citing *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44, 46. In determining whether a claimant's termination constitutes a voluntary abandonment for these purposes, we consider whether the claimant violated a written work rule that (1) defined the prohibited conduct clearly, (2) the employer had identified previously as a dischargeable offense, and (3) was known to, or should have been known to, the claimant. *Louisiana-Pacific* at 403.

{¶7} Here, relator signed an employee handbook that identified "SERIOUS OFFENSES," i.e., infractions that "are extremely serious and due to their severity, the

employee will usually be subject to immediate dismissal." Those offenses include the following: "Leaving job without permission."

{¶8} The undisputed evidence before the commission established that, on November 20, 2009, at 3:07 p.m., relator left her job without permission. By signing the employee handbook, relator became aware of the serious offenses for which she could be terminated, including the offense of leaving her job without permission. The handbook defined the offense clearly. Therefore, there was some evidence before the commission to support its conclusion that relator abandoned her employment voluntarily, and the commission did not abuse its discretion by denying relator's application for TTD compensation.

{¶9} Importantly, there is no evidence that relator's departure from her work station on November 20, or her subsequent termination, had anything to do with her work-related injuries. The magistrate's analysis of whether the employer's rule was reasonable under the circumstances was unnecessary.

{¶10} For all these reasons, we sustain the objections of the commission and the employer. We adopt the magistrate's findings of fact, but we reject the magistrate's conclusions of law. Accordingly, we deny the requested writ.

*Objections sustained;
writ of mandamus denied.*

KLATT and DORRIAN, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Barbara Sanderson,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-771
	:	
The Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Hirri Foods, Inc.,	:	
	:	
Respondents.	:	
	:	

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

Rendered on April 21, 2011

Daniel L. Shapiro and Leah P. VanderKaay, for relator.

Michael DeWine, Attorney General, and *Gerald H. Waterman*, for respondent Industrial Commission of Ohio.

Kegler Brown Hill & Ritter LPA, and *Cathryn R. Ensign*, for respondent Hirri Foods, Inc.

IN MANDAMUS

{¶11} In this original action, relator, Barbara Sanderson, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying her temporary total disability ("TTD") compensation beginning

January 29, 2010 on eligibility grounds, and to enter an order granting the compensation.

Findings of Fact:

{¶12} 1. On August 14, 2009, relator sustained an industrial injury while employed as a "deli worker" at a retail grocery store operated by respondent Hirri Foods, Inc. ("employer" or "Hirri Foods"), a state-fund employer. The employer was doing business as "Shaker's IGA." On that date, relator slipped and fell on a wet floor.

{¶13} 2. The industrial claim (No. 09-346221) is allowed for:

Sprain of neck; sprain/strain right acromioclavicular; sprain of right knee; contusion, right shoulder; tear, right supraspinatus.

{¶14} 3. Relator received TTD compensation from August 17 to November 19, 2009.

{¶15} 4. On November 19, 2009, treating physician Raymond L. Horwood, M.D. released relator to return to work with restrictions.

{¶16} 5. The employer created a light-duty position for relator outside the deli department. The light-duty position required relator to sit at a table in front of the store updating customer information.

{¶17} 6. Relator was scheduled to begin work at the light-duty position on November 20, 2009 from 1:00 p.m. to 6:00 p.m. Relator worked as scheduled on November 20, 2009.

{¶18} 7. Relator was scheduled to work at the light-duty position on November 21, 2009 from 10:00 a.m. to 4:00 p.m. However, at 3:07 p.m. that day, relator clocked out and left the store without telling a supervisor that she was leaving.

{¶19} 8. On November 24, 2009, Hirri Foods President Phillip Moody met with relator and Store Manager Brian Reid. After some discussion, Moody terminated relator's employment.

{¶20} 9. On January 13, 2010, Dr. Horwood completed a C-84 certifying TTD from January 29, 2010 to an estimated return-to-work date of April 23, 2010. On the C-84, Dr. Horwood indicated that relator was scheduled for shoulder surgery on January 29, 2010.

{¶21} 10. On February 1, 2010, the Ohio Bureau of Workers' Compensation ("bureau") mailed an order awarding TTD compensation beginning January 29, 2010.

{¶22} 11. Hirri Foods administratively appealed the bureau's order.

{¶23} 12. Following a March 10, 2010 hearing, a district hearing officer ("DHO") issued an order that vacates the bureau's order and denies TTD compensation beginning January 29, 2010, on eligibility grounds:

Injured Worker's request for the payment of temporary total disability compensation commencing 01/29/2010 is denied. The District Hearing Officer orders that the Injured Worker is not entitled to temporary total disability compensation, that she voluntarily abandoned her employment at the time of her termination on 11/24/2009. Documentation filed 11/30/2009 in this claim from the Employer demonstrates that the Injured Worker clocked out prior to her shift ending and left the premises without notification or permission from any supervisor. The Employer has submitted the Employee Handbook which documents that there are certain infractions

that are extremely serious and due to their severity the employee will usually be subject to immediate dismissal. One of those infractions includes leaving the job without permission. As a result of the Injured Worker leaving her employment without permission on 11/21/2009 she was terminated in accord with the policy set forth in the Employee Handbook. The District Hearing Officer finds that the Employer has met its burden as set forth in Louisiana-Pacific [*State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* 72 Ohio St.3d 401, 403, 1995-Ohio-153] showing that the Injured Worker is not entitled to temporary total disability compensation as she voluntarily abandoned her employment.

{¶24} 13. Relator administratively appealed the DHO's order of March 10, 2010.

{¶25} 14. Following an April 20, 2010 hearing, a Staff Hearing Officer ("SHO")

issued an order affirming the DHO's order:

The request for payment of temporary total disability compensation for the period of 01/29/2010 through 03/10/2010 is denied. The basis of this finding is that the Injured Worker is ineligible to receive temporary total because she voluntarily abandoned her former position of employment on 11/24/2009 when she was terminated for violating a written work rule and she has not returned to the work force since that time. The Injured Worker had returned to work on 11/20/2009 in a modified duty position as a result of the instant injury. On 11/21/2009 the Injured Worker was scheduled to work another shift in the modified duty position. On the morning of 11/21/2009 the Injured Worker telephoned the Employer and said she could not work due to illness. The Injured Worker testified that the Employer directed her to report to work. The Injured Worker did report to work on 11/21/2009, but left work prior to the completion of her shift. She left the workplace without notifying any supervisor that she was leaving. The Injured Worker testified that she was ill and needed to leave the building quickly. The Employer has a written work rule that sets forth dismissal as the penalty when an employee leaves his job without permission. The rule makes no exception for illness and the Employer does not appear to offer sick time. The Injured

Worker was aware of this rule as she signed a form indicating receipt and understanding of the Employer's rules. On 11/24/2009 the Injured Worker was terminated for violation of the attendance rule. The Staff Hearing Officer finds that this constitutes a voluntary abandonment of employment that would render the Injured Worker ineligible to receive temporary total disability compensation as long as she has not returned to the work force. * * *

{¶26} 15. On May 14, 2010, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of April 20, 2010.

{¶27} 16. On August 13, 2010, relator, Barbara Sanderson, filed this mandamus action.

{¶28} 17. Earlier, on November 25, 2009, Moody signed a typewritten letter addressed to "Lorraine K." at the bureau. The November 25, 2009 letter is, in effect, Moody's unsworn statement as to the events leading to relator's termination. Moody's November 25, 2009 statement reads:

Effective 11/24/09, Hirri Foods, Inc., has terminated employment of Ms. Barbara Sanderson. Ms. Sanderson was released to light work duty on 11/20/09 and was scheduled to work 11/20/09 for the 1pm to 6pm shift and on 11/21/09 for a 10am to 4pm shift. She did not want to work the 11/21/09 shift due to a family party. She was advised that because of her physician's release she would need to work her 10am to 4pm shift on 11/21/09. At approximately 8am on 11/21/09, Ms. Sanderson attempted to call off from her 10am to 4pm shift to Linda Cottrell, the deli manager. She was advised at that time by Mrs. Cottrell that she would have to speak with Phil Moody directly because of her light duty status. She refused to speak to Mr. Moody. I then contacted Ms. Sanderson at her home by telephone and advised her she would need to report for her 10am to 4pm shift. Ms. Sanderson arrived at work and I had a brief conversation with her and explained to her we wanted her light duty to go smoothly, but she would have to work her assigned shifts

and that we need to treat each other fairly. I was approached by Store Manager, Gary Sprowls at approximately 3:15pm and he asked me if I had allowed Ms. Sanderson to leave her shift early. I replied that I had not. He then told me she had left at 3:07pm without saying anything. I met with Ms. Sanderson and Store Manager Brian Reid on 11/24/09 at approximately 12pm. I asked Ms. Sanderson why she had left prior to her shift ending at 4pm. She said she didn't feel well so she left. I then asked her if she thought it was O.K. to leave prior to 4pm without saying anything to me or the store manager and she replied "I guess not". At that time I terminated her employment with the company and she left the building. Enclosed is page 30 of our employee handbook indicating "leaving job without permission" as a serious offense, punishable by termination of employment. Also included is a copy of Ms. Sanderson signature page indicating that she had received and read the employee handbook. Also included for your review are statements from Store Manager, Gary Sprowls, Store Manager, Brian Reid and Deli Manager, Linda Cottrell.

{¶29} 18. Earlier, on November 21, 2009, Store Manager Gary Sprowls signed the following unsworn statement:

When I came into work at 12pm, Barbara Sanderson was sitting at the table located at the front of the store. It seemed she wasn't too happy to be there. So I kept watching her and she was not real friendly to customers. About 3:15pm I looked at the table and she was gone. I then looked outside to see if she was on break and her car was gone. So I checked her timecard and she had punched out at 3:07pm. I knew she was to work until 4pm because Phil and I had talked about it on Thursday. She left and never said a word to me before leaving. So I checked with Phil to see if he had told her she could leave early and he said no.

{¶30} 19. On November 21, 2009, Deli Manager Linda Cottrell issued the following unsigned and unsworn statement:

7:50am I missed a call from Barbara Sanderson on my cell phone[.]

7:57am Barbara called the deli department[.] She told me to to [sic] tell Phil that she would not be in because she had diarrhea bad and could not work. She also said she knew she had a Christmas Party but she would not be going. I told her she had to talk to Phil Moody since she was not working in my department. She said no, she did not want to tell him about her bodily functions. So she asked could I please tell him. She said nothing else was wrong but that. I said feel better and hung up and paged Phil Moody.

{¶31} 20. On November 24, 2009, Store Manager Brian Reid signed the following unsworn statement:

I, Brian Reid, witnessed the conversation between Phil Moody and Barbara Sanderson. Phil addressed with Barb about her shift from 10am to 4pm on Saturday, November 21st, 2009. Phil had scheduled her from 10am to 4pm and she left early. Phil asked Barb "Do you think it was ok to leave before 4 pm?" She said "I guess not". Barb recognized it was not ok to leave and not ok to leave without telling anyone. At this point Phil addressed Barb telling her that she was released by the doctor for light duty and that she had to work her assigned shift, which she acknowledged. When this was acknowledged by Barb, Phil stated that he was letting her go (releasing her from the company). When Phil made this statement, Barb's response was "OK". At this point the conversation was over and Barb left Phil's office.

{¶32} 21. The record contains an employee handbook. Under the caption "Attendance and Work Schedules," it states:

You are not to leave your job during your normal work schedule without first obtaining permission from your department manager or manager in charge of the store.

Under the caption "Serious Offenses," the handbook reads:

- Leaving job without permission[.]

Conclusions of Law:

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

{¶34} In *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401, 403, 1995-Ohio-153, the court states:

In *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 517 N.E.2d 533, we discussed the temporary total disability compensation eligibility of an incarcerated claimant. We acknowledged that imprisonment would not fit the traditional definition of "voluntary" since individuals, as a general rule, do not actively seek or consent to incarceration. Looking more deeply, however, we found:

"While the prisoner's incarceration would not normally be considered a 'voluntary' act, one may be presumed to tacitly accept the consequences of his voluntary acts. When a person chooses to violate the law, he, by his own action, subjects himself to the punishment which the state has prescribed for that act." *Id.*, 34 Ohio St.3d at 44, 517 N.E.2d at 535.

Recognizing the parallels underlying incarceration and firing, we observed in *State ex rel. Watts v. Schottenstein Stores Corp.* (1993), 68 Ohio St.3d 118, 121, 623 N.E.2d 1202, 1204:

"We agree that firing can constitute a voluntary abandonment of the former position of employment. Although not generally consented to, discharge, like incarceration, is often a consequence of behavior that the claimant willingly undertook, and may thus take on a voluntary character. * * *"

Examining the present facts, we 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 *Ashcraft* and *Watts-i.e.*, that an employee must be presumed to intend the consequences of his or her voluntary acts.

{¶35} In *State ex rel. Feick v. Wesley Community Servs.*, 10th Dist. No. 04AP-166, 2005-Ohio-3986, ¶5-6, this court explored the question of whether an injured worker's negligent acts could constitute a voluntary abandonment of employment. This court states:

In the present case, respondent-employer had a company policy providing for discharge of an employee following a third violation of a "Class I" offense, which included offenses defined as "[c]arelessness, negligence or irresponsibility." As noted by the magistrate, on two prior occasions, claimant had negligently backed a van into another vehicle, and negligently placed the wrong key in the ignition of a van, causing damage to the van. Claimant's third incident, ultimately giving rise to her discharge, involved entering an intersection against a red traffic light.

The magistrate found no evidence in the record that the claimant's act of running a red light was willful, and neither do we. We decline, however, to adopt a per se rule that no form of negligent conduct leading to an employee's discharge could ever constitute a voluntary abandonment of employment. Rather, as suggested by the commission, there may be situations in which the nature or degree of the conduct, though not characterized as willful (e.g., repeated acts of neglect or carelessness by an employee), may rise to such a level of indifference or disregard for the employer's workplace rules/policies to support a finding of voluntary abandonment. We do not find, however, that the facts of this case involve either willful or other conduct constituting voluntary abandonment.

{¶36} Before the commission, the employer had the burden of proving by a preponderance of the evidence the affirmative defense of voluntary abandonment of

employment. *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 83-84,1997-Ohio-71; *State ex rel. Superior's Brand Meats, Inc. v. Indus. Comm.*, 78 Ohio St.3d 409, 411, 1997-Ohio-9.

{¶37} Moreover, it was the commission's duty to determine for itself whether claimant actually violated the work rule that is the premise for the employer's termination of employment. *State ex rel. Pounds v. Whetstone Gardens & Care Ctr.*, 180 Ohio App.3d 478, 2009-Ohio-66, ¶40. That is, it is insufficient for the commission to simply determine that the employer terminated the claimant for violation of a work rule. *Id.*

{¶38} Citing *Feick*, relator argues that her conduct in leaving work early without a supervisor's permission cannot be found to be a willful violation of the work rule because of her testimony "that she was ill and needed to leave the building quickly" as was noted in the SHO's order.

{¶39} Besides relator's hearing testimony, Linda Cottrell stated that on November 21, 2009, she was informed by relator that "she had diarrhea bad and could not work." Also, on November 24, 2009, as reported by Moody, upon being asked why she had left prior to her shift ending at 4:00 p.m., relator replied that "she didn't feel well so she left."

{¶40} Thus, there is evidence even from the employer's witnesses that could be viewed as supporting relator's hearing testimony that, as the SHO reported, "she was ill and needed to leave the building quickly."

{¶41} As earlier noted, relator contends that the commission abused its discretion in finding a voluntary abandonment because, under the circumstances, her

violation of the work rule was not willful.

{¶42} There is a more fundamental problem with the SHO's order.

{¶43} The SHO did not actually determine whether or not relator was ill and if so, whether her illness necessitated leaving work quickly without obtaining a supervisor's permission.

{¶44} Rather, the SHO determined that the employer's rule "makes no exception for illness" and thus, relator must be found in violation because undisputedly she did leave work early without a supervisor's permission.

{¶45} As earlier noted, in the handbook, "[l]eaving job without permission" is listed as a serious offense. Also, the handbook provides:

You are not to leave your job during your normal work schedule without first obtaining permission from your department manager or manager in charge of the store.

{¶46} Significantly, even the employer does not claim that there can be no circumstances in which an employee might be excused from leaving the job without permission. Yet, the SHO interpreted the work rule as permitting no exceptions.

{¶47} This court should not sanction a voluntary abandonment finding based upon a rule that, as interpreted, is patently unreasonable. See *State ex rel. Lamp v. J.A. Croson Co.*, 75 Ohio St.3d 77, 79, 1996-Ohio 319. (In a VSSR proceeding, where the application of a rule to a unique factual situation gives rise to a patently illogical result, common sense should prevail.)

{¶48} Clearly, a reasonable interpretation of the work rule necessitates a commission adjudication as to whether or not relator was ill at the time of her workplace

departure and, if so, whether the illness justified leaving the workplace without obtaining a supervisor's permission.

{¶49} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of April 20, 2010, and, in a manner consistent with this magistrate's decision, enter a new order that determines the voluntary abandonment issue.

/s/ Kenneth W. Macke

KENNETH W. MACKE
MAGISTRATE

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).