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CINDY A. HOFNER

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

TL Industries, Inc.,  
Appellant,

Case No. 13 CV 682

v.

JUDGE REEVE KELSEY

Carl Kuhn, et al.,  
Appellees.

JUDGMENT ENTRY

This case is before the court on TL Industries, Inc.'s ("TLI") appeal of appellee Director, Ohio Department of Job and Family Services' ("Director") determination that appellee Carl Kuhn was terminated from his job at TLI without just cause and is eligible for unemployment benefits. TLI filed its brief on March 4, 2014. The Director filed his response on April 1, 2014, and Mr. Kuhn filed his response on April 15, 2014. TLI did not file a reply. The court will now decide this matter.

**Facts**

Mr. Kuhn was employed by TLI from February 21, 2005, to April 26, 2013. Application Summary, Director's File, Certified Record of the Proceedings. On April 20, 2013, TLI management received an anonymous tip about an employee using the internet for personal purposes during work hours. TLI's July 23, 2013 appeal of initial determination, Director's File, Certified Record of the Proceedings. Mr. Kuhn's internet browsing history was pulled, and based on the extensive number of non-work-related

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site visits, TLI management decided to terminate his employment. *Id.* at Exhibit 2 and Employee Warning Report.

At a meeting on April 26, 2013, Mr. Kuhn was presented with an employee warning report that outlined TLI's complaint against him. It stated:

Based on an anonymous tip received by management, we reviewed the browsing history on the personal computer at your workstation (history attached)

The history showed that you spend extensive time on the internet reviewing non-work related information during work hours.

This is both a major offense and intolerable.

Employee Warning Report, TLI's July 23, 2013 appeal of initial determination, Director's File, Certified Record of the Proceedings. Mr. Kuhn checked a preprinted box on the report that read, "I concur with the company's statement." *Id.* The human resources manager at the meeting noted in her file that Mr. Kuhn appeared very upset, agreed that TLI's data was accurate, and apologized and asked what he could do to save his job. Human Resources note, TLI's July 23, 2013 appeal of initial determination, Director's File, Certified Record of the Proceedings. The browsing history report upon which Mr. Kuhn's termination was based included data from April 11 and 12, 2013, and a portion of the activity from April 15, 2013. Exhibit 2 to TLI's July 23, 2013 appeal of initial determination, Director's File, Certified Record of the Proceedings. Though the browsing history report covers six pages<sup>1</sup>, it represents time periods totaling

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<sup>1</sup> There are references throughout the record to Mr. Kuhn's browsing history being more than 30 pages long, but only six pages – covering all activity for April 11 and 12 and partial activity for April 15 –

approximately 110 minutes. *Id.* The report does not indicate how long Mr. Kuhn stayed on each webpage; it only shows the time at which he visited the webpage.

TLI does not have a written computer usage policy. Its employee handbook includes a code of conduct and disciplinary procedures that defines major and minor disciplinary infractions and outlines TLI's progressive discipline system. Exhibit 1 to TLI's July 23, 2013 appeal of initial determination, Director's File, Certified Record of the Proceedings. Regarding minor offenses, the handbook states,

A minor offense is one which in a single instance usually does not have serious effects on the safety or efficient operation of our facility \* \* \*. Minor offenses are not in and of themselves cause for immediate discharge or suspension \* \* \*.

The following list of examples of minor offenses is not intended to be all inclusive, nor does it suggest that these particular violations will in every case be judged to be only minor in nature:

\* \* \*

12. Loafing or any other abuse of time during work.

\* \* \*

16. Transacting personal affairs during working hours

\* \* \*.

*Id.*

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were used as the basis of Mr. Kuhn's termination and the subsequent unemployment compensation decisions.

As to major offenses, the handbook states,

A major offense is one which may directly and seriously affect the safety or efficient operation of our facility and is contrary to accepted business practices. A major offense may differ in kind or merely in degree from a minor offense \* \* \*.

The seriousness of a first major offense may vary greatly from case to case. Although suspension is the most likely penalty, discharge may be warranted depending on circumstances.

*Id.*

The company's progressive discipline policy for minor offenses calls for oral and written warnings, followed by a second written warning and one-day suspension. *Id.* For major offenses, the policy states that suspension is the most likely outcome for a first major offense, but that termination might be warranted, and a written warning might be considered if significant mitigating circumstances exist. *Id.*

TLI called Mr. Kuhn's use of the internet during work time abuse of time during work and conducting personal business during working hours. Request to Employer for Separation Information, Director's File, Certified Record of the Proceedings. Both offenses are listed on the non-exclusive list of minor offenses in the employee handbook. Exhibit 1 to TLI's July 23, 2013 appeal of initial determination, Director's File, Certified Record of the Proceedings. Although both are minor offenses, TLI believed the frequency and pervasiveness of Mr. Kuhn's internet usage equaled a

major offense warranting immediate discharge. Exhibit 2 to TLI's July 23, 2013 appeal of initial determination, Director's File, Certified Record of the Proceedings.

At the time of his discharge, Mr. Kuhn was told that he had the right to appeal his termination decision to the company within five days, but that it was unlikely the termination decision would be overturned. *Id.*; and Human Resources note, TLI's July 23, 2013 appeal of initial determination, Director's File, Certified Record of the Proceedings. He was also told that he would not qualify for unemployment benefits because he was being terminated for cause. Human Resources note, TLI's July 23, 2013 appeal of initial determination, Director's File, Certified Record of the Proceedings. Mr. Kuhn did not appeal the termination and applied for unemployment benefits on June 11, 2013.

The Director allowed Mr. Kuhn's application for unemployment compensation on July 2, 2013. Determination of Unemployment Compensation Benefits, Director's File, Certified Record of the Proceedings. TLI requested a redetermination on July 23, 2013. TLI's July 23, 2013 appeal of initial determination, Director's File, Certified Record of the Proceedings. A redetermination decision was issued on August 14, 2013. The Director found that Mr. Kuhn was fired without just cause and was entitled to benefits. Director's Redetermination, Director's File, Certified Record of the Proceedings. TLI appealed the redetermination on September 2, 2013, and the Director transferred the case to the Unemployment Compensation Review Commission ("Review Commission"). Transfer to UC Review Commission, Director's File, Certified Record of the Proceedings. A hearing on the issue of whether Mr. Kuhn was fired for just cause was held on September 24, 2013. Transcript of Testimony,

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Review Commission File, Certified Record of the Proceedings. On September 27, 2013, the officer issued his decision finding that TLI's actions were inconsistent with its written disciplinary policy and that Mr. Kuhn was fired without just cause. Hearing officer decision, Review Commission File, Certified Record of the Proceedings. TLI requested a Review Commission review on October 18, 2013, which was denied on November 6, 2013. Review request, Review Commission File, Certified Record of the Proceedings; and Decision Disallowing Request for Review, Review Commission File, Certified Record of the Proceedings. This appeal followed.

#### Issue and Analysis

The only issue before the court is whether the hearing officer's determination that Mr. Kuhn was terminated without just cause is supported by some competent, credible evidence.

The role of the court in an unemployment compensation appeal is limited to determining whether the Review Commission's decision was unlawful, unreasonable, or against the manifest weight of the evidence. It is only under one of these criteria that the court shall reverse, vacate or modify the decision. Otherwise, the Review Commission's determination must be upheld. *Tzangas, Plakas & Mannos v. Admr., Ohio Bur. Emp. Serv.*, 73 Ohio St.3d 694, 696, 653 N.E.2d 1207 (1995); and *Irvine v. Unemp. Comp. Bd. of Rev.*, 19 Ohio St.3d 15, 17-18, 482 N.E.2d 587 (1985). Under R.C. 4141.282(H), all courts sitting in review of the Review Commission must apply the same standard of review.

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The Review Commission's function as trier of fact remains intact. *Tzangas* at 697. Where factual matters, the credibility of witnesses, and the weight of conflicting evidence are at issue, the court should defer to the Review Commission's determination. *Brown-Brockmeyer Co. v. Roach*, 148 Ohio St. 511, 518, 76 N.E.2d 79 (1947); and *McCarthy v. Connectronics Corp.*, 183 Ohio App.3d 248, 2009-Ohio-3392, 916 N.E.2d 871 (6th Dist.), ¶ 10. The trier of fact – the Review Commission and its hearing officer – is in the best position to judge such issues. Therefore, as long as there is competent, credible evidence in the record that would support the decision of the Review Commission, its decision must stand. *Irvine*, 19 Ohio St.3d at 17-18. Though the determination of the facts is a function for the Review Commission, the determination of the legal import of the facts is a matter of law for the court. *Ball v. Ohio Bur. Emp. Servs.*, 6th Dist. Sandusky No. S-98-037, 1998 Ohio App. LEXIS 6323, 7 (Dec. 31, 1998), citing *Opara v. Carnegie Textile Co.*, 26 Ohio App.3d 103, 106, 498 N.E.2d 485 (8th Dist.1985); and R.C. 4141.28(O)(1); and *Lombardo v. Admr.*, 119 Ohio App.3d 217, 221, 695 N.E.2d 11 (6th Dist.1997).

A decision by the Review Commission is against the manifest weight of the evidence only if the decision is, "\* \* \* so manifestly contrary to the natural and reasonable inferences to be drawn from the evidence as to produce a result in complete violation of substantial justice \* \* \*." *Sambunjak v. Bd. of Rev., Ohio Bur. of Emp. Serv.*, 14 Ohio App.3d 432, 433, 471 N.E.2d 835 (8th Dist.1984). Where credible evidence exists, the fact that reasonable minds may differ as to factual conclusions is not a basis upon which the Review Commission may be reversed. *Tzangas*, 73 Ohio St.3d at 697.

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"Just cause" is ""\* \* \* that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act." *Irvine*, 19 Ohio St.3d at 17, quoting *Peyton v. Sun TV. & Appliances*, 44 Ohio App.2d 10, 12, 335 N.E.2d 751 (1975). Whether or not just cause exists depends on the factual considerations of each particular case. *Id.* A finding of fault is essential to a just cause determination because the purpose of the Unemployment Compensation Act is to provide subsistence compensation to workers who become involuntarily separated from their work through no fault of their own. *Salzl v. Gibson Greeting Cards*, 61 Ohio St. 2d 35, 39, 399 N.E.2d 76 (1980); and *Irvine*, 19 Ohio St.3d at 17. The employee bears the burden of demonstrating that he is entitled to unemployment benefits. *Irvine*, 19 Ohio St.3d at 17.

After a thorough review of the record, the court cannot find that the hearing officer's decision was unlawful, unreasonable, or against the manifest weight of the evidence. The hearing officer determined that the infractions that formed the basis for Mr. Kuhn's termination were specifically listed in TLI's handbook as being minor infractions and that Mr. Kuhn was never warned about his behavior or suspended under TLI's progressive discipline policy. Hearing officer decision, Review Commission File, Certified Record of the Proceedings. The hearing officer also found credible Mr. Kuhn's report that his infractions were minor and did not affect his work. *Id.* The hearing officer concluded that Mr. Kuhn's behavior did not rise to the level of a major infraction justifying his immediate termination, and he was terminated without just cause. *Id.* The fact that the circumstances surrounding Mr. Kuhn's termination could have been interpreted differently does not allow the court to reverse a hearing officer's decision. *Irvine*, 19 Ohio St.3d at 18. There is some competent, credible evidence supporting the



hearing officer's finding that Mr. Kuhn's internet usage did not rise to the level of a major offense justifying termination, so the court cannot over turn the Review Commission's decision.

TLI relies on *Marano v. Duramax Marine, LLC*, 5th Dist. Stark No. 2011CA00081, 2011-Ohio-6147, in support of its contention misuse of company computers is just cause for termination. *Marano* is distinguishable. In that case, the employer had a company policy that specifically stated that employees who misused company computers were subject to discipline up to discharge. *Id.* at ¶ 4. Here, the policies at issue forbade loafing and abusing company time. Neither of those terms is defined in the employee handbook, nor does the company have a policy specifically relating to computer use. The rationale of the *Marano* court is inapplicable here and does not convince the court that the Review Commission's decision was unlawful, unreasonable, or against the manifest weight of the evidence.

Because the record contains competent, credible evidence supporting the hearing officer's decision that Mr. Kuhn was terminated without just cause, and the decision was not unlawful, unreasonable, or against the manifest weight of the evidence, TLI's appeal will be denied.

**IT IS ORDERED** that appellant TL Industries, Inc.'s appeal is denied.

**IT IS ORDERED** that the decision of the Unemployment Compensation


Review Commission is affirmed.  
Costs to appellant.

Judgment for court costs  
rendered to Wood County

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6/17/14  
Date

  
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Judge Reeve Kelsey

Clerk to furnish copy to counsel of  
record and unrepresented parties