[Cite as *Barksdale v. State Unemployment Review Compensation Comm.*, 2010-Ohio-267.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93711

CHRISTOPHER S. BARKSDALE

PLAINTIFF-APPELLANT

vs.

STATE OF OHIO, UNEMPLOYMENT COMPENSATION REVIEW COMMISSION

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-689983

BEFORE: McMonagle, J., Kilbane, P.J., and Boyle, J.

RELEASED: January 28, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} This appeal is before the court on the accelerated docket pursuant to App.R. 11.1 and Loc.App.R. 11.1. Plaintiff-appellant, Christopher S. Barksdale, appeals the trial court's judgment affirming the Unemployment Review Compensation Commission's decision that he was not entitled to unemployment compensation because he was discharged for just cause. We affirm.

I

{¶ 2} Barksdale was employed by Mental Health Services ("MHS") from September 19, 2006 to November 18, 2008 as a shelter specialist. On January 22, 2008, MHS informed Barksdale that he was required to notify his manager anytime he anticipated being late for work. On March 27, 2008 and again on September 9, 2008, Barksdale was disciplined for arriving late to work without notifying his manager. He received a verbal warning for the March 27 incident and a three-day suspension for the September incident. On November 18, 2008, MHS terminated Barksdale's employment after it learned that he had violated the company's "Use of Technology" policy by using an MHS computer on three occasions (March 16, 2008, April 21, 2008, and September 9, 2008) to access pornographic websites.

{¶ 3} Barksdale filed for unemployment compensation. The Ohio Department of Job and Family Services ("ODJFS") issued an initial

determination denying benefits to Barksdale; it subsequently issued a redetermination decision that affirmed the initial determination and found that Barksdale had been discharged for just cause. Barksdale appealed the redetermination decision and ODJFS transferred jurisdiction to the Unemployment Compensation Review Commission. On March 17, 2009, the Review Commission held a telephonic hearing in which Barksdale participated. No one appeared on behalf of MHS. In a decision mailed March 18, 2009, the hearing officer affirmed ODJFS's redetermination decision and found that Barksdale was discharged from MHS for just cause and therefore was ineligible for unemployment compensation benefits. The Review Commission denied Barksdale's request for further review.

{¶ 4} Barksdale appealed the Review Commission's decision to the court of common pleas under R.C. 4141.282(H). The common pleas court found that the Review Commission's decision "was not unlawful, unreasonable, or against the manifest weight of the evidence," and affirmed the decision of the Review Commission. Barksdale appeals from this order.

II

{¶ 5} An appellate court may reverse a decision of the Review Commission only if the decision is unlawful, unreasonable, or against the manifest weight of the evidence. R.C. 4141.282(H); *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Serv.*, 73 Ohio St.3d 694, 653 N.E.2d 1207,

1995-Ohio-206, paragraph one of the syllabus. Appellate courts are not permitted to make factual findings or determine the credibility of witnesses, but have a duty to determine whether the Commission's decision is supported by the evidence in the record. Id. at 696, citing *Irvine v. Unemployment Comp. Bd. of Review* (1985), 19 Ohio St.3d 15, 18, 482 N.E.2d 587. Every reasonable presumption should be made in favor of the Commission's decision and findings of fact. *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19, 526 N.E.2d 1350.

{¶ 6} Under R.C. 4141.29(D)(2)(a), a claimant is not eligible for unemployment compensation benefits if the claimant was discharged for just cause. "Just cause" means "that which, to an ordinary intelligent person, is a justifiable reason for doing or not doing a particular act." *Irvine*, supra at 17. Whether just cause exists is unique to the facts of each case. Id. at 18.

{¶ 7} The evidence in the record supports the Commission's decision that Barksdale was terminated for just cause and therefore ineligible for unemployment compensation. Documentation provided by MHS to ODJFS showed that Barksdale logged on to an MHS computer with his login and account number and accessed pornographic sites while on duty. Although Barksdale denied accessing the sites on the dates identified by MHS and insisted that other persons must have used the computer with his login ID, credibility determinations are solely for the trier of fact, in this case the

hearing officer. *Simon v. Lake Geauga Printing Co.* (1982), 69 Ohio St.2d 41, 44, 430 N.E.2d 468; *Royster v. Bd. of Review* (Apr. 13, 1990), Scioto App. No. 89 CA 1826. Thus, the hearing officer could accept or reject all or part of Barksdale's testimony. The Review Commission apparently gave little credibility to Barksdale's testimony, presumably because he admitted at the hearing that he had accessed pornographic websites at work previously, despite his awareness of MHS's Use of Technology policy.

{¶ 8} The fact that MHS did not send a representative to the hearing did not, as Barksdale suggests, deprive him of any due process rights. Even where the employer does not send a representative to the hearing, the Review Commission may properly rely on any and all evidence incorporated in the certified record, including any disciplinary evidence (e.g., the IT record) submitted by the employer during the administrative claim process. *Simon*, supra. Further, the Review Commission is free to find the evidence in the record submitted on behalf of the employer more credible than the sworn testimony of the claimant. Id.; *Fisher v. Bill Lake Buick*, Cuyahoga App. No. 86338, 2006-Ohio-457, ¶20. Thus, it was within the province of the hearing officer to place greater weight on the documentary evidence submitted by MHS than on Barksdale's testimony.

{¶ 9} Barksdale's argument that MHS's failure to send a representative to the hearing deprived him of his Sixth Amendment constitutional right to

confront the witnesses against him and compelled him to be a witness against himself, in violation of his Fifth Amendment rights, is not appropriate in this context. Fifth and Sixth Amendment rights are applicable to defendants involved in criminal prosecutions, not to this type of proceeding.

{¶ 10} Barksdale's arguments that he was denied due process rights because the hearing officer could not adequately "ascertain facts and fully develop the record" and he could not cross-examine the witnesses without a representative from MHS at the hearing likewise fail. As noted above, in making its determination, the Commission considered all of the evidence in the administrative record, as it is required to do, including evidence submitted by the parties prior to the hearing. Further, it is well established that the claimant has the burden of proving his or her entitlement to unemployment compensation benefits. *Irvine*, supra. Thus, it was Barksdale's, and not the hearing officer's, duty to prove facts demonstrating that he was not at fault in bringing about his termination and was entitled to benefits.

{¶ 11} Further, the Notice of Hearing issued to the parties on January 28, 2009 advised the parties of the hearing and their right to request the issuance of subpoenas to require the attendance of necessary witnesses or the production of necessary documents. Thus, Barksdale could have subpoenaed

the attendance of any witnesses he deemed necessary (including those he wanted to cross-examine) but did not do so.

{¶ 12} Finally, we find no merit to Barksdale's argument that because MHS did not appear at the hearing, the Review Commission had no jurisdiction over the hearing and its decision is therefore void. Under R.C. 4141.281(C)(1), "the Commission has jurisdiction over an appeal on transfer [from ODJFS] or on direct appeal to the Commission." Thus, the Commission's jurisdiction was invoked when Barksdale appealed ODJFS's redetermination that he was not entitled to unemployment benefits and ODJFS transferred his appeal to the Review Commission. The statute requires that the Commission "provide an opportunity for a fair hearing to the interested parties of appeals," but does not require that both parties appear at the hearing.

{¶ 13} The record demonstrates that Barksdale was given a full and fair opportunity to present evidence on his own behalf. It further demonstrates that the hearing officer acted according to her statutory duties under R.C. 4141.281(C)(2) by properly questioning Barksdale and examining all of the evidence in the record, before determining that he was terminated for just cause for violating company policy by accessing pornographic websites and was therefore ineligible for unemployment compensation. As there is competent, credible evidence in the record to support the Commission's

decision, we do not find it unreasonable, unlawful, or against the manifest weight of the evidence. Accordingly, we affirm.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

MARY EILEEN KILBANE, P.J., and
MARY J. BOYLE, J., CONCUR