

DANIEL M. HOFFIGAN

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

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SUMMIT COUNTY INFOCISION MANAGEMENT CORP. CLEAR)	CASE NO.: CV2011-07-3863
)	
Plaintiff – Appellant,)	
)	JUDGE PAUL J. GALLAGHER
vs.)	
)	
DAVID G. BROWN, et al.,)	<u>ENTRY & ORDER RESOLVING</u>
)	<u>ADMINISTRATIVE APPEAL</u>
Defendants – Appellees.)	

This matter is before the Court as an Administrative Appeal of a decision of the Unemployment Compensation Review Commission pursuant to R.C. §4141.282. The Director’s File, UCRC File, and the transcript of the hearing are in the record; the parties have briefed the issues for review.

FACTUAL & PROCEDURAL HISTORY

Defendant – Appellee David G. Brown (“Brown”) was employed by Plaintiff – Appellant InfoCision Management Corp. (“InfoCision”) from April 6, 2009 through September 29, 2010. In that brief period, Human Resources at InfoCision investigated three complaints against Brown by his co-workers for harassing behavior, and suspended Brown for a physical altercation with a co-worker. Upon receipt and investigation of the third complaint by a co-worker, Brown was terminated for violating InfoCision’s Harassment Free Workplace Policy.

Brown filed an application for unemployment compensation benefits. The Director of the Ohio Dept. of Jobs and Family Services (ODJFS) issued a decision disallowing benefits and finding that Brown was discharged for just cause in connection with work.

Brown appealed the Director’s decision and a Director’s Redetermination was issued affirming the original conclusion that Brown was discharged for just cause and disallowed benefits. The Director’s “Fact Finding Information” in the record evinces Brown felt he was discharged only because of co-worker accusations and he denied all the accusations against him. Brown surmised his co-workers were conspiring against him and wanted to sue and obtain money for sexual harassment, or that his co-workers were jealous of his performance

and pay. The Director reasoned: "Although [Brown] disputes all allegations, the weight of the evidence is with the employer (witness statements) and they followed their policy in terminating [Brown] for his actions which were in violation of a reasonable policy."

Brown appealed this decision and ODJFS transferred jurisdiction to the Unemployment Compensation Review Commission (UCRC). Brown submitted a two page letter in support of his appeal to the UCRC. Brown claimed his employment was terminated because he insisted on being paid overtime and he asserted that InfoCision was in violation of certain pay and labor laws.

The UCRC conducted a hearing on the matter. At the hearing, InfoCision's Human Resources Coordinator, A.J. Spencer, testified about three complaints against Brown by his co-workers for harassing behavior, and an incident where Brown was suspended for a physical altercation with a co-worker. Upon receiving separate complaints from three of Brown's co-workers, Mr. Spencer conducted the investigations and forwarded the results to the Human Resources Director for final decisions.

The first complaint for harassing behavior was investigated by Human Resources and determined to be unfounded.

The second complaint as documented in EX. B, a Written Warning to Brown, occurred in April 2010. A female co-worker alleged Brown had touched her inappropriately and had been following her home from work. Brown declined to provide a statement to Human Resources at the time. At the hearing, Brown denied the accusations and reasoned his co-workers were jealous of him. Human Resources investigated the complaint, found it did not rise to the level of sexual harassment, but found that Brown had indeed been harassing this co-worker by his persistent behavior. The Written Warning, which was also considered a final warning,¹ counseled Brown about his behavior, reminded him of the Harassment Free Workplace Policy, and instructed him to watch the company's sexual harassment video. InfoCision warned Brown his behavior was creating an intimidating and offensive work environment and that such behavior would not be tolerated.

Mr. Spencer testified to the facts of this investigation and his summary as documented in EX. B. He was cross-examined by Brown's counsel, who noted the original witness statements Mr. Spencer testified that he had collected from the complaining co-workers were

¹ InfoCision's Harassment Free Workplace Policy notes the company has zero tolerance for any harassment.

missing from the file. InfoCision's Harassment Free Workplace Policy, EX. A, was admitted into the record and Mr. Spencer testified he reviewed the policy with Brown, as he documented in the Written Warning. Counsel also examined Mr. Spencer regarding Brown's complaints to management about the method by which his pay was calculated.

Brown also testified about the incident documented in EX. B. He denied all the accusations in the complaints and surmised his co-workers were jealous of his performance and pay. Brown's testimony about his knowledge of InfoCision's Harassment Free Workplace Policy, and whether he was ever counseled about alleged harassing behavior was inconsistent. He also denied watching a sexual harassment training video in connection with receiving his Written Warning.

In another incident, in June 2010, Brown was suspended for threatening and intimidating others by engaging in a physical altercation with a co-worker. Mr. Spencer and Brown both testified regarding this incident. Brown stated he was suspended because he retaliated; the other male co-worker was also suspended for the incident.

The third and final complaint, in September 2010, was documented in EX. C. Mr. Spencer testified he received a complaint about Brown by a female co-worker that Brown was persistently moving his seat to sit closer to her despite being asked to leave her alone. Further, another female co-worker alleged that Brown had threatened or intimidated her to dissuade her from filing any complaints about him. Mr. Spencer testified he received written statements from the complainants but, as previously noted, at the time of the hearing, the written statements were not in the record. Mr. Spencer testified that he questioned Brown about these incidents, Brown denied all accusations and was suspended during the course of Human Resource's investigation. The investigation again determined the harassment did not rise to the level of sexual harassment, but nevertheless found Brown's behavior was persistent and harassing. EX. C detailed Brown's history of complaints for violations of InfoCision's Harassment Free Workplace policy, and concluded that Brown's history, coupled with the most recent complaints, warranted termination of his employment.

Regarding these complaints, Brown testified he was required to have permission from a supervisor before moving his seat at work. InfoCision then admitted EX. 1, an Incident Conference Sheet, which cited an infraction because Brown was not in his assigned seat and had not received permission to move his seat. Brown denied this and claimed to have received

the requisite permission to move his seat closer to the complaining co-worker. Brown speculated that certain co-workers were jealous of him and / or that InfoCision was retaliating against him for his pay-related complaints to management. Brown admitted EX. D a Salary Pay Rate Memorandum from InfoCision, EX. E three of his Earnings Statements, and he was permitted to testify about his pay and overtime complaints. Mr. Spencer testified Brown's pay and overtime complaints had nothing to do with InfoCision's decision to terminate his employment.

The Hearing Officer issued a written decision reversing the Director's Redetermination and finding that Brown was discharged without just cause and thus entitled to unemployment compensation benefits. The Hearing Officer's reasoning is set forth below in its entirety:

The claimant was discharged by InfoCision Management Corporation for alleged harassing behavior toward co-workers. The employer has listed an incident in October 2009, which was found not to be a harassing situation involving claimant. On April 2, 2010, claimant received a final warning based on a complaint from a female co-worker. Claimant has credibly testified at the hearing that he was not guilty of the action that resulting in him receiving a final warning. The employer has provided no firsthand testimony concerning the incident resulting in the final warning or the incident shortly before claimant's discharge. Claimant has credibly denied the allegations that he threatened a co-worker shortly before his discharge. The evidence before the Hearing Officer fails to establish that claimant was guilty of fault or misconduct in connection with work warranting disallowance of unemployment benefits. The claimant was discharged by InfoCision Management Corporation without just cause in connection with work.

InfoCision has appealed the Hearing Officer's decision pursuant to R.C. §4141.282 arguing this decision is against the manifest weight of the evidence. InfoCision argues the Hearing Officer held the company to a higher evidentiary standard because he discredited the company's documented record of complaints and investigations against Brown as not supported by "firsthand testimony."

Brown and the UCRC are defending the decision. They argue although the Hearing Officer indicated in his decision that InfoCision failed to provide firsthand testimony concerning the incident resulting in the final warning or the incident resulting in discharge, this does not mean he did not consider the entire file before rendering a decision. They note that this Court must presume the regularity of the administrative proceedings, and is precluded from making factual findings or determining the credibility of witnesses.

LAW & ANALYSIS

A Common Pleas Court reviewing a determination by the UCRC may only reverse an unemployment compensation eligibility decision if the decision is unlawful, unreasonable, or against the manifest weight of the evidence. *Ro-Mai Industries, Inc. v. Weinberg*, 176 Ohio App.3d 151, 2008-Ohio-301, at ¶6, 891 N.E.2d 348 (citation omitted). “Every reasonable presumption must be made in favor of the [decision] and the findings of facts [of the UCRC].” *Id.* at ¶7, citing *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19, 526 N.E.2d 1350. “The resolution of factual questions is chiefly within the UCRC’s scope of review.” *Id.* at ¶8, citing *Tsangas, Plakas & Mannos v. Ohio Bur. of Emp. Serv.* (1995), 73 Ohio St.3d 694, 696, 653 N.E.2d 1207. “The court’s role is to determine whether the decision of the UCRC is supported by evidence in the certified record.” *Id.* (citations omitted). “If the reviewing court finds that such support is found, then the court cannot substitute its judgment for that of the UCRC.” *Id.* (citations omitted). “The fact that reasonable minds might reach different conclusions is not a basis for reversal of the [UCRC’s] decision.” *Id.*, citing *Irvine v. Unemp. Comp. Bd. of Rev.* (1985), 19 Ohio St.3d 15, 18, 482 N.E.2d 587.

A party is entitled to unemployment benefits if he or she quits with just cause or is terminated without just cause. R.C. §4141.29(D)(2)(a); *Upton v. Rapid Mailing Serv.*, 9th Dist. App. No. 21714, 2004-Ohio-966, at ¶13. Traditionally, in the statutory sense, “just cause” has been defined as “that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.” (Quotations omitted.) *Irvine*, 19 Ohio St.3d at 17. The determination of whether an employer had just cause to terminate an employee is a factual question primarily within the province of the UCRC, and one which reviewing courts are precluded from inquiring into during these administrative appeals. *Roberts v. Hayes*, 9th Dist. No. 21550, 2003-Ohio-5903, at ¶20, citing *Durgan [v. Ohio Bur. Of Emp. Servs.]* (1996), 110 Ohio App.3d 545, 551, 674 N.E.2d 1208].

Ro-Mai Industries, Inc. v. Weinberg, 2008-Ohio-301, at ¶9.

Just cause for discharge must be predicated upon conduct of the employee. *Morris v. Ohio Bur. of Emp. Serv.* (1993), 90 Ohio App.3d 295, 299, 629 N.E.2d 35. “The determination of what constitutes ‘just cause’ within the context of unemployment compensation * * * involves a concurrent analysis of the legislative purposes of the Unemployment Compensation Act.” *Autozone, Inc. v. Herring*, 9th Dist. App. No. 22824, 2006-Ohio-1039, at ¶14 (citations omitted). “The purpose of the Act is to provide financial assistance to an individual who had worked, was able and willing to work, but was temporarily without employment through no

fault or agreement of his own.” *Id.* (citations and quotations omitted). “Consistent with the purpose of the Act, a discharge is considered for just cause where an employee’s conduct demonstrates some degree of fault.” *Id.* (citations and quotations omitted). Fault includes behavior that displays disregard for the best interests of the employer. *Id.*, citing *Markovich v. Employers Unity, Inc.*, 9th Dist. App. No. 21826, 2004-Ohio-4193, at ¶8.

It is the employee’s burden to prove entitlement to unemployment compensation benefits. *Irvine v. State Unemployment Comp. Bd. of Review*, 19 Ohio St.3d at 17. The employee must provide evidence that his / her discharge was without just cause by demonstrating he / she was without fault in the incident resulting in termination. See *Id.* at 18.

InfoCision terminated Brown for violating its Harassment Free Workplace Policy. The policy focuses on sexual harassment and harassment on the basis of any other protected characteristic. InfoCision documented complaints of harassment, and although not found to rise to the level of sexual harassment, were still considered harassing behavior and Brown was creating a hostile work environment. InfoCision documented the complaints against Brown and the results of its internal investigation of these complaints in Exhibits B and C. These documents are reliable business records that were created to address Brown’s misconduct in connection with work. They had not been created in contemplation of Brown’s request for unemployment benefits. Mr. Spencer was the author of Exhibits B and C and he testified regarding their content. InfoCision’s demonstrated Brown’s behavior had the purpose and effect of unreasonably interfering with co-workers’ performance and was creating an intimidating, hostile, or offensive work environment. Such behavior in the workplace amounts to unreasonable disregard for the company’s best interests, thereby providing ‘just cause’ (a justifiable reason) to terminate employment.

However, the Hearing Officer expressly found Brown “credibly testified” and “credibly denied” the allegations and incidents that lead to his termination. Also, Brown did present evidence contradictory to InfoCision’s evidence in attempt to demonstrate he was not at fault but was being retaliated against.

Upon this conflicting record, the Hearing Officer’s credibility determinations must be given due deference. It is not this Court’s duty to second-guess credibility determinations when reviewing a decision from the UCRC and this Court cannot reverse a Hearing Officer’s

decision simply because reasonable minds might disagree. *Brown v. Sysco Food Services of Cincinnati*, 4th Dist. App. Nos. 09CA3275, 09CA3276, 2009-Ohio-5536, at ¶22.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the decision of the Hearing Officer in this Administrative Appeal is AFFIRMED. This is a final and appealable Order; there is no just cause for delay.

It is so Ordered.



JUDGE PAUL J. GALLAGHER

cc: Attorney Laurel Blum Mazorow
Attorney Kathleen M. Gadd