IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO
GENERAL DIVISION (CIVIL)

JORDAN RUSSELL,

Appellant,

v.

THE BERRY COMPANY, LLC, et al.,

Appellees.

CASE NO. 2011 CV 0972

JUDGE STEPHEN A. WOLAVER

DECISION, ENTRY AND ORDER

FINAL APPEALABLE ORDER

This matter is before the Court on the appeal of Jordan Russell pursuant to R.C. 4141.282 from the Decision of the State of Ohio Unemployment Compensation Review Commission determining that Appellant was discharged for just cause in connection with work and determining that benefits had been overpaid. For the following reasons, the decision of the State of Ohio Unemployment Compensation Review Commission is AFFIRMED.

PROCEDURAL HISTORY

Appellant, Jordan Russell, was terminated from employment with The Berry Company effective Dec. 24, 2010. On Jan. 19, 2011, the Ohio Department of Job and Family Services ("ODJ&FS") issued a determination allowing Mr. Jordan's application for unemployment compensation benefits based upon its finding that Mr. Jordan was discharged without just cause. The Berry Company appealed, stating that Mr. Jordan had been discharged for misconduct

related performance. On March 2, 2011, the ODJ&FS issued a Director's Redetermination affirming the initial determination.

The Berry Company filed an appeal to the State of Ohio Unemployment Compensation Review Commission (UCRC) on March 23, 2011. The UCRC held a hearing on June 7, 2011. By decision mailed on June 17, 2011, the UCRC reversed the ODJ&FS Director's Redetermination. Mr. Russell requested a review of the Hearing Officer's decision pursuant to R.C. 4141.281(C). By decision mailed on August 10, 2011, the UCRC Review Committee denied Mr. Russell's Request for Review, stating that upon consideration and a review of the entire record, the Commission had concluded that the Request for Review should be disallowed.

Mr. Russell filed an appeal to this Court on September 8, 2011 from the final decision of the UCRC. The record of the hearing held by the UCRC Hearing Officer was not complete until May 17, 2012, when Appellant Jordan filed a CD-R of the recording served on Jordan Russell at the UCRC hearing. Appellee, the Ohio Department of Job and Family Services on May 14, 2012 withdrew its previous motion to remand the matter to the UCRC, stating that its counsel was now convinced that the Court would be "in possession of the CD listened to by the hearing officer" for the UCRC. Briefing was completed on June 1, 2012.

THE RECORD ON APPEAL

The Hearing of June 7, 2011

The UCRC held a hearing on June 7, 2011 on the issue of whether Mr. Jordan was discharged for just cause in connection with work. Michelle Carter and Robert Crosen testified on behalf of the employer. Mr. Jordan testified on his own behalf.

Ms. Carter is a Lead HR Generalist of the employer. Transcript of June 7, 2011 Telephone Hearing ("Tr.") at p. 7. Mr. Russell was a Client Services Associate handling telephone sales for yellow pages and digital online yellow pages advertising. Tr., 8. Mr. Russell was terminated for falsification. *Id.*

Each individual telephone sales order is assigned a unique "raz number" which is the customer's verbally authorized signature. Tr., 10. The fact that two of Mr. Russell's sales to two different customers had the same "raz" number on the "Advertising Order Signature Sheet" prompted an investigation into Mr. Russell's sales. *Id.*; Exhibits A and B. A manager, Mr. Crosen, listened to the call for the second customer order containing the duplicate "raz" number and found that Mr. Russell had not spoken to the customer; the call was called into a full voicemail box. Tr., 11. The employer could not find a sales record of the sales for these two sales documents. *Id.* This led to further investigation. *Id.*

Mr. Crosen then listened to a recording of one of Mr. Russell's sales calls in regard to a fairly large sale of $647.00 per month to Berry Tree Service which had been confirmed as sold by Mr. Russell on November 30, 2010, and found that the customer had actually told Mr. Russell to hold off on the sale. Tr., 10; Ex. D. In other words, Mr. Russell had sent through the paperwork for the sale after the customer asked him to put it on hold. Tr., 12. The CD-R of this call was admitted into evidence at the hearing as part of Exhibit D. Tr., 12–13.

The Berry Company owed bonuses to Mr. Russell at the time of his termination, but bonuses which come due after an employee has been terminated are not paid. Tr. p. 15. This was company policy. Tr., 16.

Mr. Crosen testified that he is a Senior Manager of Client Services Initiatives. Tr., 21. Mr. Crosen became involved in the situation because he was helping three new managers get adjusted. Tr., 22. When a representative closes a sale it is done through a customer voice

authorization which is assigned a "raz" number which is unique to that customer. *Id.* One of the newer managers came to him with a concern because the same "raz" number had been used on two different customers. *Id.* On investigation, the first sale was legitimate, but the recording of the second sale had only calls going to a full voicemail box. Tr., 22-23. This prompted further investigation. Tr., 23.

Mr. Crosen then looked into another recent sale by Mr. Russell which was sold and properly voice authorized on November 22, 2010. Tr., 23. The paperwork was not completed at that time. *Id.* On November 29th, there was a second call to that customer in which the customer twice said that he wanted to put the sale on hold. *Id.* Mr. Crosen personally listened to this call. Tr., 25. The HR Generalist, Ms. Carter, also personally listened to this call. *Id.*

The customer twice told Mr. Russell that he needed to put the sale on hold. *Id.* Mr. Crosen testified that he knew that the communication was clear with Mr. Russell that the sale was not to go through. Tr., 23. The intent of the client was certainly to put the sale on hold. Tr., 25. The customer went into detail about some trucks or money not coming available as the customer had expected, the customer stated that certain finances and resources were not taking place so please hold the sale. Tr., 26. Mr. Russell however processed the paperwork the next day for a sale of about $647.00 a month. *Id.*

The Berry Company, the employer, has been in business for 100 years and follows ethics that when a customer wants to remove or not place advertising, it is crystal clear that the company does not place the advertising, and that is the way the employer's representatives are trained. Tr., 26.

Mr. Crosen testified that he personally talked to Mr. Russell about the calls. Tr., 24. Mr. Russell stated that he would go back and check his notes in regard to the duplicate raz numbers. *Id.* When questioned about the $647.00 a month sale, Mr. Russell stated that he was still

working with the customer even though the customer had told him twice that he did not want to do it, "and he really didn't have a reasonable explanation on why then after the customer told him not to do the sale would he then process that order the very next day through our, uh our database so there really wasn't a reasonable explanation given." *Id.*

Mr. Russell testified that in regard to the duplicate raz numbers, he had meant to write a different raz number for the second customer, but wrote down a duplicate raz number by mistake. Tr., 32. Sales order contracts are automatically renewed if the employer does not reach the customer. Tr., 32-33. His manager had told him to use a raz number previously used by a John Gibson for this second customer if Mr. Russell could not reach this customer, and that number is what he meant to write down. Tr., 32. This was an honest mistake. *Id.*

Mr. Russell, in regard to the call in which the customer had asked him to put the sale on hold, testified that the customer told him he did not get a loan and did not know what he was going to do and probably should hold off. Tr., 33. The employer had trained the sales representatives through a rebuttal training program to rebut a person with buyer's remorse. *Id.* Mr. Russell told the customer that nothing was charged up front, the customer would start receiving business before he received a bill. Tr., 34. About five minutes into the call, the customer was hesitant, but it was Mr. Russell's job to make him feel comfortable about the purchase. *Id.* At the end of the conversation they had come to an agreement to leave everything as is, and Mr. Russell was to follow up in two weeks. *Id.*

Company policy is that once a sale is "raz'd" customers only have a certain number of days to call and cancel; at that point this sale was past that time frame, so in Mr. Russell's eyes and per his training, the sale was a "complete go." *Id.* There was no fault on his part. *Id.* The employer did not give him an opportunity to explain the situation. *Id.* Mr. Russell had been at the company for over a year with no prior warnings. Tr., 36.

Mr. Russell testified that he had told the customer he would follow up in two weeks because he could process the sale and tell the billing department to send the bill out two weeks later. Tr., 35. The employer had trained him to do that. *Id.* The customer had told Mr. Russell that he needed two more weeks "to get everything together" and at that point Mr. Russell told him that they would leave everything as is, and the billing would start two weeks from then, and it was Mr. Russell's understanding that the customer was okay with that. *Id.*

The Nov. 29, 2010 Telephone Call with Berry Tree Service

The Court has listened to the CD-R of the sales call of November 29, 2010 which was admitted as part of Exhibit D at the hearing and which had led to Mr. Jordan's termination. This recording contains only the customer's voice and does not include the voice of Mr. Jordan. This CD-R was filed with this Court by Appellant on May 17, 2012 with the title "Submission of CD-R of Recording Served on Jordan Russell at Evidentiary Hearing Before UCRC." This was the CD-R which the Hearing Officer listened to as part of the hearing. The CD-R itself is marked "J. Russell v. Berry Co. Doc H2011-008812" and "Ex D for Berry Co – Ct Copy." The following constitutes the Court's rough paraphrase of the recorded telephone call which includes only the voice of the customer, Mr. Berry of Berry Tree Services, and is not a transcription.

Mr. Berry, at the beginning of the recorded call, states 'right now, I know I am committed to doing it and "I don't know if they've already got started on it or not." Right now I probably need to put a hold on all of it. It's looking that bad on my end, when that loan didn't go through, that caught me by surprise, everything was go-go-go and it was all going to be good, then when they hit me with that, I don't know what I'm going to do. [PAUSE]

'It was refinancing so I could afford to – I had about 6 separate loans on the equipment – I am not able to make all the payments right now and I was trying to refinance it – and get it in

one smaller payment. They told me everything was going to be good and we could do it, then at the last minute they backed out. I spent the better part of last week. . . [PAUSE]

'What I'm looking at is that I've got about 20 days left to either get rid of this equipment or come up with the money to do it, I'm that far behind, I'm . . . [PAUSE] When I thought that loan was going to go through I thought everything was going to be good. Everything was good and going on then all of a sudden it's not. [PAUSE]

'Like I said for right now I think we, I, just need to stop – and on the website is that something you only do at certain times of year or is that something I can call back and . . . [PAUSE] What I'm looking at right now is that I'm more than likely not going to have any equipment to do anything before this is over. So . . . [PAUSE] No. [PAUSE]

'I'm thinking right now two weeks is probably – and I understand this is putting everything on a rush-rush to get it done – I'm thinking in two weeks it's probably going to be too late – because it's not looking good at all. I talked to three different loan officers last week and all three said they didn't think they could help me. They were going to try but they didn't look like it was going to happen. [PAUSE]

'I know they probably already done some more work on it and if they have and you have to bill me for that I understand, but for right now I need at least a couple weeks to just not do anything and see what I could come up with. [PAUSE]

'That would be best. I hope I can get it all turned around and can do this because I know there's work out there but I've gotta be able to have the equipment now to do it so. . . [PAUSE] Alright, I appreciate it.

Decision of UCRC Hearing Officer

The Hearing Officer, in his Decision mailed on June 17, 2011, in the findings of fact, found that The Berry Company LLC had adopted a code of ethics applicable to all employees which prohibited illegal and/or unethical activity. An employee who violates the code of ethics is subject to disciplinary action, up to and including termination. This policy is set forth in an employee handbook which had been provided to Mr. Russell. The employer also explained this policy to Mr. Russell during his orientation as a new employee. Mr. Russell knew or should have known about the policy.

The Hearing Officer found that Mr. Russell had spoken by telephone on November 29, 2010 with the owner of Berry Tree Service. Mr. Russell inquired whether the customer wanted to continue with Yellow Pages advertising at a cost of $647.70 per month. The Hearing Officer found that the customer explained "that he was having financial problems and wanted to put the matter on hold. The customer did not agree to purchase the advertising." The Hearing Officer found that on November 30, 2010, the claimant submitted paperwork to process a sale of advertising to this customer, and that claimant did this even though the customer had asked him to put the sale on hold. The Hearing Officer found that the claimant had a financial incentive to process this sale in that he would have received a commission. The Berry Company LLC discharged the claimant for falsification.

The Hearing Officer determined that Mr. Jordan was discharged for just cause. The Hearing Officer set forth his reasoning as follows:

> A preponderance of the credible evidence demonstrates that claimant violated a known and reasonable policy. The Hearing Officer listened to a recording of the customer's voice who was involved in the telephone call of November 29, 2010. The customer clearly tells claimant to put everything on hold. Despite this, claimant submitted the paperwork to process a sale. This is a form of falsification and it is clearly unethical activity. Therefore, the Hearing Officer concludes that The Berry Company LLC discharged claimant for just cause in connection

with work.

The Hearing Officer reversed the ODJF&S Director's Redetermination issued March 2, 2011. The Hearing Officer found that claimant received benefits to which he was not entitled and was required to repay those benefits to the ODJ&FS. Appellant filed a Request for Review. On August 10, 2011, the UCRC mailed a Decision Disallowing Request for Review.

APPELLANT'S ARGUMENTS AND ASSIGNMENTS OF ERROR

Appellant, Jordan Russell, sets forth three Assignments of Error:

Assignment of Error Number One

> The Court must vacate the Commission's decision that reversed the prior two decisions by the Department of Job and Family Services that Mr. Jordan was eligible for unemployment because he had not been discharged for just cause, because the UCRC's decision is unlawful, unreasonable, and not based on reliable and competent evidence since it is based on an incomplete CD-R recording for finding "just cause" for the discharge which CD-R is unfair, arbitrary, unreasonable, and not competent and reliable evidence since it contains only one voice.

Assignment of Error Number Two

> The Unemployment Compensation Review Commission acted unlawfully, unreasonably in deciding that an undefined and unidentified claim of misconduct by "falsification" in presenting a customer order for advertising constituted "just cause" for the discharge of Jordan Russell within the meaning of the unemployment benefits law, without prior notice, prior warning, and without any evidence of intent to deceive or intent to obtain dishonest gain or intent to harm the employer.

Assignment of Error Number Three

> The UCRC decision is unlawful, unreasonable, and without evidentiary support and must be vacated and reversed since the only evidence in support of the charge of "falsification" is hearsay on hearsay from an incomplete recording, disregarding the sworn testimony of Jordan Russell at the hearing that he acted consistent with what the customer agreed to, he did not make a false order, and he did not act in disregard of the employer's best interests.

Brief of Plaintiff/Appellant, Jordan Russell ("Appellant's Brief") at p. 3.

Mr. Jordan states that the CD-R omitted Mr. Jordan's voice, and that in actuality, the customer had agreed to go forward with the sale and have billing start in two weeks. Appellant's Brief, p. 8. Mr. Jordan asserts that the Hearing Officer disregarded his testimony and relied only upon the incomplete CD-R. *Id.* Mr. Jordan asserts that it was undisputed that he believed that the customer wanted to go forward with the order, the customer agreed to delayed billing of the order, and that processing the order was required by company policies. *Id.* at 8-9.

Mr. Jordan states that the Hearing Officer misapplied the "just cause" issue, in that the issue was not whether Mr. Jordan violated any company rules, but "whether he demonstrated an unreasonable disregard for his employer's best interests by falsifying a sales order contrary to the directions of the customer." *Id.* at 10. Mr. Jordan states that 'just cause' under the statutory scheme is whether the employee's actions demonstrated an unreasonable disregard for the employer's best interests. *Id.* Mr. Jordan states that there is not any evidence that Mr. Russell intentionally misrepresented the order; it could easily be a misjudgment, or a misinterpretation of company policy, and such a misjudgment does not constitute 'just cause.' Appellant argues that the Hearing Officer's decision must be reversed because it is based upon incompetent evidence of a partial recording of hearsay outside the hearing, not under oath and not subject to explanation. *Id.* at 11.

LAW AND ANALYSIS

Standard of Review

Appeals to a court of common pleas from a final decision of the Unemployment Compensation Review Commission are governed by R.C. 4141.282, effective September 5, 2005. The standard of review is as follows:

> 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.

R.C. 4141.282(H).

An appellate court may reverse a 'just cause' determination of the UCRC "only if it is unlawful, unreasonable, or against the manifest weight of the evidence." *Tzangus, Plaka & Mannos v. Ohio Bur. of Emp. Serv.*, 73 Ohio St.3d 694, 1995-Ohio-206, 653 N.E.2d 1207, paragraph one of the syllabus.

In reviewing a decision of the UCRC, courts are not permitted to make factual findings, or to determine the credibility of witnesses; factfinding is the role of the UCRC, not of the court. *Id.* at 696-697. A court may not substitute its judgment in regard to the UCRC's findings of fact, or reverse a decision of the UCRC on the basis that reasonable minds might reach different conclusions from the record. *Id.* The court's role is simply to determine if the board's decision is supported by the evidence in the record. *Id.* at 696.

The statutes governing appeals from decisions of the UCRC are designed to leave the board's decision on close questions undisturbed; where "the board might reasonably decide

either way, the courts have no authority to upset the board's decision." *Biles v. Ohio Bur. of Employment Serv.*, 107 Ohio App.3d 114, 120, 667 N.E.2d 1244 (2d Dist., 1995) (citation omitted).

Just Cause

R.C. 4141.29(D)(2)(a) generally precludes an award of unemployment compensation benefits to an individual who has been discharged for 'just cause' in connection with that person's work. A determination of whether 'just cause' exists depends on "the unique factual considerations of the particular case;" and determination of purely factual questions is primarily within the province of the board. *Irvine v. State Unemp. Comp. Bd. of Review,* 19 Ohio St.3d 15, 17, 482 N.E.2d 587.(1985).

"Just cause" has been defined as conduct that would lead a person of ordinary intelligence to conclude that the circumstances justified an employee's discharge; where an employee's actions demonstrate an unreasonable disregard for the employer's best interest, just cause exists. *LaChapelle v. Ohio Dept. of Job Family Servs.*, 184 Ohio App.3d 166, 2009-Ohio-3399, 920 N.E.2d 155, ¶ 18 (6th Dist.). Under the 'just cause' standard, the cause of the termination must be a matter for which the employee was at fault, i.e., culpable or blameworthy. *Sprowls v. Ohio Dept. of Job & Family Serv.*, 156 Ohio App.3d 513, 2004-Ohio-1317, 806 N.E.2d 1030, ¶ 22 (2d Dist.). "The critical issue is whether the employee by his actions demonstrated an unreasonable disregard for his employer's best interest." *Banks v. Natural Essentials, Inc.*, 8th Dis. No. 95780, 2011-Ohio-3063, ¶ 26 (June 23, 2011).

UCRC Hearing Standards

Hearings before the UCRC are governed by "the principles of due process in administrative hearings." R.C. 4141.281(C)(2). Hearing officers are to "give weight to the kind

of evidence on which reasonably prudent persons are accustomed to rely in the conduct of serious affairs." *Id.* Hearing officers are not bound by formal rules of evidence: "Hearing officers are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure." *Id.*

Analysis

The Court finds that the decision of the UCRC was not unlawful, unreasonable or against the manifest weight of the evidence. The Court finds that the decision of the UCRC is supported by the evidence in the record.

The decision was not unlawful, because Appellant was provided with administrative due process: he was given notice of the reason for his termination, and provided a fair hearing with an opportunity to be heard, to call witnesses on his behalf and to cross-examine witnesses. *See MacConnell v. Ohio Dept. of Commerce,* 10th Dist. No. 04AP-433, 2005-Ohio-1960, ¶ 24 (April 28, 2005).

The decision was not unreasonable. "A decision is unreasonable if there is no sound reasoning process that would support that decision." *Riverview Health Inst., L.L.C. v. Kral,* 2d Dist. No. 24931, 2012-Ohio-3502, ¶ 25 (Aug.3, 2012), *quoting AAAA Enterprises, Inc. v. River Place Community Redevelopment*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). And, the decision was not against the manifest weight of the evidence. In determining whether a judgment is against the manifest weight of the evidence, the reviewing court must make all reasonable presumptions in favor of the judgment and the finder of fact; if the evidence can support more than one construction, the reviewing court must give the evidence the interpretation most favorable to sustaining the judgment. *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3.

In this case, Ms. Carter and Mr. Crosen both testified that they had personally listened to the recording of Mr. Jordan's telephone discussion of November 29, 2010 with Mr. Berry and concluded that the customer had clearly told Mr. Jordan that he did not want the sale to go forward. The Hearing Officer also listened to the CD-R recording of the customer's statements during the telephone call, admitted into evidence as part of Ex. D.

The evidence in the record supports the Hearing Officer's determination that Mr. Jordan processed the sale after the customer told him that he did not want to go forward with the sale. The customer, on November 29, 2010, told Mr. Jordan that he was about to lose his equipment and go out of business. He told Mr. Jordan that he was not able to keep up with his payments on the six separate loans he had on his equipment, and that the refinancing loan he previously thought he was going to obtain to wrap the loans into one loan with a smaller payment had fallen through. He told Mr. Jordan that it was unlikely that he would be able to obtain a refinancing.

Given these statements by the customer, the Hearing Officer's determination was reasonable and not against the manifest weight of the evidence. There was evidence from which the Hearing Officer could conclude that Mr. Jordan's testimony that the customer had agreed to be billed for $647.00 in two weeks was not credible and was entitled to little weight, given that the customer had told Mr. Jordan that he was about to go out of business due to an inability to pay his equipment loans and wanted to hold off on the sale. In addition, Mr. Crosen testified that Mr. Jordan had given him "no reasonable explanation" for his processing of the sale after the customer had told him he was about to go out of business and told him to hold off on the sale at the time Mr. Crosen discussed the sale with him before his termination.

Appellant argues that the recording of the customer's statements is hearsay. Mr. Jordan does not challenge the authenticity of the recording itself other than to point out that it is incomplete and does not include his voice. The Hearing Officer was entitled to consider and

give weight to the telephone recording. The Hearing Officer was not bound by formal rules of evidence, and the Court finds that the recording constituted the "kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of serious affairs." And, under the formal rules of evidence, the telephone recording constitutes a "verbal act" and is not hearsay. *See In Matter of Erwin,* 4th Dist. No. 87 CA 25, 1988 WL 118697 (Nov. 3, 1988).

In a 2003 appellate decision from the Second District, a claimant appealed the denial of unemployment compensation on the basis that the UCRC and the trial court had relied upon hearsay rather than the appellant's sworn testimony; the Court of Appeals affirmed the decisions of the UCRC and the trial court. *Mastromatteo v. Brown & Williamson Tobacco Corp.*, 2d Dist. No. 19701, 2003-Ohio-5328. The claimant had been terminated for falsification. *Id.* at ¶ 7. By the time the hearing was held, the manager who had performed the investigation had retired, and another manager testified about the results of the investigation. The Second District, in affirming the denial of benefits, stated that under certain circumstances, "a claimant's sworn testimony might defy credibility" or an employer's hearsay testimony might be entitled to more weight. *Id.* at ¶ 14. The Court finds that this case falls within that category.

CONCLUSION

Appellant's assignments of error are overruled. The Decision of the Ohio Unemployment Compensation Review Commission is AFFIRMED.

IT IS SO ORDERED.

JUDGE STEPHAN A. WOLAVER
8/27/12

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Jessica Falkner
Assignment Commissioner