89540580

6

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CHARLES W. MCINTIRE, IV
Plaintiff

CUYAHOGA COUNTY, ET AL.
Defendant

Case No: CV-14-832199

Judge: BRENDAN J SHEEHAN

JOURNAL ENTRY

96 DISP.OTHER - FINAL

OPINION AND JUDGMENT ENTRY. O.S.J.
COURT COST ASSESSED TO THE PLAINTIFF(S).
PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

Judge Signature Date

FILED
2015 JUN -2 P 12: 09
CLERK OF COURTS
CUYAHOGA COUNTY

- 96
06/01/2015

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CHARLES W. McINTIRE, IV, Appellant, v. CUYAHOGA COUNTY, *et al.*, Appellees.	)	CASE NO. CV 14 832199 JUDGE BRENDAN J. SHEEHAN **OPINION AND JUDGMENT ENTRY**

This case is an administrative appeal from the Ohio Unemployment Compensation Review Commission ("Review Commission") pursuant to R.C. §4141.282. The Review Commission found that Charles W. McIntire, IV ("Appellant") was discharged from employment with Cuyahoga County (the "County") for just cause in connection with Appellant's work performance. Appellant contends that his discharge was without just cause.

Appellant was employed by the County from January 2, 1996 through May 8, 2013. In early 2012, Appellant was having difficulties with his work computer. He was given a new hard drive in May 2012. In September 2012, Appellant again had difficulties with his computer. The information technology staff person who examined Appellant's hard drive discovered personal music files on the computer in violation of County policy. It appears that Appellant was given a verbal warning about placing personal files on his work computer although Appellant denied knowledge of the files.

In November 2012, Appellant again had problems with his computer and a review of the hard drive revealed unauthorized music and Internet access software, which was uninstalled by the information technology staff member. Within days, Appellant again complained of problems

with his computer. At this time, Appellant's hard drive was copied onto another computer. The copy of Appellant's computer was reviewed an approximately 3000 files of music, photos and movies were discovered. Consistent with the County's progressive discipline policy, Appellant was issued a 3-day suspension on February 21, 2013.

Thereafter, while preparing Appellant's computer for use by another employee, the information technology staff member noticed that Appellant's hard drive copied much faster than it had previously copied. The information technology staff member examined both Appellant's current drive and the preserved copy of Appellant's drive to discover that all of the unauthorized files had been deleted from Appellant's computer at some time between December 2012 and February 2013. Only then did the information technology staff member review the archived drive contents to find personal sexually explicit photos among Appellant's family photos, videos and music files had been previously stored on Appellant's computer. Evidence provided at the hearing established that at least one of the sexually explicit photos had been sent to Appellant by the photo's subject via email or text.

The standard of review this Court must apply to appeals of unemployment compensation benefits determinations is set forth in R.C. §4141.282(H):

> The court shall hear the appeal on the certified record provided by the commission. If the court finds that the decision of the commission was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse, vacate, or modify the decision, or remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission.

The Court's power to review agency decisions is, therefore, strictly limited. The Ohio Supreme Court has further explained the limited power of a reviewing court in stating:

> Such courts are not permitted to make factual findings or to determine the credibility of witnesses. *Hall v. American Brake Shoe Co.* (1968), 13 Ohio St.2d 11, 13, 233 N.E.2d 582 [42 O.O.2d 6]. The duty or authority of the courts is to determine whether the decision of the board is supported by the evidence in the record. *Kilgore v. Bd. of Review* (1965), 2 Ohio App.2d 69, 71, 206 N.E.2d 423 [31 O.O.2d 108]. The fact that reasonable minds might reach different conclusions is not a basis for the reversal of the board's decision. *Craig v. Bur. of Unemp. Comp.* (1948), 83 Ohio App. 247, 260, 83 N.E.2d 628 [38 O.O. 356]. Moreover, "[o]ur statutes on appeals from such decisions [of the board] are so designed and worded as to leave undisturbed the board's decisions on close questions. Where the board might reasonably decide either way, the courts have no authority to upset the board's decision." *Charles Livingston & Sons, Inc. v. Constance* (1961), 115 Ohio App. 437, 438, 185 N.E.2d 655 [21 O.O.2d 65].

Irvine v. State Unemploy. Comp. Bd. of Review, 19 Ohio St.3d 15, 17-18, 482 N.E.2d 587 (1985).

Appellees maintain that the current case is virtually identical to *Barksdale v. State*, 8th Dist. No. 93711, 2010-Ohio-267. In *Barksdale*, an employee was denied unemployment compensation because he was terminated for repeatedly accessing pornographic websites from his work computer. Clearly, the facts in *Barksdale* are not similar to the current case.

There is no evidence that Appellant accessed pornographic websites while at work. The only allegations are that personal files of his were stored on a work computer for a short period of time, were deleted by Appellant and were not stored again by Appellant after their discovery.

A reasonable review of the circumstances raises the unanswered question of how the files got onto Appellant's computer. The evidence demonstrates that the files were created and/or stored on Appellant's smartphone. The most likely explanation is that Appellant's smartphone was plugged into his computer and the files were uploaded to the computer intentionally or unintentionally.

Personal electronic devices are common in workplaces across the world today with available technology outpacing both employers' and employees' ability to address workplace security issues. While employers often focus on photographic and recording abilities of smart phones, file transfers between smart phones and work computers are rarely addressed. There is no evidence that any discussions were had with Appellant about securing his phone from synching or otherwise uploading to his work computer. It is clear, however, that Appellant changed his practices after December when no additional files from his phone were transferred to his computer.

The Court finds that the underlying evidence was insufficient to establish, as Appellee consistently asserted, that Appellant was at fault for conduct sufficient to warrant his termination. There appears to have been one act, intentional or inadvertent, that transferred personal files to his computer. Upon learning that the files were there and were not permissible, Appellant deleted the files and did not replace them thereafter. Under these narrow circumstances, the Court finds that the evidence in the record does not support the decision of the board.

REVERSED.

IT IS SO ORDERED.

JUDGE BRENDAN J. SHEEHAN

Dated: 6/1/15

CERTIFICATE OF SERVICE

A copy of the foregoing was served by mail this 18st day of June, 2015 on the following:

Lester S. Potash
25700 Science Park Drive
Beachwood, OH 44122

Laurence R. Snyder
11th Floor, State Office Building
615 W. Superior Avenue
Cleveland, OH 44113

Ruchi V. Asher
2079 East 9th Street
Cleveland, OH 44115