

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

JAMES M. KAVANAUGH, JR.,

CASE NO. 2011 CV 08834

Plaintiff,

JUDGE MARY KATHERINE HUFFMAN

-vs-

OHIO DEPARTMENT OF JOB AND
FAMILY SERVICES, et. al,

DECISION, ORDER AND ENTRY
AFFIRMING DECISION OF THE
UNEMPLOYMENT COMPENSATION
REVIEW COMMISSION

Defendants.

This matter is before the court as a result of an appeal taken by Appellant, James M. Kavanaugh, Jr., from a determination of the Ohio Unemployment Compensation Review Commission, denying him unemployment compensation benefits. Appellant is a former employee of Kanet Pol Bridges, Inc. (hereinafter "KPB"). Appellant filed his brief herein on February 27, 2012. Appellee, Director, Ohio Department of Job & Family Services, filed its brief on March 23, 2012. Appellant has not filed a timely reply brief. This matter is now ripe for decision.

I. FACTS

The record herein reveals that Appellant, James M. Kavanaugh, Jr., was employed full time by KPB as a digital copy operator from September 9, 2004 to August 5, 2010 (Transcript 2, p. 6)(Transcript 1 refers to the transcript of the hearing held on February 16, 2011, and Transcript 2 refers to the transcript of the hearing held on October 11, 2011. He received a handbook at the time of

hire. Kavanaugh was discharged from his employment on August 5, 2010, after he had been sent home on August 2, 2010. Mr. Kavanaugh acknowledged that he was using his work computer for personal use, but that he believed that his supervisors were aware of his use and that “(i)t was alright.” (Transcript 2, p. 6). His admitted personal use of the computer included sending emails and freelance internet design. (Transcript 2, p. 7). He admitted meeting with Bob Bridges on August 2, 2010, but denied admitting to Bridges that he was working on designs and products and using company equipment and printing materials. (Transcript 2, p. 8).

Chas Lindemann of KPBB testified that he attended a meeting with Appellant and Bob Bridges on August 2, 2010, and Appellant admitted that he was using company printers to print personal printing jobs. Prior to the meeting KPBB management had received e-mail correspondence from Jay Wishman indicating that Appellant had been printing and selling items on company time for several years, which prompted the company’s investigation into Kavanaugh’s activities. (Transcript 2, p. 17). Specifically, Lindemann testified that Appellant admitted to him and Bridges that he was printing stickers without management knowledge or permission. (Transcript 2, p. 18). However, during his testimony Appellant stated that he did print stickers but that he had permission from “either Jeff, Charlie Lindemann, or Kim Gardner.” (Transcript 2, p. 21).

According to the testimony of Bob Bridges, President of KPBB, Kavanaugh was discharged from his employment with KPBB August 5, 2010 for using company property and company equipment on company time for personal use before August 2, 2010. (Transcript 1, p. 7). The company property included equipment, paper, toners and a computer. (Transcript 1, p. 7). Mr. Bridges testified that on August 2, 2010, during a meeting with Bridges and Chas Lindemann, Kavanaugh admitted using company equipment to print personal material. (Transcript 1, p. 8). Mr. Bridges also testified that the company handbook, which had been supplied to Mr. Kavanaugh on the day he was hired, prohibited using company property for personal use. (Transcript 1, p. 8). Mr.

Bridges testified that Mr. Kavanaugh admitted to him that he had printed stickers for his personal use. (Transcript 1, p. 9). A search of Kavanaugh's computer hard-drive revealed that his personal work was being done during his work hours. Specifically, on one occasion at 3:52PM Kavanaugh accessed a website for his personal use. (Transcript 1, p. 10). Company policy prohibits using any company computers for personal use. (Transcript 1, p. 10). KPB maintained a progressive discipline policy, which provided:

A violation of these regulations constitutes misconduct on the part of the employee and appropriate disciplinary action may include, but is not limited to verbal reprimands, written notice, suspension from work without pay, and immediate termination of employment. Management reserves the right to terminate or discipline any employee at the company in its discretion, considers it necessary in individual circumstances. In the event the employee is suspended from work for disciplinary reasons, benefits will not accrue nor will benefits be recoverable during the suspension period.

(Transcript 1, p. 16).

Appellant made application for Unemployment Compensation benefits on August 30, 2010. On October 14, 2010 the Director issued a Redetermination finding that Kavanaugh was discharged by KPB without just cause and his application was allowed. On October 28, 2010 KPB filed an appeal from the Redetermination. On November 2, 2010 the Ohio Department of Job and Family Services transferred jurisdiction to the Unemployment Compensation Review Commission. On February 16, 2011 a telephone hearing was held. Present at the hearing and representing KPB was its President, Bob Bridges, and its Accounting Manager, Cathy Welz. Appellant Kavanaugh did participate in the telephone hearing.

The hearing officer made the following findings of fact:

Claimant was employed by Kanet Pol Bridges Inc. from September 9, 2004, until August 5, 2012. He worked as a Digital Copy Operator.

The employer's handbook specifies its policies and provides that disciplinary action can include, but is not limited to, verbal reprimand, written notice, suspension of work without pay and immediate termination from employment. In addition, it states that the

employer reserves the right to terminate or discipline any employee, as the company, in its discretion, considers necessary in individual circumstances. The employer's handbook also lists various examples of misconduct for which an employee may be disciplined for, and includes, "Theft of any property on company premises, or theft of company property at any time." Upon hire, the claimant received a copy of the employer's handbook.

On August 2, 2010, the employer examined the hard drive on its computer and became aware that the claimant was using its computer for his personal use. The employer discovered that the claimant was using its computer to design his own personal website during business hours. The employer also learned that the claimant was using the employer's copier and toner to print stickers without management's knowledge or permission. The employer confronted the claimant with its discovery and the claimant admitted to using the employer's printer and computer to design his website and print stickers for his personal use. At that time, the employer decided to suspend the claimant without pay. The claimant was instructed to call the employer on August 5, 2010, to find out what further disciplinary action the employer planned to take as a result of his actions. The employer determined that the continued and unauthorized use of its equipment by claimant, for his personal use, constituted theft in accordance with its policies. On August 5, 2010, the employer discharged the claimant for the unauthorized use of company property in violation of its policies.

The hearing officer stated in her decision the following reasoning for her determination:

The credible evidence establishes that the employer discharged the claimant for his continued and unauthorized use of its equipment for his personal use. The claimant had received a copy of the employer's handbook and knew, or should have known, that such conduct was prohibited. The claimant not only used the employer's computer, but also the employer's printer and toner solutions. The employer should be able to reasonably expect that its supplies will only be used for company business and the unauthorized use of its supplies affects its financial interests. Accordingly, this Hearing Officer finds that the claimant was discharged by Kanet Pol Bridges Inc. with just cause in connection with work.

Based upon this finding, claimant received benefits to which he was not entitled and is required to repay those benefits to the Ohio Department of Job and Family Services.

On March 4, 2011 Appellant filed a Request for Review of the Hearing Officer's Decision, alleging that he did not receive notice of the previously-held hearing. On March 9, 2011 the Review Commission allowed Appellant's Request for Review and ordered a further hearing. That hearing was held by telephone on October 11, 2011. Appellant appeared and testified. The employer was represented by Cathy Welz, Jeff Lack and Chas Lindemann. As a result of the

hearing, the hearing officer, in her decision, issued the following findings of fact on November 10, 2011:

The claimant was employed by Kanet Pol Bridges, Inc. from September 9, 2004 until August 5, 2010 as a digital copier operator.

On August 2, 2010, the employer received a complaint that the claimant was using company equipment for his personal use. The company examined his hard drive. The employee discovered that the claimant was using its computer to design his own personal website during working hours. Additionally, the claimant was using company equipment to print stickers. Claimant was suspended without pay after he admitted to using company resources for personal business during working hours. On August 5, 2010, the claimant was discharged for the unauthorized use of company equipment.

The company has a written handbook that prohibits "Theft of any property on company premises, or theft of company property at any time." Claimant received a copy of the handbook at the time of hire.

In her reasoning supporting her decision, the hearing officer stated:

The employer has provided substantial, reliable and probative evidence that claimant utilized company equipment and resources for personal business during work hours on several occasions. Therefore, the claimant was discharged for just cause in connection with work.

...

Since the claimant was separated from his employment under disqualifying conditions, the Overpayment Order in the amount of \$6,000.00 is affirmed.

Thus, the hearing officer found that Appellant was discharged with just cause in connection with his work and was ordered to pay the overpayment in the amount of \$6,000.00.

II. LAW AND ANALYSIS

The right to appeal from an administrative decision is not an inherent right, but instead is one conferred by statute. *See Harrison v. Ohio State Medical Board*, 103 Ohio App.3d 317, 321 (1995). Where a statute confers a right to appeal, strict adherence to the statutory conditions is essential. *Holmes v. Union Gospel Press*, 64 Ohio St. 2d 187, 188 (1980).

Pursuant to O. R.C. §4141.281(A), a party may appeal a determination of unemployment benefit rights or a claim for benefits determination. “Within twenty-one days after receipt of the appeal, the director of job and family services shall issue a redetermination or transfer the appeal to the unemployment compensation review commission. A redetermination under this section is appealable in the same manner as an initial determination by the director.” O.R.C. §4141.281(B).

Once the final decision of the review commission has been sent to all interested parties, any party may appeal the decision to the court of common pleas within thirty days. O.R.C. §4141.282(A). O.R.C. §4141.282(H) delineates the standard of review for the court of common pleas during such appeal, stating:

The court shall hear the appeal on the certified record provided by the commission. 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.

The reviewing court is limited to the record as certified by the review commission.

Abrams-Rodkey v. Summit County Children Servs., 163 Ohio App. 3d 1 (2005). The court must give due deference to the agency’s resolution of evidentiary conflicts, and the court may not substitute its judgment for that of the agency. *Budd Co. v. Mercer*, 14 Ohio App. 3d 269 (1984). Moreover, “[a] reviewing court may not make factual findings or determine the credibility of witnesses, and may not overturn a decision of the commission simply because it might reach a different result.” *Gregg v. SBC Ameritech*, 2004-Ohio-1061, citing *Tzangas, Plakas & Mannos v. Administrator, Ohio Bureau of Employment Servs.*, 73 Ohio St. 3d 694, 696-697 (1995). The claimant has the burden of proving his entitlement to unemployment compensation benefits. *Irvine v. Unemployment Comp. Bd. of Review*, 19 Ohio St. 3d 15, 17 (1985). A trial court “must uphold the hearing officer’s decision so long as it is not unlawful or unreasonable and some competent,

credible evidence supports it.” *Myers v. Director, Ohio Dept. of Job and Family Services*, 2009-Ohio-6023. The court, however, does not have the discretion to consider the credibility of the witnesses in its review of the decision of the hearing officer. Instead, the sole duty of the Court of Common Pleas is to determine whether the evidence on record supported the Commission’s decision. *Kilgore v. Board of Review*, 2 Ohio App. 2d 69, 71 (1965). “The Court may not substitute its judgment***, it may not reverse simply because it interprets evidence differently***.” *Angelkovski v. Buckeye Potato Chips, Co.*, 11 Ohio App.3d 159, 161 (1983).

An employee is ineligible for unemployment compensation benefits if he was terminated for just cause. O.R.C. §4141.29(D)(2)(a) provides, in pertinent part:

- (D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:
 - (2) For the duration of the individual’s unemployment if the Director finds that:
 - (a) The individual...has been discharged for just cause in connection with the individual’s work.

“An employee is not eligible for benefits if he has ‘quit work without just cause or has been discharged for just cause in connection with [his] work.’” *Lorain County Auditor v. Ohio Unemployment Compensation Review Comm.*, 113 Ohio St. 3d 124 (2007); *see also* O.R.C. §4141.29(D)(2)(a). The Ohio Supreme Court has defined “just cause” as “that which, to an ordinary intelligent person, is a justifiable reason for doing or not doing a particular act” *Irvine v. Unemployment Comp. Bd. of Rev.*, 19 Ohio St. 3d 15, 16 (1985), *quoting Peyton v. Sun T.V.*, 44 Ohio App. 2d 10, 12 (1975). “(T)here is, of course, not a slide-rule definition of just cause. Essentially, each case must be considered upon its particular merits. Traditionally, just cause, in the statutory sense, is that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.” *Irvine v. Unemployment Comp. Bd. of Review*, 19 Ohio St. 3d 15, 17 (1985) *quoting Peyton v. Sun T.V.*, 44 Ohio App. 2d 10, 12 (1975). In reviewing such a

determination, a court is not permitted to interpret the facts or put its spin to the facts. *Gallagher v. Alliance Hospitality Management*, 2010-Ohio-1882.

“Just cause” is “conduct that would lead a person of ordinary intelligence to conclude the surrounding circumstances justified the employee’s discharge.” *Carter v. Univ. of Toledo*, 2008-Ohio-1958. When an employee demonstrates by his or her actions an unreasonable disregard for the employer’s best interest, there is just cause for the discharge. *Kiikka v. Ohio Bur. Of Emp. Serv.*, 21 Ohio App. 3d 168 (1985); *see also LaChappelle v. Ohio Dept. of Job and Family Serv.*, 184 Ohio App. 3d 166, 2009-Ohio-3399. “(T)he critical issue is not whether an employee has technically violated some company rule, but rather whether the employee, by his actions, demonstrated an unreasonable disregard for his employer’s best interests.***” *Stephens v. Bd. of Rev.*, Cuyahoga App. No. 41369 (May 22, 1980); *see also Kiikka, supra*. “The determination of whether just cause exists to support discharge depends on the factual circumstances of each case and is largely an issue for the trier of fact.” *Harrison v. Penn Traffic Co.*, 2005-Ohio-638. Theft of company property represents “just cause” for discharge from employment. *See Morris v. The Timken Co.*, Stark App. No. 2499 (May 24, 1999). Similarly, misappropriation of company property serves as “just cause” for discharge from employment. *Holzer v. Unemployment Compensation Review Commission*, 2011-Ohio-6523.

In his brief Appellant asked that this court “exercise its considerable discretion” and vacate the decision of the hearing officer. In reviewing a decision of an administrative body, this court has limited authority and is not conferred with discretion to vacate a hearing officer’s decision. Instead, the statutory authority conferred on a court of common pleas in reviewing the decision of an administrative agency is limited to determining whether the decision was “unlawful, unreasonable, or against the manifest weight of the evidence.” Furthermore, this court is required to give due

deference to the hearing officer's resolution of evidentiary conflicts and determination of the credibility of witnesses.

Appellant also argues that the decision of the hearing officer is against the manifest weight of the evidence. Mindful that this court cannot reach its own conclusion on evidentiary conflicts, but must defer to the factual findings of the hearing officer, this court cannot say that the decision was against the manifest weight of the evidence. In reviewing the evidence, Mr. Bridges testified that Appellant admitted to him that he was using company property, including computers and printers, for personal use. Mr. Bridges also testified that Appellant's actions were in violation of company policy provided to Appellant at the time he was hired by way of a company handbook. Mr. Bridges further testified that Appellant's conduct was detrimental to the employer's interests. Mr. Kavanaugh, in his own testimony, admitted that he was using company property for his personal use, but claimed that he had permission from other KPB employees to do so. The hearing officer was entitled to resolve the evidentiary conflict between the testimony in terms of whether Appellant had permission to use company property for his personal use. Her resolution of that evidence cannot be disturbed by this court, as she was the finder of fact and entitled to judge the credibility of the witnesses.

After reviewing the entire transcript of proceedings, the court finds that the decision of the hearing officer was not unlawful, unreasonable, or against the manifest weight of the evidence and supports a finding that Appellant was discharged for just cause.

III. CONCLUSION

The court finds that the decision of Unemployment Compensation Review Commission was appropriate in this matter and supported by the evidence and was not unlawful, unreasonable, or

against the manifest weight of the evidence. This court hereby **AFFIRMS** the decision of the Review Commission.

SO ORDERED:

JUDGE MARY KATHERINE HUFFMAN

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MICHELLE T SUTTER
(614) 466-2766
Attorney for Defendant, Ohio Department Of Job And Family Services

Copies of this document were sent to all parties listed below by ordinary mail:

JAMES M KAVANAUGH, JR
2012 TWEED CR
DAYTON, OH 45459
Plaintiff, Pro Se.

UNEMPLOYMENT COMPENSATION REVIEW COMMISSION OF OH
PO BOX 182299
COLUMBUS, OH 43218-2299
Defendant

KPB COMMERCIAL PRINTING
7107 SHONA DR
CINCINNATI, OH 45237
Defendant

OHIO ATTORNEY GENERAL
30 E BROAD ST
COLUMBUS, OH 45215
Defendant

Ryan Colvin, Bailiff (937) 496-7955 Colvinr@montcourt.org



General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

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Case Number: 2011 CV 08834
Type: Decision

So Ordered

Mary K. Huffman