

FILED
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LOUIS P. GIAVASIS
STARK COUNTY OHIO
CLERK OF COURTS

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

KEVIN MURPHY,

Plaintiff/Appellant

v.

M&A DISTRIBUTION CO., et al.,

Defendants/Appellees

Case No. 2016CV00781

JUDGE HARTNETT

**JUDGMENT ENTRY AFFIRMING
ORDER OF THE STATE OF OHIO
UNEMPLOYMENT
COMPENSATION REVIEW
COMMISSION**

This case arises as a result of an Ohio Unemployment Compensation Review Commission (“Review Commission”) decision denying unemployment compensation benefits to Plaintiff/Appellant Kevin Murphy (“Murphy”). The only question to be determined is whether Murphy was discharged from employment without just cause, thereby making him eligible for unemployment compensation benefits. The Review Commission’s decision is hereby **AFFIRMED**.

Factual Background

Murphy worked as a delivery driver for M&A Distribution Co. (“M&A”) from January 2014 until his discharge on November 18, 2016. At the time of his discharge, Murphy was on “light duty” work due to a back injury that he sustained in the course of his employment with M&A. When Murphy’s physician released him to light duty work after his back injury, M&A accommodated the work restriction by providing him with a “helper” who did the lifting part of Murphy’s job; Murphy drove the delivery truck.

Murphy's "helper" resigned from his employment with M&A on November 13, 2016. When the resignation occurred, M&A told Murphy to report to M&A's warehouse on November 16, 2016 after his weekend off so that M&A could accommodate Murphy's medical restrictions. Based upon the certified record before the Court, Murphy did not report to work on November 16, 2016 or November 17, 2016, and did not call in to report off for either day. Testimony also supports that Murphy did not return phone calls from M&A that occurred during that two-day time period.

At the hearing, a representative from M&A testified that the company has a policy that two days of no call/no show constitutes abandonment of employment. M&A therefore terminated Murphy's employment.

Procedural History

Upon his termination, Murphy applied for unemployment compensation benefits, which were granted. The Review Commission's decision that is the subject of this appeal overruled two prior administrative decisions in favor of Murphy's award of unemployment benefits. Murphy timely appealed the Review Commission's decision.

Standard of Review

In considering this appeal, the Court applies Ohio Revised Code § 4141.282(H), which requires this Court to affirm a decision of the Review Commission allowing a claim for unemployment compensation benefits unless the Review Commission's decision was "unlawful, unreasonable, or against the manifest weight of the evidence." *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Serv.* (1995), 73 Ohio St. 3d 694. If "some evidence in the record" supports a Review Commission's decision, it must be affirmed. See, *Binger v. Whirlpool Corp.*, 110 Ohio App.3d 583, 589 (1996); *Durgan v.*

Ohio Bur. of Emp. Serv., 110 Ohio App.3d 545, 551. “The fact that reasonable minds might reach different conclusions is not a basis for the reversal of the [Review Commission’s] decision.” *Irvine v. State Unemployment Comp. Bd.* (1985), 19 Ohio St.3d 15, 17. A reviewing court cannot usurp the function of the trier of fact by substituting its judgment for theirs. *Simon v. Lake Geauga Printing Co.* (1982), 69 Ohio St.2d 41, 45. The reviewing court must give deference to the Review Commission’s credibility determination regarding witness testimony. *Durgan*, 110 Ohio App. 3d at 552.

Findings

A. Murphy’s discharge was with just cause.

The Review Commission denied Murphy unemployment compensation benefits on the grounds that he was discharged with just cause in connection with work pursuant to R.C. 4141.29(D)(2)(a). “Just cause” is defined as “that which, to an ordinary intelligent person, is a justifiable reason for doing or not doing a particular act.” *Irvine* at 17, quoting *Peyton v. Sun T.V.* (1975), 44 Ohio App.2d 10, 12.

It is well-settled that an employee is discharged for just cause when “the employee, by his actions, demonstrated an unreasonable disregard for his employer’s best interests.” *Kiikka v. Ohio Bur. of Emp. Serv.* (1985), 21 Ohio App.3d 168, 169. The employee’s conduct need not rise to the level of misconduct, but there must be a showing of fault by the employee. *Sellers v. Bd. of Review* (1981), 1 Ohio App.3d 161. The “just cause” test for discharge is whether the discharge was due to the culpability of the employee rather than due to circumstances beyond the employee’s control. *Loy v. Unemp. Comp. Bd.* (1986), 30 Ohio App.3d 1204, 1206.

Here, the incident which precipitated Murphy's discharge was his failure to appear for work for two days accompanied by his failure to call off work. In addition to the violation of the no show/no call policy of which M&A testified at the hearing, testimony supports that Murphy failed to return calls from M&A during that two-day time period. The Review Commission determined that because M&A had a policy that stated "no call/no show" for two days constituted abandonment of employment, M&A properly discharged Murphy.

While the Court appreciates that there was conflicting testimony, it is well-settled that "the commission, not the court, resolves the conflicts and determines the credibility of the witnesses." *Cottrell v. ODJFS*, 10th Dist., 2006-Ohio-793, ¶ 15. The evidence contained in the certified record before this Court does not demonstrate that the Review Commission's decision was "unlawful, unreasonable, or against the manifest weight of the evidence."

B. The Court is not in the position to determine whether M&A's directive for Murphy to report to the warehouse constituted a *bona fide* offer of employment.

In his brief, Murphy argues that M&A's disputed offer of warehouse work does not constitute a *bona fide* offer of employment. However, the sole issue before this Court is whether Murphy was discharged with just cause. The Review Commission relied on the evidence before it that M&A terminated Murphy's employment due to his violation of the no call/no show policy. Had this evidence not existed, then perhaps the issue of *bona fide* employment might be relevant; however, in applying the standard of review, the evidence contained in the certified record before this Court does not demonstrate that

the Review Commission's decision was "unlawful, unreasonable, or against the manifest weight of the evidence."

C. The Court is not permitted to review matters outside of the Review Commission's certified record.

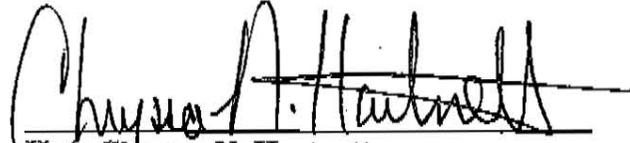
It is well-settled that in a statutory unemployment compensation appeal, the reviewing court is "limited to reviewing only what was before the [Review Commission] when it came to its decision." *Abrams-Rodkey v. Summit County Children Services*, 163 Ohio App.3d 1, 2005-Ohio-4359 at ¶ 32, citing *Hall v. American Brake Shoe Co.* (1968), 13 Ohio St.2d 11. In his brief, Murphy presents arguments relating to the distance of M&A's warehouse from his home and the cost of his resulting commute to work. Murphy did not present testimony or evidence regarding these topics at the administrative level and they are not contained in the Review Commission's certified record. Additionally, Murphy attached cell phone records as an exhibit to his brief and these records are not part of the Review Commission's certified record. The Court is not permitted to consider any of this information.

CONCLUSION

Credible evidence supports the Review Commission's decision. Thus, even if this Court would have reached a different conclusion, the law prohibits a reviewing court from substituting its judgment for that of the Review Commission. *Simon*, 69 Ohio St.2d at 41. Based upon a review of the entire certified record, and pursuant to current and binding case law, this Court finds the Review Commission's determination that Claimant was discharged with just cause and is therefore not entitled to unemployment compensation benefits to be supported by sufficient and credible evidence. Therefore, the Court defers to the Review Commission's decision and finds that the decision was not

unlawful, unreasonable, or against the manifest weight of the evidence. The decision of the Review Commission is hereby **AFFIRMED**.

IT IS SO ORDERED.


Hon. Chryssa N. Hartnett

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