[Cite as *Braun v. Indep. Taxi Cab Assn. of Columbus, Inc.*, 2011-Ohio-6056.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Gregory E. Braun,	:	
Appellant-Appellant,	:	
		No. 11AP-94
v.	:	(C.P.C. No. 10CVF-07-10002)
Independent Taxi Cab Association of Columbus, Inc. et al.,	:	(ACCELERATED CALENDAR)
	:	
Appellees-Appellees.	:	

D E C I S I O N

Rendered on November 22, 2011

Marshall and Morrow, LLC, Edward R. Forman and *John S. Marshall,* for appellant.

Gallagher, Gams, Pryor, Tallan & Littrell L.L.P., and *Barry W. Littrell,* for appellee Independent Taxi Cab Association of Columbus, Inc.

Michael DeWine, Attorney General, and *David E. Lefton,* for appellee Director, Ohio Department of Job and Family Services.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Appellant-appellant, Gregory E. Braun, appeals from a judgment of the Franklin County Court of Common Pleas affirming the decision of the Unemployment Compensation Review Commission ("commission") that denied appellant's request for unemployment compensation. Appellant assigns a single error:

> The Common Pleas Court Committed Reversible Error In Inventing A Fact Which Was Not In The Record Or Claimed By Either Party, And Then Relying On This Fact To Find That Plaintiff Was Discharged For Just Cause In Connection With Work.

Because the commission's decision is not unlawful, unreasonable, or against the manifest weight of the evidence, we affirm.

I. Facts and Procedural History

{¶2} Appellant worked for appellee, Independent Taxi Cab Association of Columbus, Inc. ("ITAC") from May 26, 2005 to November 27, 2009, last serving as a claims adjuster. From May through November of 2005, appellant worked from ITAC's offices in Columbus. In December of that year, he and an ITAC office manager prepared and signed an agreement stating that appellant could work from his residence in Florida for a "few weeks." (Dec. 2, 2005 Agreement.) In the agreement, appellant further stipulated that, "[t]his is being temporary[,] I will perform the same work I did while I was in my office in Columbus, Ohio[,] meaning that no change on my job description handed to me at the beginning of my employment with the firm." (Dec. 2, 2005 Agreement.) As the commission's hearing officer noted, this "simple agreement evolved into an allowance for claimant to work at the employer's offices in Columbus from June through October and work from home at his permanent residence in Florida from November through May." (Decision Letter, May 13, 2010.) Appellant and ITAC operated under such an "allowance" for four winters.

{¶3} In October of 2009, ITAC's president, Goshu Tadese, wrote to appellant in Florida to inform him that "as a precautionary measure and to protect the organization's interest, the Executive Board made a decision on October 15, 2009 that you are no

longer allowed to work more than three months outside of state" or to take "files out of the office without leaving a copy of current claim files in the office." (ITAC Executive Board Letter, Oct. 25, 2009.) Among the ITAC board's expressed concerns were the "escalating" cost of shipping documents between Ohio and Florida, the increased burden on co-workers left to complete appellant's "office work," and the claim files removed from ITAC's control for extended periods. (ITAC Executive Board Letter, Oct. 25, 2009.) The letter concluded by stating that if appellant "intended to take claim files without leaving a copy in the office and leaving longer than three months or disagreed with the Board's decision," then he needed "to submit a written response as soon as possible." The letter further advised appellant he needed "to attend to [sic] November 05, 2009 Board meeting to discuss further" such issues.

{¶4} In a letter dated November 2, 2009, described as a follow-up to an earlier telephone conversation between Tadese and appellant, Tadese provided a summary of the preceding week's events. His letter stated that, during the phone call, appellant assented to the board's decision and "agreed to leave a copy of all current claim files in the office and sign a leave paper prior [to] leaving town." (ITAC Executive Board Letter, Nov. 2, 2009.) The letter further stated that, as of the morning of November 2, Tadese had not received a response from appellant and appellant had not reported to work or submitted a signed and approved leave paper as expected.

{¶5} Around 11:00 a.m. on November 2, 2009, before the November 2, 2009 letter was dispatched, appellant e-mailed Tadese to inform ITAC he changed his mind and would "not be able to return to the office at the beginning of February." He stated he already had left for Florida and would "[o]bviously * * * not be able to attend the Board

meeting because [he was] out of town now." In response to appellant's e-mail, Tadese stated, "I consider these actions as non-compliance with the Board's decision and you left work without permission. Therefore, your lack of responding and not reporting to work may force the board to take action against you. You must attend to [sic] November 05, 2009 Board meeting to explain your action and discuss further regarding these issues." (ITAC Executive Board Letter, Nov. 2, 2009.)

{¶6} The next day, November 3, appellant sent an e-mail reply to Tadese that stated, "I have received your response this morning. My position remains the same. You will have to take whatever action you see fit. Let me know what your decision is regarding this matter." Appellant did not attend the November 5 board meeting that resulted in the board's requesting appellant to "return all claim files within two weeks and no later than Nov. 19, 2009 in person." (ITAC Executive Board Letter, Nov. 5, 2009.)

{¶7} By November 19, appellant had not returned the requested files; nor had he appeared in person at the ITAC office. In a letter dated November 20, 2009, Tadese advised appellant the executive board was ordering him to return to the office no later than November 27, 2009 and failure to do so would indicate to ITAC that he was voluntarily terminating his employment. Appellant did not return to the office by the specified deadline, and Tadese wrote in a final letter dated November 30, 2009 that the board regretted "to inform [appellant] that effective November 27, 2009 [his] employment with ITAC was terminated for defying the executive order and failing to follow instructions."

{¶8} Appellant applied for and was denied unemployment compensation benefits for a benefit year beginning December 6, 2009. On March 9, 2010, the director of the

Ohio Department of Job and Family Services ("ODJFS") issued a redetermination disallowing appellant's application based upon the finding that ITAC terminated its former employee for just cause under R.C. 4141.29(D)(2)(a). Specifically, the director concluded that appellant gave ITAC just cause to terminate when he "violated a company rule." Further, the director determined the evidence supported a finding of "negligence or willful disregard of the rule on the part of the claimant."

{¶9} Appellant appealed the director's decision, and on April 2, 2010, ODJFS transferred its file to the commission pursuant to R.C. 4141.281. On April 27, 2010, after an oral hearing with both parties present by telephone, a commission hearing officer affirmed ODJFS's decision disallowing the benefits. The hearing officer determined ITAC's directive ordering appellant to work from his employer's office in Ohio for the majority of the year was a reasonable business decision. As a result, the commission concluded, appellant was discharged for just cause pursuant to R.C. 4141.29, because "claimant's failure to follow that instruction constitutes misconduct." (Hearing Officer's Decision, 2.) On June 9, 2010, the commission disallowed appellant's request for further review.

{¶10} In response, appellant submitted a timely appeal to the Franklin County Court of Common Pleas. The court issued a decision and final judgment affirming the denial of unemployment compensation benefits. The court determined "[t]he administrative finding that Braun's failure to return to work in Columbus as ordered by his employer constituted just cause for discharge is lawful, reasonable, and in accord with the manifest weight of the evidence." (Decision and Final Judgment, 5.)

{¶11} Appellant's single assignment of error essentially raises two issues: (1) whether the common pleas court committed reversible error by "inventing a fact which was not in the record or claimed by either party, and then relying on this fact to find that [appellant] was discharged for just cause in connection with work" (Appellant's brief, i), and (2) whether the common pleas court's determination that he was terminated for just cause in connection with work was unlawful, unreasonable, or against the manifest weight of the evidence. (Appellant's brief, 5.) For ease of discussion, we address them in reverse order.

II. Assignment of Error

A. Commission's "Just Cause" Determination

{¶12} Appellant asserts the common pleas court erred in determining ITAC discharged him from employment for just cause, contending the factual record does not support such a conclusion.

{¶13} R.C. 4141.29 sets forth the statutory authority for an award of unemployment benefits and provides that "[e]ach eligible individual shall receive benefits as compensation for loss of remuneration due to involuntary total or partial unemployment in the amounts and subject to the conditions stipulated in this chapter." In that context, R.C. 4141.29(D)(2)(a) establishes that a claimant who quits his or her work without just cause or has been discharged for just cause in connection with his or her work is not entitled to unemployment compensation benefits. The claimant has the burden to prove his or her entitlement to benefits. *Irvine v. Unemployment Comp. Bd. of Rev.* (1985), 19 Ohio St.3d 15, 17.

{¶14} The term "just cause" has been defined "in the statutory sense, [as] that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act." *Irvine,* quoting *Peyton v. Sun T.V.* (1975), 44 Ohio App.2d 10, 12. The determination of just cause must be analyzed in conjunction with the purpose of the unemployment compensation business and industrial conditions. *Irvine*. Whether just cause exists to support an employee's quitting depends on the factual circumstances of each case and is largely an issue for the trier of fact. *Irvine; Peterson v. Director,* 4th Dist. No. 03CA2738, 2004-Ohio-2030. Determinations of purely factual questions are primarily within the province of the hearing officer and the commission. "Upon appeal, a court of law may reverse such decisions only if they are unlawful, unreasonable, or against the manifest weight of the evidence." *Irvine* at 17-18; *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 1995-Ohio-206, paragraph one of the syllabus.

{¶15} Accordingly, a reviewing court does not make factual findings, determine the credibility of witnesses, or substitute its judgment for that of the commission; where the commission might reasonably decide either way, the courts have no authority to upset the commission's decision. *Irvine* at 18; *Simon v. Lake Geauga Printing Co.* (1982), 69 Ohio St.2d 41, 45 (noting that "[a] reviewing court can not usurp the function of the triers of fact by substituting its judgment for theirs"); *Aliff v. Ohio Dept. of Job & Family Servs.* (Sept. 25, 2001), 10th Dist. No. 01AP-18. Rather, the court's duty or authority is to determine whether the evidence of record supports the commission's decision. *Irvine* at 18. If some evidence supports the commission's decision, the reviewing court, whether a common pleas court or court of appeals, must affirm. *Crisp v.*

Scioto Residential Servs., Inc., 4th Dist. No. 03CA2918, 2004-Ohio-6349. Where the board might reasonably decide either way, reviewing courts must leave the board's decision undisturbed. Id.

{¶16} Here, the commission affirmed the director's redetermination denying appellant unemployment benefits because his "negligence or willful disregard" for company rules constituted "misconduct" and provided ITAC with just cause to terminate his employment. (Hearing Officer's Decision, 2-3.) The company rule at issue in the section addressing insubordination states that "[r]efusal to obey orders[,] instruction or job assignments given by a manager and the Executive Board is prohibited. As long as the order or instruction is not illegal or immoral, the staff must follow the order and complain later." (Policy Paper signed Oct. 30, 2008.)

{¶17} Appellant admits both that he did not follow orders and his failure was the reason ITAC terminated him from employment. He contends, however, that not only was his refusal justified but just cause is lacking because he did not exhibit an unreasonable disregard for his employer's best interest. Appellant's primary contention thus centers upon whether his "refusal to return to work in Ohio was unreasonable." (Appellant's brief, 6.)

{¶18} In that regard, he argues he reasonably refused to comply with ITAC's demands that he return to Ohio "because being at home [in Florida] for 3 months made it impossible for [him] to maintain his permanent residence in Florida." (Appellant's brief, 4.) According to appellant, ITAC modified the employment agreement and demanded appellant "give up his 25 year permanent residence in Florida." (Appellant's brief, 6.) He thus asserts "[t]his is not a case of an Ohio resident who wanted to spend part of the year

in Florida – this is a case of a Florida resident who was willing to spend part of the year in Ohio." (Appellant's brief, 3.)

{¶19} Although appellant now asserts all understood from the beginning of his employment with ITAC that he primarily was based in Florida and intended to spend most of each year there, an examination of appellant's paperwork from ITAC easily could be interpreted as contradicting his assertion. For instance, in his ITAC employment application of May 26, 2005, appellant represented his permanent address to be in Columbus, Ohio, and claimed he left his previous job because he was moving back to Ohio. Similarly, although appellant now contends ITAC's orders amounted to a "unilateral imposition of an impossible commute" and would adversely impact his ability to keep his residence in Florida, appellant's testimony before the commission's hearing officer admitted appellant owned a home in the Columbus area in addition to the one in Florida. The commission reasonably could conclude that fact contributed to the feasibility and fairness of ITAC's order.

{¶20} Moreover, the only documentation of the arrangement under which appellant contends he was allowed to work for months in Florida is the 2005 agreement that an ITAC manager wrote and appellant signed, stating appellant could work from Florida for a few *weeks* in 2005. The commission reasonably could interpret the clause to directly conflict with appellant's argument that not only did ITAC know exactly what appellant's intentions were from the beginning, but ITAC acted contrary to its agreement with appellant in later ordering appellant to work from Ohio.

{¶21} In addition, appellant's ability to travel back and forth for years demonstrated his ability to make accommodations for his property in Florida when he was

working from Ohio. Appellant offers, and the record yields, no evidence to explain why the commission should have determined that adding four months to appellant's obligations in Columbus was an unreasonable order on the part of his employer, given the nature and origin of their arrangement as it already existed.

{¶22} Appellant further suggests ITAC lacked just cause in terminating his employment because it did not make appellant aware of how his absence from the Columbus office affected the company's best interest. Although appellant does not explicitly explain it, his argument appears to be premised on the notion that appellant could not disregard interests of which he was unaware. Appellant's assertion that he was "not privy to why his working from home was no longer acceptable" is inconsistent with the evidence in the record. (Appellant's brief, 6.)

{¶23} Contrary to appellant's claims, and supporting the commission's finding that appellant negligently or willfully disregarded ITAC's best interests, the record demonstrates ITAC informed appellant at the time of their request that several key considerations influenced the modification to his arrangement as it had evolved. Initially, ITAC noted "[t]here is no agreement or document on file in your job description or job application that authorized you to take company documents and work out of state." (ITAC Executive Board Letter, Oct. 25, 2009.) The letter continued, stating that, "[a]s you know, checks have been missing in the mail and your office work left incomplete. Faxing and mailing documents is done by your co-workers. The cost of shipping documents back and forth has been escalating." (ITAC Executive Board Letter, Oct. 25, 2009.) Finally, the letter advised that appellant was "not able to take accident reports and assist customers

with their paperwork. Most importantly, [he was] not at the office when [his] help is needed during membership renewal." (ITAC Executive Board Letter, Oct. 25, 2009.)

{¶24} In the final analysis, the record supports the commission's conclusion that appellant purposely and unjustifiably violated ITAC's policies regarding insubordination and disobedience to company orders. Given the record, the commission reasonably could conclude appellant disregarded, either negligently or willfully, clear indications from his employer that his actions were negatively impacting its interests.

B. Alleged Mistake of Fact in the Court of Common Pleas

{¶25} Appellant also contends the common pleas court "invented a new fact that was nowhere in the record, specifically that appellant was on a "scheduled vacation" in Florida." (Appellant's brief, 2.) Appellant asserts "[t]his is not the case; not even the appellees have suggested that appellant was on vacation. All parties agree that appellant was in fact working from home, as he had done for years." (Appellant's brief, 2.) The record does not support appellant's contention.

{¶26} The record contains several references to appellant's requesting and taking vacation time. Appellant's own November 2, 2009 e-mail to Tadese states that after the dinner on Saturday night, appellant and Tadese had a meeting the following Monday morning. During the meeting, Tadese said he felt three months was sufficient time for appellant to be out of state, but appellant said he had to be in Florida longer and could not agree to three months. Appellant also advised he would be in the office all week that week but was requesting a week's vacation the following week, because he wanted to travel and would be heading to Florida for the winter as he normally did. Similarly, in his testimony before the commission's hearing officer, Tadese stated that appellant had

requested "a week off vacation, one week off, from October 26 to October 30." (Hearing Tr. 10.) Tadese testified appellant did not return to work on October 30 as expected; when he was contacted, he "said he's on vacation." (Hearing Tr. 11.)

{¶27} Indeed, despite appellant's assertions to the contrary, the hearing officer's decision, issued May 13, 2010, included the finding appellant claims the common pleas court fabricated months later. The hearing officer found "[c]laimant was on a scheduled vacation through the end of October of 2009." (Hearing Officer's Decision, 2.) The record for the common pleas court's review thus included evidence indicating, and the commission's factual finding, that appellant was on a scheduled vacation during some part of the time period in question. The common pleas court did not fabricate the fact at issue but instead relied on the record.

III. Disposition

{¶28} Competent, credible evidence supports the commission determination that appellant's failure to make reasonable efforts to comply with ITAC's instructions was so detrimental to ITAC's interest as to allow the employer to terminate appellant's employment with just cause. Accordingly, the commission's decision is not unlawful, unreasonable, or against the manifest weight of the evidence. Appellant's assignment of error is overruled. Having overruled appellant's sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH and TYACK, JJ., concur.

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