

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Edgar L. Cross

Court of Appeals No. L-10-1187

Appellant

Trial Court No. CI 200908881

v.

Ohio Department of Job
and Family Services

DECISION AND JUDGMENT

Appellee

Decided: November 19, 2010

* * * * *

Edgar L. Cross, pro se.

Richard Cordray, Attorney General of Ohio, and Eric A. Baum,
Assistant Attorney General, for appellee.

* * * * *

SINGER, J.

{¶ 1} Appellant, Edgar L. Cross, appeals a judgment issued by the Lucas County Court of Common Pleas, in an administrative appeal from a decision of the Ohio

Unemployment Compensation Review Commission. For the reasons that follow, we affirm.

{¶ 2} Appellant filed a claim for unemployment compensation with appellee, Ohio Department of Job and Family Services ("ODJFS"), after his separation from employment due to lack of work. Appellant's initial application for benefits was allowed for the benefit year beginning April 19, 2009, and he was found eligible for a weekly benefit of \$452.

{¶ 3} As a member of the International Brotherhood of Electrical Workers ("IBEW"), Local No. 8, appellant was eligible to participate in a retirement and trust plan contributed to by employers who are signatories to the IBEW's collective bargaining agreement.

{¶ 4} Appellant was not retired at the time he began drawing on his pension, but because he was over the age of 70½, if he failed to withdraw a required minimum distribution ("RMD") for the year, he would face penalties from the Internal Revenue Service. The RMD could be taken in any form chosen by the recipient; appellant chose to receive a monthly distribution of \$1000.

{¶ 5} After finding out that his unemployment benefits would be reduced by the retirement benefits, appellant cancelled the distributions effective June 1, 2009. On July 31, 2009, the Director of ODJFS issued a redetermination finding that the retirement benefits appellant received for the period beginning April 19, 2009, were deductible from

the unemployment benefits otherwise payable to him. The director ordered that appellant was subject to a deduction reducing his weekly benefit to \$221.

{¶ 6} Appellant appealed the director's redetermination reducing his benefit allowance, and the appeal was transferred to the Unemployment Compensation Review Commission ("UCRC"). After a telephone hearing on October 16, 2009, the UCRC affirmed the reduction in unemployment benefits for the weeks ending April 25, 2009, through May 30, 2009, but granted full benefits for the weeks ending June 6, 2009, and after.¹

{¶ 7} The review commission denied appellant's subsequent appeal, and he appealed the decision to the Lucas County Court of Common Pleas. The court affirmed the UCRC's decision reducing appellant's benefits during the time he was receiving retirement benefits and allowing full benefits for the time after he cancelled the benefits. It is from that decision that appellant now appeals.

{¶ 8} Appellant does not set forth any formal assignments of error. The issue appellant raises is whether the trial court properly affirmed the UCRC's decision that his weekly unemployment benefit be reduced by the amount appellant received from his pension plan where appellant was not yet retired, but withdrew funds from his 401(k) to comply with the RMD mandated by the IRS to avoid penalties.

¹The Review Commission also ruled that appellant is entitled to a Federal Additional Compensation payment of \$25 for each week in question, which is not at issue here.

{¶ 9} A party who is dissatisfied with the final determination of the UCRC may appeal that decision to the appropriate court of common pleas, which shall hear the appeal on the record certified by the commission. R.C. 4141.282(H). "If the court finds that the decision was unlawful, unreasonable, or against the manifest weight of the evidence * * *" it may reverse the determination. *Id.* On review of purely factual questions, the common pleas court is limited to determining whether the UCRC hearing officer's determination is supported by the evidence in the record. *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Services* (1995), 73 Ohio St.3d 694, 697. Factual findings supported by some competent, credible evidence going to the essential elements of the controversy must be affirmed. *C.E. Morris v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus.

{¶ 10} This court "may only reverse an unemployment compensation eligibility decision by [UCRC] if the decision is unlawful, unreasonable, or against the manifest weight of the evidence." (Quotations omitted.) *Markovich v. Emps. Unity, Inc.*, 9th Dist. No. 21826, 2004-Ohio-4193, ¶ 10. When an appellate court reviews the common pleas court's review, it applies the same standard. *Tzangas, supra.* In such cases, this court is "required to focus on the decision of [UCRC], rather than that of the common pleas court[.]" *Markovich*, ¶ 10, citing *Barilla v. Ohio Dept. of Job & Family Servs.*, 9th Dist. No. 02CA008012, 2002-Ohio-5425, ¶ 6. "Every reasonable presumption must be made in favor of the [decision] and the findings of facts [of the UCRC]." *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19.

{¶ 11} The UCRC relied on R.C. 4141.31 in finding that the appellant's unemployment benefits should be reduced by the amount he received from his retirement plan. R.C. 4141.31 states, in relevant part:

{¶ 12} "(A) Benefits otherwise payable for any week shall be reduced by the amount of remuneration or other payments a claimant receives with respect to such week as follows:

{¶ 13} "* * * (3) Payments in the form of retirement, or pension allowances as provided under section 4141.312 of the Revised Code."

{¶ 14} R.C. 4141.312, in turn, provides in pertinent part:

{¶ 15} "(A) Except as otherwise specified in division (B) of this section, the amount of benefits payable to a claimant for any week with respect to which the claimant is receiving a governmental or other pension, retirement or retired pay, annuity or any other similar periodic payment which is based on the previous work of the individual, shall be reduced by an amount equal to the amount of the pension, retirement or retired pay, annuity or other payment which is reasonably attributable to that week, except that the requirements for this division shall apply to any pension, retirement or retired pay, annuity, or other similar periodic payment only if both of the following apply:

{¶ 16} "(1) The payment is under a plan maintained or contributed to by a base period employer or chargeable employer.

{¶ 17} "(2) In the case of a payment under a plan not made under the 'Social Security Act,' 42 U.S.C. 401 et seq., or the 'Railroad Retirement Act of 1974,' 45 U.S.C.

231 et seq., or the corresponding provisions of prior law, services performed for such employer by the individual after the beginning of the base period, or remuneration for such services, affect eligibility for, or increase the amount of, such pension, retirement or retired pay, annuity, or similar payment."

{¶ 18} The UCRC determined that the retirement benefits that appellant was receiving were contributed to by his base period employers. Appellant argues that the fund is entirely employee funded, but stated at the UCRC hearing that employers contribute to the plan as part of the wage package for union members.

{¶ 19} Appellant maintains that because he was not retired, the money he withdrew from his 401(k) was not a pension, but simply a RMD that should be treated as a savings account. The UCRC found that the funds appellant withdrew were part of his retirement plan, regardless of whether he was actually retired at the time. Further, payments that may be deducted from unemployment benefits include "a governmental or other pension, retirement or retired pay, annuity or any other similar periodic payment which is based on the previous work of the individual." R.C. 4141.31. Even if, as appellant claims, the money he withdrew was not a pension, it would be considered a similar periodic payment based on appellant's previous work.

{¶ 20} Appellant's reliance on our holding in *Rich v. ODJFS* (Oct. 23, 2009), 6th Dist. Nos. L-09-1106, L-09-1108, 2009-Ohio-5623, is misplaced. In that case, Rich received his payment in a single lump-sum, "rather than the requisite receipt of a stream of periodic payments connected to prior employment so as to be deemed offsetting to

unemployment eligibility within the parameters established by R.C. 4141.312(A)." *Id.* at ¶ 19. Appellant received monthly payments from his retirement plan, which would bring him within this offsetting provision. The fact that he was not required to receive the funds in periodic payments is irrelevant so long as he actually did receive them in that manner.

{¶ 21} Further, this court found that the lump-sum savings cash-out in *Rich* was not "reasonably attributable" so as to be offsetting to Rich's unemployment eligibility. In this case, it is irrelevant whether or not the payments were reasonably attributed to the weeks in which appellant received the benefits. The payments appellant received came from a fund to which appellant's base-period employers contributed, and appellant's work for these employers affected his eligibility for or increased the amount of these payments. Thus the setoff provision applies regardless of whether the payments were reasonably attributable to that week. R.C. 4141.312(A).

{¶ 22} Upon review, we cannot say that the determination of the UCRC was unlawful, unreasonable or against the manifest weight of the evidence. What we construe as appellant's sole assignment of error is not well-taken. Accordingly, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

Cross v. Ohio Dept. of Job
and Family Servs.
C.A. No. L-10-1187

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.