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LUCAS COUNTY

2015 JUN 22 P 2: 15

COMMON PLEAS COURT  
BERNIE QUILTER  
CLERK OF COURTS

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

Community ISP, Inc.

Case No. CI14-3888

Appellant,

Judge James D. Bates

vs.

Erin M. Bernthisel, et al.,

**OPINION AND JUDGMENT ENTRY**

Appellees.

\* \* \* \* \*

This is an appeal from a decision of the Ohio Unemployment Compensation Review Commission (hereinafter "the commission"), mailed August 20, 2014, which affirmed the hearing officer's decision to grant appellee Erin M. Bernthisel unemployment compensation. Upon a review of the parties' memoranda, the record of the administrative proceedings, and the applicable law, the commission's decision is affirmed for the reasons that follow.

## **I. ASSIGNMENT OF ERROR**

"The Hearing Officer abused his discretion in finding that Erin Bernthisel was discharged without just cause.

"1.A. Erin Bernthisel voluntarily resigned her position by failing to return to work.

"2.A. If Erin Bernthisel's voluntary resignation by failing to return to work is construed as her reaction to a notice of termination, that termination was with just cause because, as the Administrative Assistant to the Employer's Chief Executive Officer, her lies and related breaches of trust made impossible her continued employment in her position."

## **II. STATEMENT OF FACTS**

Bernthisel was employed by appellant, Community ISP, Inc. ("Community ISP"), as an administrative assistant to the CEO, Jeff Klingshirn, from November 2012 to March 2014. The parties dispute whether Bernthisel quit, or was terminated from her position. It is undisputed that, after finding out that Bernthisel accessed phone calls between Klingshirn and the company's controller, Kim Grear, as well as two of Grear's voicemails,<sup>1</sup> Klingshirn changed all of Bernthisel's company passwords. Then, on Saturday, March 29, 2014, Bernthisel contacted Klingshirn by telephone to find out why her passwords had been changed. During this conversation, it is undisputed that Klingshirn suggest Bernthisel resign, and that a further meeting was suggested for Monday, but Bernthisel choose to have the meeting on Sunday, March 30, 2014. However, the parties disagree on how Bernthisel's employment was eventually concluded.

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<sup>1</sup>Bernthisel has testified that, although she may have accessed more than one phone call, that was merely to find the one phone call for which she was searching.

According to Klingshirn, the telephone conversation ended with Bernthisel resigning, and Klingshirn and the company HR manager, Ann Clarkson, at the Sunday meeting, presented Bernthisel with a resignation letter, but she refused to sign the letter. Regardless, according to Klingshirn and Clarkson, it was understood that Bernthisel resigned, and she was not fired. Bernthisel, on the other hand, testified, that during the Sunday meeting, when she refused to sign the resignation letter, she was terminated.

On March 31, 2014, Bernthisel applied for unemployment benefits. The application was disallowed on April 16, 2014. Bernthisel appealed this decision and that determination was affirmed in a Director's Redetermination issued by the Ohio Department of Job and Family Services ("ODJFS") on May 1, 2014. Bernthisel appealed the Director's Redetermination and the ODJFS transferred jurisdiction to the commission. A telephone hearing was held with hearing officer Charles Kohler. At the hearing, Bernthisel, Klingshirn, Clarkson, and Gear, as well as two additional employees of appellant, Dan Illausky and Chad Emmenecker, testified. The hearing officer then issued a decision reversing the Director's Redetermination after finding that Bernthisel had been discharged without cause, and was therefore entitled to unemployment compensation. Appellant filed a Request for Review to the commission, which was allowed. The commission affirmed the hearing officer's decision in a decision mailed August 20, 2014. Appellant then appealed that decision to this court. Appellant and ODJFS have filed their briefs and the appeal is now before the court for determination.

### **III. LAW AND APPLICABLE DISCUSSION**

A party may appeal a decision of the review commission to the appropriate court of common

pleas. R.C. 4141.282(A). The review commission's decision can be reversed only if it was "unlawful, unreasonable, or against the manifest weight of the evidence." R.C. 4141.282(H). *Also, see, Lombardo v. Ohio Bur. of Emp. Servs.*, 119 Ohio App.3d 217, 220, 695 N.E.2d 11 (6th Dist.1997). "In reviewing the commission's decision, an appellate court has the duty to determine whether the decision is supported by the evidence in the record; however, it is not permitted to make factual findings or determine the credibility of witnesses. \*\*\* A reviewing court, whether it be the common pleas court or the Ohio Supreme Court, may only overturn the commission's decision if it was 'unlawful, unreasonable, or against the manifest weight of the evidence.'" *Stoll v. Owens Brockway Glass Container, Inc.*, 6th Dist. No. L-02-1049, 2002-Ohio-3822 (citations omitted).

The first issue before the court is whether Bernthisel quit or was fired. The hearing officer made a factual determination that Bernthisel was fired. This court is not permitted to weigh the evidence or substitute its judgment with respect to factual determinations. *Elliott v. Bedsole Transp., Inc.*, 6th Dist. No. L-11-1004, 2011-Ohio-3232, ¶ 12. Determinations that are supported by some competent, credible evidence will not be reversed. *Ball v. Ohio Bur. Emp. Servs.*, 6th Dist. No. S-98-037, 1998 Ohio App. LEXIS 6323 (December 31, 1998), citing *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578, at syllabus. Bernthisel has testified that, at the meeting on March 30, 2014, when she refused to sign the resignation letter, Klingshirn responded that she would be terminated, and that when she requested a copy of the termination letter, Clarkson stated that it would be mailed to her. There is also testimony that, on that same date, she texted Emmenecker and told him that she had been fired. Although there is conflicting evidence in the record, the hearing officer's finding that Bernthisel was terminated is supported by competent, credible evidence.

The next issue before the court is whether Bernthisel was discharged for cause. A person is

not entitled to unemployment benefits in Ohio if it is found that "[t]he individual quit work without just cause or has been discharged for just cause in connection with the individual's work \*\*\*." R.C. 4141.29(D)(2)(a). "'Just cause' is 'conduct that would lead a person of ordinary intelligence to conclude the surrounding circumstances justified the employee's discharge.' An employee's conduct need not rise to the level of misconduct for there to be just cause, but there must be some fault by the employee." *McCarthy v. Connectronics Corp.*, 183 Ohio App.3d 248, 2009-Ohio-3392, 916 N.E.2d 871, ¶ 13 (6th Dist.) (citations omitted). The Sixth District Court of Appeals has stated that "[i]n just cause determinations, what matters is not whether the employee technically violated some company rule, but whether the employee, by her actions, demonstrated an unreasonable disregard for her employer's best interest." *McCarthy*, at ¶ 18.

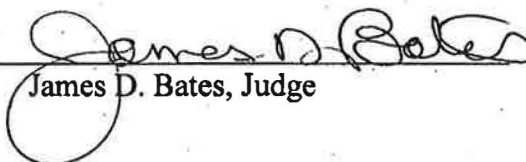
With regard to a just cause determination, the hearing officer found that there was no evidence that Bernthisel had ever been told that there were some recorded telephone calls she was not permitted to access, nor was there any evidence that Bernthisel used any information improperly, or that her actions were harmful to the employer's business. Community ISP contends that a termination would have been with just cause due to Bernthisel's "breach of security, terrible judgment, and deception." Community ISP further contends that Bernthisel's actions were harmful to the company as she betrayed the company's trust and abused her position to obtain access to confidential information, and then lied about it. Bernthisel has testified that listening to phone conversations was a routine part of her job, and that, although usually she was asked by another person to access a phone call, she was never told that she did not have authorization to access a phone call on her own. There is also no evidence that Bernthisel used, or ever intended to use, the information she heard in any manner harmful to the company. Given this court's limited review, this

court finds there to be evidence in the record to support the hearing officer's decision that Bernthisel's termination was without cause, and thus, will affirm the commission's decision.

**JUDGMENT ENTRY**

It is **ORDERED, ADJUDGED, AND DECREED** that the commission's decision is hereby **AFFIRMED.**

June 22, 2015

  
James D. Bates, Judge

cc: Fritz Byers, Esq.  
Eric A. Baum, Esq.  
Erin M. Bernthisel