

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Kevin E. Moore,	:	
Appellant-Appellant,	:	
v.	:	No. 11AP-756 (C.P.C. No. 10CVF08-11810)
Ohio Unemployment Compensation Review Commission et al.,	:	(REGULAR CALENDAR)
Appellees-Appellees.	:	

D E C I S I O N

Rendered on March 30, 2012

Kevin E. Moore, pro se.

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

*Bricker & Eckler LLP, and Cavett R. Kreps, for appellee
Habitat for Humanity Greater Columbus.*

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Appellant, Kevin E. Moore, appeals a judgment of the Franklin County Court of Common Pleas affirming the decision of appellee, the Ohio Unemployment Compensation Review Commission ("commission"), which denied him unemployment compensation benefits. The commission found Moore ineligible for unemployment compensation benefits because his employer, Greater Columbus Habitat for Humanity, ("Habitat"), terminated his employment for just cause. For the following reasons, we affirm.

{¶ 2} Habitat hired Moore on July 31, 2006 to work as a clerk at ReStore, a retail outlet that sells donated building materials. Moore was chronically late in reporting to work. He was tardy eight times in January 2009, twice in February 2009, three times in March 2009, twice in April 2009, and twice in May 2009. According to Habitat's Employee Handbook, "[e]xcessive absences * * * will result in disciplinary action, up to and including termination." *Id.* at 12. The Employee Handbook defines "excessive" absence as six or more instances of tardiness in a period of three months or less. In late March 2009, Moore's immediate supervisor, Jared VanDyne, formally disciplined Moore for his tardiness by reprimanding him first verbally and then in writing.

{¶ 3} In addition to his chronic tardiness, Moore sometimes exhibited his frustration with store policies and his supervisors through treating customers rudely. On March 19, 2009, Moore refused to answer a customer's question about the price of an item, and instead, directed the customer to the "green door," *i.e.*, VanDyne's office door. When VanDyne verbally reprimanded Moore over the incident, Moore admitted that he was intentionally rude to the customer. The next day, another customer asked Moore about the price of a cabinet. Moore failed to follow store procedure for responding to pricing questions, and he kept the customer waiting about one half hour.

{¶ 4} Despite Moore's problems with tardiness and customer service, VanDyne promoted Moore to co-manager of ReStore in late May 2009. In his new position, Moore was responsible for overseeing half of the store. Habitat promoted Moore because Moore, for the most part, was a competent and skilled employee. According to Michael Cosgrove, chief financial officer for Habitat, when Moore was "on" he was a really good employee. Moore's supervisors believed that giving him more responsibility would put him in a position to succeed and reengage him in ReStore's mission.

{¶ 5} After his promotion to co-manager, Moore continued to arrive at work late. Moore was tardy twice in both June and August 2009, once in September 2009, and four times in October 2009. Moore also continued to display a negative attitude. After VanDyne told Moore that he could not solicit ReStore customers for his home remodeling business, Moore retaliated by extensively advising customers about remodeling while he was working. VanDyne had to tell Moore that 45-to-50-minute conversations with

customers were inappropriate. Another time, VanDyne asked Moore to straighten his half of the store. Moore then spent the rest of his shift sweeping a small area.

{¶ 6} On October 12, 2009, Moore attended a counseling session with VanDyne, Cosgrove, and E.J. Thomas, the executive director of Habitat. Moore responded to the counseling by slouching in his chair and glaring at Thomas. Cosgrove characterized Moore's behavior during the meeting as both dismissive and insubordinate.

{¶ 7} The next day, Moore vented his frustration on customers and co-workers. Moore rudely snapped at VanDyne's administrative assistant when she asked him for the telephone number of the Delaware ReStore. VanDyne also saw Moore ignore a customer until Moore realized that VanDyne was observing his behavior.

{¶ 8} On October 21, 2009, VanDyne verbally reprimanded Moore for reporting to work late. The next day, Moore did not arrive on time for a mandatory staff meeting. VanDyne responded by giving Moore a written reprimand.

{¶ 9} VanDyne placed Moore on probation on October 27, 2009. In a "Final Warning Letter" to Moore, VanDyne summarized Moore's history of tardiness and rudeness to customers and co-workers. The letter warned Moore that, "[i]f [his] unprofessional behavior continue[d], including any further unscheduled tardy arrivals, [he] [would] be subject to further disciplinary action up to and including termination."

{¶ 10} On October 30, 2009, Moore decided to use his lunch hour to visit his physician, whose office was located near ReStore. Moore's appointment lasted longer than he anticipated. Moore telephoned VanDyne shortly after his lunch hour had elapsed to inform VanDyne that he would be late in returning to work. VanDyne told Moore that he was needed back at the store as soon as possible. Moore responded that he was going to a pharmacy to fill a prescription and he would return when he was finished. Moore arrived back at ReStore over 40 minutes after his lunch period had ended.

{¶ 11} As a result of this incident, VanDyne, Cosgrove, and Thomas reviewed Moore's employment record and decided to discharge him. VanDyne fired Moore on November 3, 2009.

{¶ 12} Moore applied for unemployment compensation benefits immediately after the termination of his employment. The director of the Ohio Department of Job and Family Services denied Moore's application, finding that Habitat had just cause to fire

him. Moore sought a redetermination, but the director again disallowed his claim. When Moore appealed a second time, the director transferred the appeal to the commission.

{¶ 13} The commission scheduled Moore's appeal for a hearing before a hearing officer. Based on the evidence presented at that hearing, the hearing officer found that Habitat did not have just cause to discharge Moore. In her April 22, 2010 decision, the hearing officer reversed the disallowance of Moore's claim for unemployment compensation benefits.

{¶ 14} Habitat decided to request that the commission review the hearing officer's decision. To prepare its request, Habitat asked for a copy of the recording of the hearing. In attempting to fulfill this request, the commission's records management department discovered that the recording was inaudible. Because no record existed of the hearing, Habitat sought a rehearing so the commission would have a complete evidentiary record to consider.

{¶ 15} On May 19, 2010, the commission allowed Habitat's request for review. The commission also ordered a de novo hearing due to the faulty record.

{¶ 16} A second hearing, before a different hearing officer, occurred on July 1, 2010. In a decision issued July 14, 2010, the commission found that Habitat discharged Moore based on his poor attendance record and his unwillingness to accept the direction and authority of his supervisors. The commission held that these two reasons constituted just cause for Habitat's decision to terminate Moore's employment. Therefore, the commission reversed the hearing officer's April 22, 2010 decision.

{¶ 17} Moore appealed the commission's decision to the trial court. In a judgment entered August 9, 2011, the trial court affirmed the commission's decision.

{¶ 18} Moore now appeals from the trial court's judgment, and he assigns the following error:

THE TRIAL COURT ABUSED ITS DISCRETION BY
DISALLOWING PLAINTIFF-APPELLANT'S CLAIM FOR
BENEFITS AND FINDING THE PLAINTIFF-APPELLANT
WAS DISCHARGED FOR JUST CAUSE BY THE
DEFENDANT-APPELLEE.

{¶ 19} All courts, regardless of the level of review, apply the same standard to appeals of commission decisions. *Williams v. Ohio Dept. of Job & Family Servs.*, 129

Ohio St.3d 332, 2011-Ohio-2897, ¶ 20. Under that standard, a court must determine if the decision of the commission is unlawful, unreasonable, or against the manifest weight of the evidence. R.C. 4141.282(H). If it is, then the court must reverse, vacate, or modify the decision, or remand the matter to the commission. *Id.* If it is not, then the court must affirm the decision of the commission. *Id.*

{¶ 20} In reviewing a commission decision, a court is not permitted to make factual findings or determine the credibility of the evidence. *Williams* at ¶ 20; *Tzangas, Plakas & Mannos v. Admr., Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 696 (1995); *Irvine v. Unemployment Comp. Bd. of Review*, 19 Ohio St.3d 15, 18 (1985). Rather, the court must decide whether the commission's decision is supported by evidence in the record. *Tzangas* at 696; *Irvine* at 18. If some competent, credible evidence supports the commission's decision, then the court must affirm the decision. *Williams* at ¶ 20. A court cannot reverse the commission's decision merely because reasonable minds might reach different conclusions based on the evidence in the record. *Id.*; *Tzangas* at 697; *Irvine* at 18.

{¶ 21} A former employee is ineligible for unemployment compensation benefits if the employer discharged the employee for "just cause in connection with the [employee's] work." R.C. 4141.29(D)(2)(a). Whether an employer has just cause for discharge depends on the factual circumstances of each case. *Williams* at ¶ 22; *Tzangas* at 698. "Just cause" is " 'that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.' " *Williams* at ¶ 22, quoting *Irvine* at 17. "Just cause" cannot exist without evidence of fault on the employee's part. *Williams* at ¶ 24; *Tzangas* at 698. Fault may arise from willful or heedless disregard of a duty, a violation of an employer's instructions, or unsuitability for a position. *Williams* at ¶ 24.

{¶ 22} Here, the commission found that Habitat had just cause to discharge Moore due to his chronic tardiness and his dismissive attitude toward his supervisors. Moore challenges the factual predicate for these reasons. He does not dispute that these reasons, if substantiated, justified his discharge and resulted from his fault. We, therefore, must determine whether the record contains competent, credible evidence supporting the commission's finding.

{¶ 23} According to VanDyne's calculations, Moore was late to work 26 times from January to October 2009. VanDyne reprimanded Moore for his tardiness in both March and October 2009. Additionally, VanDyne recounted multiple instances where Moore was directly or subversively insubordinate. For example, Moore arrived late for a staff meeting the day after VanDyne verbally reprimanded him about his tardiness, he repeatedly swept a small area when asked to straighten his half of the store, and he returned over 40 minutes late when told to come back to the store as soon as possible. VanDyne and Cosgrove both testified that Moore was dismissive to his superiors' attempts to correct his negative behavior. Based on the foregoing, we conclude that competent, credible evidence supports the commission's finding of just cause for discharge.

{¶ 24} Moore contends that his evidence is more convincing than the evidence Habitat adduced, and thus, reversal is warranted. Moore points to testimony that he elicited from ReStore customers and employees that he was a good employee. Additionally, Moore contends that his version of events—which diverges from VanDyne's version—is more credible. Because we cannot reweigh the evidence, we cannot engage in the analysis Moore wishes us to undertake. The commission resolved the factual disputes in Habitat's favor; we cannot change that determination.

{¶ 25} Moore also argues that certain evidence is hearsay, and he urges this court to strike it from the record. However, "evidence which might constitute inadmissible hearsay where stringent rules of evidence are followed must be taken into account in proceedings such as [commission hearings] where relaxed rules of evidence are applied." *Simon v. Lake Geauga Printing Co.*, 69 Ohio St.2d 41, 44 (1982); *see also* R.C. 4141.281(C)(2) ("Hearing officers are not bound by common law or statutory rules of evidence."). Thus, the hearing officer could accept hearsay evidence, and the commission could rely upon that evidence in rendering its decision.

{¶ 26} Finally, Moore argues that reversal is necessary because the hearing examiner who conducted the second hearing was biased. Pursuant to Ohio Adm.Code 4146-11-01, "[n]o hearing officer or member of the review commission shall participate in proceedings in any case in which the hearing officer or member has an interest which might prevent the hearing officer or member from conducting a fair hearing or reaching an impartial decision." This rule is consistent with the due process requirement that an

individual in an administrative proceeding is entitled to a fair hearing before an impartial tribunal. *See Althof v. Ohio State Bd. of Psychology*, 10th Dist. No. 05AP-1169, 2007-Ohio-1010, ¶ 32. However:

[A] showing of substantial personal bias will be required before a hearing officer may be disqualified or the results of a hearing vacated. In practice this means a personal bias so extreme as to display clear inability to render a fair judgment.

Meadowbrook Care Ctr. v. Ohio Dept. of Job & Family Servs., 10th Dist. No. 06AP-871, 2007-Ohio-6534, ¶ 25.

{¶ 27} Here, the hearing officer was a commission employee while Thomas, now the executive director of Habitat, was the chairperson of the commission. After disclosing his past working relationship with Thomas, the hearing officer represented that he was "confident that [his] relationship, minimal as it was[,] with Mr. Thomas [] [was] not going to influence the decision." (Tr. 7.) We conclude that neither the hearing officer's former working relationship with Thomas nor the hearing officer's actions during the hearing demonstrate any bias. Accordingly, we find no merit to Moore's argument that the hearing officer should have disqualified himself.

{¶ 28} For the foregoing reasons, we overrule Moore's assignment of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and TYACK, JJ., concur.
