

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Randolph C. Rhode,	:	
Appellant-Appellant,	:	No. 12AP-160
v.	:	(C.P.C. No. 11CV-11565)
Market Ready Real Estate et al.,	:	(REGULAR CALENDAR)
Appellees-Appellees.	:	

D E C I S I O N

Rendered on November 27, 2012

Randolph C. Rhode, pro se.

Michael DeWine, Attorney General, and *Patria V. Hoskins*,
for appellee Director, Ohio Department of Job and Family
Services.

APPEAL from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Appellant, Randolph C. Rhode, pro se, appeals from a judgment of the Franklin County Court of Common Pleas affirming a decision of the Ohio Unemployment Compensation Review Commission ("commission") denying appellant's request for unemployment compensation benefits. Because the commission's decision is not unlawful, unreasonable, or against the manifest weight of the evidence, we affirm.

I. BACKGROUND

{¶ 2} On January 12, 2011, appellant filed an application for determination of unemployment benefit rights with appellee, Director, Ohio Department of Job and Family Services ("ODJFS"), following his discharge from employment with Market Ready Real Estate Services, Inc. ("Market Ready"). ODJFS initially allowed the application. Upon

Market Ready's request for redetermination, ODJFS vacated the initial determination and disallowed the application. Upon appellant's appeal from the redetermination, ODJFS transferred jurisdiction to the commission. Following a July 12, 2011 hearing, a commission hearing officer issued a decision disallowing appellant's application. After the commission denied his request for review, appellant appealed to the Franklin County Court of Common Pleas. In a decision and entry dated January 27, 2012, the common pleas court affirmed the commission's decision.

II. ASSIGNMENTS OF ERROR

{¶ 3} On appeal to this court, appellant has filed a pro se brief. Although appellant's brief fails to set forth assignments of error as required by App.R. 16(A)(3), the brief contains the following "statement of issues," which we construe as assignments of error for purposes of this appeal:

ISSUE 1[:] Can a Common Pleas Court make a decision based on statutes that weren't part of the original Unemployment Compensation Review Commission "UCRC" Determination[?]

ISSUE 2[:] When may an Employer terminate an employee and deny unemployment benefits without consideration for the "Remoteness and Condoning" doctrines[?]

ISSUE 3[:] May an employer circumvent the "Remoteness" of cause of termination and deny benefits by saying an investigation was being done, when it wasn't necessary to terminate an employee without benefits[?]

ISSUE 4[:] May an employer appear to condone an action but use it to deny benefits[?]

ISSUE 5[:] Is not replacement of an employee after termination a prima facie evidence of lack of work[?]

III. DISCUSSION

{¶ 4} An applicant seeking unemployment compensation benefits submits to ODJFS an application for such benefits along with information in support of his or her claim. *McGee v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 09AP-680, 2010-Ohio-673, ¶ 9. Initially, ODJFS makes findings of fact and conclusions of law as to whether the

applicant is entitled to unemployment compensation benefits. *Id.*, citing R.C. 4141.28(B). Such decision is subject to an appeal to the commission for a de novo hearing. *Id.*, citing R.C. 4141.281(C)(1) and (3).

{¶ 5} A party dissatisfied with the commission's final determination may appeal to the appropriate court of common pleas, which shall hear the appeal on the record certified by the commission. *Id.*, citing R.C. 4141.282(H). Pursuant to R.C. 4141.282(H), "[i]f 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."

{¶ 6} This standard of review applies to all levels of appellate review in unemployment compensation cases. *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 696-97 (1995). Applying the same standard of review at both the common pleas and appellate court levels does not result in a de novo review standard. *Id.* In reviewing commission decisions, a court may not make factual findings or determine witness credibility. *Id.* at 696, citing *Irvine v. Unemp. Comp. Bd. of Review*, 19 Ohio St.3d 15, 18 (1985). Factual questions remain solely within the province of the commission. *Tzangas* at 697. Similarly, a court may not substitute its judgment for that of the commission. *McCarthy v. Connectronics Corp.*, 183 Ohio App.3d 248, 2009-Ohio-3392, ¶ 16 (6th Dist.), citing *Irvine* at 18. The fact that reasonable minds might reach different conclusions is not a basis for reversing the commission's decision. *McGee* at ¶ 11, citing *Tzangas* at 696. Instead, a court must "determine whether [the commission's] decision is supported by the evidence in the record." *Tzangas* at 696, citing *Irvine* at 18. Judgments supported by some competent, credible evidence on the essential elements of the controversy may not be reversed as being against the manifest weight of the evidence. *Houser v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 10AP-116, 2011-Ohio-1593, ¶ 7, citing *Carter v. Univ. of Toledo*, 6th Dist. No. L-07-1260, 2008-Ohio-1958, ¶ 12, citing *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus.

{¶ 7} This court's focus is on the commission's decision, rather than on that of the common pleas court. *Howard v. Electronic Classroom of Tomorrow*, 10th Dist. No. 11AP-159, 2011-Ohio-6059, ¶ 12, citing *Moore v. Comparison Market, Inc.*, 9th Dist. No.

23255, 2006-Ohio-6382, ¶ 8. Thus, our task is to review the commission's decision and determine whether it is supported by evidence in the certified record and is unlawful, unreasonable, or against the manifest weight of the evidence. *McGee* at ¶ 12.

{¶ 8} At the July 12, 2011 hearing, Kenneth B. Leachman testified on behalf of Market Ready; appellant testified on his own behalf. The evidence adduced at the hearing established the following facts. Appellant was employed by Market Ready as a controller. In that capacity, appellant processed checks for signature by Matt Fulton, Market Ready's owner; however, appellant did not have check signing authorization. In December 2010, Market Ready's bank returned a check due to insufficient funds. In January 2011, Fulton commenced an investigation into the matter. Pursuant to this investigation, Fulton discovered that over the course of the preceding 15-18 months, appellant, without authorization, had forged Fulton's signature on several checks made payable to appellant. Following a termination hearing on January 11, 2011, at which appellant offered no explanation for his actions, Fulton discharged appellant for embezzling company funds via forgery and alteration of checks. Appellant was subsequently indicted on multiple counts of forgery.

{¶ 9} At the hearing, appellant denied that he forged Fulton's signature on the checks. According to appellant, Fulton instructed him to issue the checks to himself because Fulton owed him money for doing some outside work. Appellant further averred that Fulton signed the checks at issue, but later denied doing so in order to "get rid" of appellant. (Tr. 12.)

{¶ 10} Following the hearing, the hearing officer rendered a written decision disallowing appellant's application, reasoning as follows:

During the hearing, claimant admitted that he issued the checks in question, but stated that he did so under the request of Mr. Fulton, who allegedly told claimant to process the checks that way. Claimant provided no evidence of such instructions. Claimant also stated that he was instructed by the employer to lie to the government and private parties and assist the employer in fraud, and that claimant did so. However, claimant could not explain why he lost his job if he performed these allegedly criminal acts as requested by the employer. Claimant provided no evidence of these allegations and admitted that he did not contact the government or

anyone outside the employer to call attention to the alleged crimes.

The employer presented reliable, probative and substantial evidence that claimant forged Mr. Fulton's names on checks to himself without Mr. Fulton's authorization, including the forged checks and a signed statement from Mr. Fulton. The employer provided sufficient evidence of substantive theft, fraud, and deceitful acts in connection with work as the basis of claimant's discharge. Based on the evidence, the Hearing Officer finds that claimant was discharged by the employer because of dishonesty in connection with work.

(Hearing Officer Decision, at 4.)

{¶ 11} Accordingly, the hearing officer determined that appellant's discharge for dishonesty in connection with work disqualified him from eligibility for unemployment compensation benefits pursuant to R.C. 4141.29(D)(2)(e).

{¶ 12} Upon its review, the common pleas court affirmed the commission's decision disallowing appellant's request for review. Citing R.C. 4141.29(D)(2)(a), the court averred that "fault on the part of appellant is easily seen. The finding that appellant was discharged by the employer for just cause because of dishonesty in connection with his work is found to be reasonable, lawful and in accordance with the manifest weight of the evidence." (Decision and entry, at 4.)

{¶ 13} In his first assignment of error, appellant contends that the common pleas court improperly based its decision upon a ground not considered by the commission. Appellant argues that the hearing officer denied his request for unemployment compensation benefits after finding that he was discharged for dishonesty in connection with work under R.C. 4141.29(D)(2)(e), while the common pleas court, citing R.C. 4141.29(D)(2)(a), found that appellant was not eligible for unemployment compensation benefits because he had been discharged for just cause.

{¶ 14} R.C. 4141.29(D)(2)(e) provides that an individual is not entitled to unemployment compensation benefits if the director finds that the individual became unemployed because of dishonesty in connection with work. The statute defines dishonesty for purposes of R.C. 4141.29(D)(2)(e) as "the commission of substantive theft, fraud, or deceitful acts." An individual may also be denied unemployment compensation

benefits if the director finds that the individual has been discharged for just cause. R.C. 4141.29(D)(2)(a). "Just cause" is " 'that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.' " *Irvine* at 17. "Just cause" cannot exist without evidence of fault on the part of the employee. *Tzangas* at 698.

{¶ 15} Initially, we reiterate that this court's focus is on the commission's decision, rather than on that of the common pleas court. *Howard* at ¶ 12. Accordingly, we review the commission's decision to determine whether it is supported by competent, credible evidence and is not unlawful, unreasonable, or against the manifest weight of the evidence. Here, the commission determined that appellant was discharged for dishonesty in connection with work. That determination was supported by competent, credible evidence establishing that appellant, without Fulton's authorization, forged Fulton's signature on several checks made payable to appellant, and that Fulton discharged appellant for embezzling company funds. An individual who, without authorization, forges company checks made payable to himself commits acts constituting dishonesty as defined in R.C. 4141.29(D)(2)(e). Accordingly, the commission's decision is not unlawful, unreasonable, or against the manifest weight of the evidence.

{¶ 16} As to the common pleas court's decision, it appears that the court merged the concepts of unemployment because of dishonesty in connection with work and discharge for just cause. Indeed, the court found that appellant was discharged "for just cause because of dishonesty in connection with his work." (Decision and Entry, at 4.) Evidence that appellant, without authorization, forged checks made payable to himself supports a denial of unemployment compensation under either prong of R.C. 4141.29(D)(2). The fact that the common pleas court determined that appellant's conduct constituted both dishonesty in connection with work and justifiable cause for discharge does not render the commission's decision unlawful, unreasonable, or against the manifest weight of the evidence. Accordingly, we overrule appellant's first assignment of error.

{¶ 17} As appellant's second, third, and fourth assignments of error are interrelated, we will consider them jointly. By these assignments of error, appellant contends that the delay between Market Ready's discovery of financial improprieties in December 2010 and its termination of his employment on January 11, 2011 was too

remote to support a finding that he was discharged for dishonesty in connection with work.

{¶ 18} In support of his argument, appellant relies upon *Tundel v. Pennsylvania Unemp. Comp. Bd. of Rev.*, 44 Pa.Commw. 312, 404 A.2d 434 (1979). In *Tundel*, an employee was discharged 25 days after the employer discovered him sleeping on the job. Pennsylvania's Unemployment Compensation Board of Review concluded that the employee had been discharged for "willful misconduct" under the pertinent statute and was thus ineligible for unemployment compensation benefits. *Id.* at 313. The court reversed, stating:

Considering the time span, it is unlikely that an employer would consider the specific incident to be of such grave consequence as to constitute willful misconduct. An incident of willful misconduct cannot be so temporally remote from the ultimate dismissal and still be the basis for a denial of benefits. * * * There being no explanation in the record for the delay, we hold that, under these circumstances, the May 19 incident is too remote in time to support UCBR's conclusion that Tundel's discharge was caused by willful misconduct

Id. at 316-17. (Fn. deleted.)

{¶ 19} We note initially that decisions by out-of-state courts are not binding upon this court. *Ellington v. Gray Barrel & Drum, Inc.*, 8th Dist. No. 75724 (July 1, 1999). Moreover, *Tundel* is distinguishable, as the employer there provided no reason for the delay in discharging the employee. In the instant case, Market Ready commenced an investigation in January 2011, which accounts for at least a portion of the intervening time period between discovery of the financial improprieties in December 2010 and appellant's termination of employment on January 11, 2011. In addition, contrary to appellant's assertions, there is no suggestion that Market Ready condoned appellant's conduct. Accordingly, we reject appellant's contention that the delay between Market Ready's discovery of financial improprieties in December 2010 and its termination of his employment on January 11, 2011 was too remote to support a finding that he was discharged for dishonesty in connection with work. Appellant's second, third, and fourth assignments of error are therefore overruled.

{¶ 20} In his fifth assignment of error, appellant contends that Market Ready's failure to replace him following his discharge constitutes prima facie evidence of lack of work, and that such lack of work was the real reason for his discharge. Appellant's self-serving testimony that he was dismissed for lack of work is the only evidence supporting appellant's argument. In contrast, Market Ready's representative testified that appellant's embezzlement of company funds was the sole reason for his discharge. The commission hearing officer, finding that Market Ready had provided sufficient evidence that appellant was discharged for dishonesty in connection with work, apparently rejected appellant's contention that he was discharged for lack of work. Factual findings and credibility determinations are within the province of the commission, not this court. *Tzangas* at 696-97. Appellant's fifth assignment of error is overruled.

IV. CONCLUSION

{¶ 21} Having overruled appellant's five assignments of error, we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.
