

JUN 11 2015

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PORTAGE COUNTY, OHIO

IN THE COURT OF COMMON PLEAS

PORTAGE COUNTY, OHIO

THEODORE T. KOST)	CASE NO. 20014 CV 00128
)	
Appellant)	JUDGE LAURIE J. PITTMAN
)	
--vs--)	<u>ORDER AND JOURNAL ENTRY</u>
)	
DIRECTOR, OFJFS, et al.,)	
)	
Appellee)	

This matter is before the Court upon Theodore T Kost's appeal (Claimant or Appellant) of a decision by the Ohio Unemployment Compensation Review Commission (Commission) denying him unemployment compensation benefits. Appellee is Director, OFJFS and Atwater Nursery, Inc. is Employer. Both parties have filed merit briefs and Appellant has filed a reply brief.

A. STATEMENT OF THE FACTS

Appellant was president and co-owner of Atwater Nursery from 2004 until May, 2012 when he suffered a heart attack. At that time he stopped reporting to work and did not return to the nursery until March, 2013, when he was terminated by his brother Timothy Kost, vice president and co-owner of the business. As determined by the Commission "[C]laimant gave the employer no indication regarding his possible return to work." (Decision at Reasoning at 4) It is undisputed that Appellant was compensated by weekly paychecks picked up by his wife the entire time he was off work.

B. STATEMENT OF THE CASE

On 8/26/13, Appellee issued an initial determination holding that Claimant was "totally unemployed" due to lack of work and allowed his application for benefits. Employer timely appealed and in a redetermination decision issued on 10/3/13 the Director affirmed the decision in its entirety. Employer timely appealed the Director's redetermination decision and on 10/21/13 the Director transferred jurisdiction to the Commission pursuant to R.C. 4141.281(B). On 11/20/13 and 12/6/13 Commission Hearing Officer Shane Griest conducted telephonic evidentiary hearings. By decision

issued 12/16/13 Hearing Officer Griest reversed the Director's redetermination decision concluding that Claimant was ineligible for benefits, Claimant timely requested further review by the Commission and on 1/2/14 his request was disallowed. Claimant thereafter appealed to this Court.

C. STANDARD OF REVIEW

In the case sub judice this Court adheres to the standard of review set forth in R.C. 4141.282 (H) which provides in pertinent part:

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.

D. ASSIGNMENTS OF ERROR

Appellant raises the following three assignments of error:

- I. The finding that Claimant was discharged for just cause is not supported by the evidence.
- II. The Commission erred in failing to recognize the fact that Claimant was paid on a weekly basis with checks picked up by either Claimant's wife and/or Claimant who described Claimant's ongoing condition from his heart attack.
- III. The Decision is against the manifest weight of the evidence.

E. DISCUSSION AND LAW

Appellant centers his argument on the claim that he was physically "locked out" when he returned to the nursery after his convalescence, thus preventing him from working. This argument is inapposite because "lockout" is a word of art that applies only to a labor dispute/collective bargaining scenario. This court has discussed this issue as follows:

Our Ohio Supreme Court has defined lockout 'as...a cessation of the furnishing of work to employees or a withholding of work from them in an effort to get for (*sic*) the employer more desirable terms.' See Bays v. Shenango Co. (1990), 53 Ohio St. 3d 132, 133, citations omitted. Bays emphasized that a lockout is not confined or restricted to an actual physical closing of the place of employment but can arise

from circumstances surrounding the subject labor dispute as in Zanesville Rapid Transit, Inc v. Bailey (1958), 168 Ohio St. 351.

(Rotek, Inc v. Director, ODJFS, et al., Case No. 2013 CV 868, 1/16/14, p. 6)

Additionally, “lockout” contemplates a breakdown in negotiations producing an impasse between an employer and employees. See Rotek at 7.

Appellant also relies upon a claimed disparity in earnings between him and his brother for tax year 2013 and has attached their respective W-2 forms to his brief as “Exhibit A.” As pointed out by Appellee these payroll records were not made part of the certified record pursuant to R.C. 4141.282(H) thus making them “off-limits” insofar as this court is concerned. (See Abrams-Rodkey v. Summit Cty. Children Serv., 163 Ohio App.3d 1, 2005-Ohio-4359, Holding 4, “employees could not offer new evidence on appeal.”)

F. CONCLUSION

Upon review of the record of proceedings and briefs presented herein, this Court finds that the Commission’s decision that “Claimant’s abandonment of his position constitutes fault that will serve to suspend his connection with work” thus rendering him ineligible for benefits is supported by the record. This Court finds that the decision below is lawful and determines that Appellant’s appeal is not well taken.

IT IS THEREFORE ORDERED that the appeal of Appellant Theodore T Kost is denied and the decision of the Commission be and hereby is affirmed.

Costs to be taxed to Appellant.

The Clerk is instructed to serve upon all parties or their counsel notice of this judgment and its date of entry upon the journal in accordance with Civ.R. 58(B).


LAURIE KUTTMAN, JUDGE
COURT OF COMMON PLEAS

Cc: Frank J Cimino, Esq.
Cc: Susan M Sheffield, Esq.