

FILED  
LUCAS COUNTY

2013 OCT -3 PM 1:27

COMMON PLEAS COURT  
BERNIE QUILTER  
CLERK OF COURTS

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

SCOTT MCDONALD,  
Appellant

vs.

MID CONTINENT HOTEL MANAGEMENT  
LLC, ET AL.,  
Appellees.

Case No. G-4801-CI-201301598-000

**OPINION AND JUDGMENT ENTRY**

JUDGE STACY L COOK

This matter is before the Court upon an appeal of the denial of unemployment benefits, based on a determination that Appellant Scott McDonald ("McDonald") was terminated for just cause from his position with Appellee Mid Continent Hotel Management, LLC ("Mid Continent"). On June 10, 2013, McDonald filed his appellant brief. On July 22, 2013, the Director, Ohio Department of Job and Family Services ("ODJFS") filed its appellee brief. McDonald filed no reply brief. For the reasons that follow, the Court affirms the decision.

**E-JOURNALIZED**

OCT 7 2013

## **I. Procedural History**

McDonald worked for Mid Continent as a room-service server from March 22, 2010 until his separation effective August 1, 2012, based on infractions occurring July 22, 2012. During his employ and prior to the July 22, 2012 incident, McDonald received warnings and write-ups regarding his conduct and poor work performance. Mid Continent has policies that provide for immediate discharge for certain infractions, including the infraction written up for the incident of July 22, 2012, insubordination.

On August 1, 2012, McDonald filed a claim for unemployment benefits with ODJFS. On August 20, 2012, ODJFS disallowed the claim. On September 4, 2012, McDonald appealed that decision. On September 21, 2012, ODJFS affirmed the denial of unemployment benefits. On October 2, 2012, McDonald appealed that decision to the Unemployment Compensation Review Commission ("Commission"). On October 3, 2012, the ODJFS transferred jurisdiction to the Commission.

On October 29, 2012, the Commission held a telephonic hearing on McDonald's claim. McDonald and his witness Robert Ott participated.<sup>1</sup> Mid Continent did not appear for the hearing. On December 7, 2012, the Commission affirmed the denial of unemployment benefits, finding that Mid Continent discharged McDonald for just cause. On December 28, 2012, McDonald requested review of that decision. On January 9, 2013, the Commission disallowed McDonald's request for review.

On February 8, 2013, McDonald filed his notice of appeal to this Court, as provided

---

<sup>1</sup>McDonald also presented Tasha Shuff as a witness, but the hearing officer declined to hear her testimony based on her presence with McDonald as he testified. See Certified Transcript (Mar. 22, 2013), Review Commission File, Transcript of Hearing, 33.

under R.C. 4141.282. On March 22, 2013, ODJFS filed the certified transcript of the record. The parties then filed their briefs.

## **II. Legal Analysis**

### **A. Jurisdiction**

An appeal of unemployment benefits is brought pursuant to R.C. 4141.282. The right to appeal is statutory, and therefore, McDonald must meet statutory requirements for this Court to have proper jurisdiction. See e.g. *Ramsdell v. Ohio Civil Rights Comm.* (1990), 56 Ohio St. 3d 24, 27 ("We have always considered it to be fundamental that when the right to appeal is conferred by statute, the appeal can be perfected only in the mode prescribed by statute.")

Pursuant to R.C. 4141.282, an interested party has thirty days to appeal an adverse decision after written notice from the unemployment compensation review commission of that adverse decision. R.C. 4141.282(A). The Commission issued its final determination as to McDonald's claim on January 9, 2013. Therefore, McDonald's appeal of February 8, 2013 is timely, and this Court has jurisdiction to consider the appeal.

### **B. Issue on Appeal**

The issue before this Court, upon appeal, is whether Mid Continent wrongfully terminated McDonald entitling McDonald to unemployment benefits, or whether Mid Continent terminated McDonald with just cause. "The determination of whether just cause exists necessarily depends upon the unique factual considerations of the particular case." *Tzangas, Plaka & Mannos v. Admin., Ohio Bur. of Empl. Servs.*, 73 Ohio St.3d 694, 698, 653 N.E.2d 1207 (1995), quoting *Irvine v. State, Unemp. Comp. Bd. of Rev.*, 19 Ohio St. 3d 15, 17, 482 N.E.2d 587 (1985)

"Pursuant to R.C. 4141.29(D)(2)(a), no individual may receive benefits if that individual

'has been discharged for just cause in connection with the individual's work.'" *Wegrzyn v. Riverside Mercy Hosp.*, 6th Dist. No. L-11-1144, 2012-Ohio-3185, ¶11. "Just cause" is defined as conduct "which an ordinarily intelligent person would regard as a justifiable reason for discharging an employee. The conduct need not reach the level of misconduct, but there must be some fault on the part of the employee." *Schivelbein v. Riverside Mercy Hosp.*, 6th Dist. No. L-11-1208, 2012-Ohio-3991, ¶14, citing *Angelkovski v. Buckeye Potato Chips Co.*, 11 Ohio App.3d 159, 11 Ohio B. 242, 463 N.E.2d 1280 (10th Dist.1983), paragraph four of the syllabus, overruled on other grounds as stated in *Galluzzo v. Ohio Bur. Of Emp. Servs.*, 2d Dist. App. No. 95-CA-6, 1995 Ohio App. LEXIS 5238, 1995 WL 704193 (Nov. 29, 1995).

### **C. Standard**

In considering McDonald's appeal, this Court "is limited to determining whether the hearing officer's determination is supported by evidence in the record." *Bellevue City Sch. Dist. Bd. of Educ. v. Martin*, 6th Dist. No. H-12-009, 2013-Ohio-2801, ¶11, citing *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Services*, 73 Ohio St.3d 694, 697, 653 N.E.2d 1207 (1995). If competent, credible evidence supports the hearing officer's factual findings, the Court must affirm the determination regarding unemployment benefits. *Bellevue*, ¶11, citing *C.E. Morris v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus. Moreover, the Court must not substitute its own judgment in reviewing the decision, as "[t]he fact that reasonable minds might reach different conclusions is not a basis for reversal[.]" *Irvine*, at 18, citing *Craig v. Bur. of Unemp. Comp.*, 83 Ohio App. 247, 260, 83 N.E.2d 628 (1st Dist.1948).

"The finding and decision of the Bureau of Unemployment Compensation can only be reversed or modified when the court finds they are either unlawful, unreasonable or against the manifest weight of the evidence." *Craig v. Bur. of Unemployment Compensation*, 83 Ohio App.

247, 83 N.E.2d 628 (1st Dist.1948), paragraph three of the syllabus. "Where the board might reasonably decide either way, the courts have no authority to upset the board's decision." *Irvine*, at 18, quoting *Charles Livingston & Sons, Inc. v. Constance*, 115 Ohio App. 437, 438, 185 N.E.2d 655 (1961).

McDonald, as claimant, must demonstrate a right to unemployment benefits. *Bays v. Shenango Co.*, 53 Ohio St.3d 132, 140-141, 559 N.E.2d 740 (1990). Accordingly, he must provide evidence demonstrating his lack of fault in any incident resulting in his termination. *Williams v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 09AP-471, 2009-Ohio-6328, ¶14, citing *Irvine* at 17.

#### **D. Analysis**

In this case, the evidence at hearing demonstrated that Mid Continent disciplined McDonald on separate occasions, including two write-ups for infractions, with the final write-up resulting in termination. The record before the Commission included a copy of McDonald's write-up dated April 11, 2012, his write-up dated July 24, 2012, an email communication regarding his conduct relative to the second write-up, as well as the statement of the manager on duty the night of the incident leading to the second write-up for insubordination. Finally, the record included Mid Continent's policy regarding disciplinary action, providing for immediate termination for insubordination.

In the write-up that led to McDonald's termination, prior disciplinary action for incidents on April 5, 2012, and April 11, 2012 was listed, and McDonald, his supervisor Scott Killingbeck, and Mid Continent's human resources manager Natasha Wedley each signed the document.<sup>2</sup> In

---

<sup>2</sup>Certified Transcript, Director's File, Request to Employer, attachments.

his testimony, McDonald acknowledged receipt of the document, as well as the infractions listed.

McDonald testified at the hearing:

Uh yeah there was a final incident and uh I was discharged, they gave me two write-ups. One was for not collecting trays off of the second floor, was a write-up for that and then they said I was being fired for arguing with a manager over whether or telling her I wasn't going to take glasses up to a room which I did I was just, I spoke to her and told her that it wasn't our policy<sup>3</sup>

Additionally, the record contained an email from Laura Roman to Wedley, dated July 21, 2012, indicating that a guest complained of rude behavior, and that another guest requested glasses for their room and were refused, prompting the guest to call the front desk with the same request. Laura stated that Patti at the desk asked McDonald to deliver the glasses and he initially refused, complying with the request only after "[putting] up a fight about it[.]"<sup>4</sup>

The record also contained a written statement by Patti Kain, a Mid Continent manager, indicating that she asked McDonald to deliver items to a guest's room and he refused.<sup>5</sup> Additionally, prior infractions were demonstrated by the first write-up, signed by McDonald, for various infractions on April 11, 2012, including refusing to mop when asked, walking out the fire doors to get food from his girlfriend, eating in the kitchen during an unauthorized break, and ringing the kitchen buzzer with a co-worker when there were no food orders, resulting in complaints by guests of a disturbance.<sup>6</sup>

Finally, the record included excerpts from Mid Continent's policy, identifying conduct that may result in immediate discharge without warning. The actionable conduct listed in the

---

<sup>3</sup>Certified Transcript, Transcript of Hearing, 7-8.

<sup>4</sup>Certified Transcript, Director's File, Request to Employer, attachments.

<sup>5</sup>Id.

<sup>6</sup>Id.

policy includes:

**11. Insubordination:** insubordination, willful disregards or disrespect towards a supervisor or representative of management or failure to obey or to perform work as required or assigned. If you disagree with your supervisor's request, always follow the instructions given at the time and discuss it later in private.<sup>7</sup>

Mid Continent indicated it terminated McDonald for insubordination, having previously giving McDonald write-ups for his conduct and poor work performance. McDonald, however, argues that his work performance was not the issue, he was not insubordinate, and that his supervisor harassed him for being a felon and was looking for ways to fire him. His testimony at the hearing contradicts this argument, however, as McDonald admits he argued initially, rather than follow the instructions given and reserve discussion for a later time, as required in the policy.

McDonald testified as follows:

Q: Alright I, I guess I just want to find out, I really just have two questions, were you given an directive by a manager, supervisor/supervisor to take the um gl, plate glasses that were requested up to the guest?

A: Yes.

Q: Were you given that directive?

A: Oh yes, yes and I did it (inaudible).

Q: Well what about all of this issue of back, the back and forth because it, it indicates in here that you refused to do that.

A: No I, I never refused. I was just letting her know that it was against company policy to do it and I told her you know I'll do it if you're telling me to do it but I'm just letting yo know that if I get in trouble I'm going to tell them that you ordered me to do it.<sup>8</sup>

In support of his harassment argument, McDonald also testified that Killingbeck told his girlfriend, who worked for Mid Continent as a bar tender, that "he wanted to fire me, he was

---

<sup>7</sup>Id.

<sup>8</sup>Transcript, 11.

going to fire me and then he was going to fire her you know so he had it out for me anyhow[.]"<sup>9</sup> Furthermore, McDonald testified that the manager on duty, Patti Kain, would testify that "whenever I'm asked to do something I do it. She's the one that asked me if I wanted her to take up the glasses."<sup>10</sup> The written statement of Kain provided by Mid Continent, however, refutes McDonald's assertion as to how Kain would testify.<sup>11</sup>

Only McDonald presented testimony at hearing, including his own and that of his co-worker, Robert Ott. McDonald does not dispute that he argued with his supervisor regarding the incident that led to his termination, but instead believes that his termination resulted from unfair application of company policy. Mid Continent was not required to appear and provide evidence at the hearing, however. See e.g. *Milyo v. Bd. of Rev., Ohio Bur. of Emp. Servs.*, 8th Dist. No. 60841, 1992 Ohio App. LEXIS 3921 (July 30, 1992) (no need for employer testimony at hearing where claimant's own testimony provided sufficient evidence of his insubordinate conduct.") Moreover, in an unemployment appeal, the employer does not need to demonstrate that rules or policies have been fairly applied to other employees.

In *Williams v. Ohio Dept. of Job & Family Servs.*, 129 Ohio St.3d 332, 2011-Ohio-2897, 951 N.E.2d 1031, the Ohio Supreme Court reviewed the just cause standard applicable where an employee raised a fairness argument regarding treatment under a company policy. In *Williams*, the employee received a promotion and acknowledged her employer's requirement that she become certified as a licensed social worker within 15 months of promotion. After the employee

---

<sup>9</sup>Certified Transcript, Transcript of Hearing, 12.

<sup>10</sup>Id., 15.

<sup>11</sup>Certified Transcript, Director's File, Request to Employer, attachments.



failed to receive her certification, she was terminated for cause. On appeal, the employee argued that the policy requiring certification was not uniformly or fairly applied by the employer, and therefore her termination was without just cause. In finding that just cause existed, the Court held:

'This court's review of the fairness of a company policy is necessarily limited to a determination of whether the employee received notice of the policy; whether the policy could be understood by the average person; and whether there was a rational basis for the policy. The issue of whether the policy was fairly applied relates to whether the policy was applied to some individuals but not others.' \* \* \* We have never adopted such a standard, nor is it necessary to do so in this case. 2011-Ohio-2897, ¶28-29, quoting *Shaffer v. Amer. Sickle Cell Anemia Assn.*, 8th Dist. No. 50127, 1986 Ohio App. LEXIS 7116 (Jun. 12 1986).

At hearing, McDonald offered no evidence demonstrating either that he never received notice of the policy, or that he did not understand what was required of him under the policy. There was also no evidence that the policy lacked a rational basis. Instead, McDonald seems to argue that he was justified in disregarding the policy, insisting that Patti Kain supported his conduct while failing to refute or explain Kain's written statement to the contrary. Simply put, McDonald's own testimony demonstrates he argued with his supervisor after receiving direction rather than complete the task assigned as required under the policy, and that McDonald had been previously disciplined for failing to follow the rules.

The Commission heard the testimony of McDonald and Ott, and reviewed the documentation submitted by Mid Continent, concluding that McDonald was terminated for just cause. Specifically, the Commission stated:


The evidence presented in this matter establishes that [McDonald] received a final warning and suspension for insubordination and a second final warning for poor work performance. In the final incident, [McDonald] refused to deliver glasses to a guest as directed by two different managers. Under the evidence presented in this matter, the Hearing Officer finds that [McDonald's] actions constitute

insubordination. \* \* \*<sup>12</sup>

This Court's role in reviewing the determination regarding McDonald's entitlement to benefits is limited to consideration of whether that determination is supported by the evidence in the record. *Tzangas* at 697. Furthermore, McDonald bears the burden of demonstrating his lack of fault related to the final incident leading to his termination. *Williams*, 2009-Ohio-6328, ¶14, citing *Irvine* at 17. Upon careful consideration of the record, as well as the argument of the parties, this Court finds that the determination is supported by the record evidence, and that the Commission did not abuse its discretion in finding McDonald was terminated for just cause based on insubordination.

JUDGMENT ENTRY

It is therefore ORDERED that the Unemployment Compensation Review Commission's final decision, upholding the denial of Scott McDonald's claim for unemployment benefits and disallowing review, is hereby AFFIRMED.

  
JUDGE STACY L COOK

---

<sup>12</sup>Certified Transcript, Review Commission File, Decision, 4.